Japan Analysis
La lettre du Japon

32 December 2013

Will Japan change its Constitution in 2014?

CLOSE UP ON THE NEWS

POINTS OF NEWS

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ÉDITORIAL

This 32nd issue of *Japan Analysis* brings to a close a year of analysis of Japanese news that has been dominated by questions on the current and future intentions of Abe Shinzō's second government, questions that were often phrased along the following lines: after years of government instability and within a tense regional context, is the new Prime Minister behaving pragmatically or like a hawk? Now that his power has been reinforced by the comprehensive victory of the Liberal-Democratic Party at the Upper House elections in July 2013, will he give free rein to aggressive policies, illustrated, for example, by a desire to review the 2010 guidelines for the National Defence Programme (increasing the defence budget), or will he remain cautious to humour his allies in the Kōmeitō party? Any future changes to the structure or the name of the Self-Defence Forces, or JSDF, would inevitably be linked to a project to amend the clauses of the famous Article 9 of the Japanese Constitution. This Article states that while Japan renounces war, it does not prohibit a Self-Defence Force.

The question of whether constitutional changes to allow Japan to exercise a legitimate right to defence are necessary or not, within a regional context that has changed significantly since the end of the Cold War, has been the source of much discussion in Japan. Nevertheless, worsening territorial disputes between China and Japan and calls for constitutional changes by the three majority parties in the Upper House since 21 July 2013 (the LDP, the Japan Restoration Party or Nippon *Ishin no kai*, and the Minna no tō) make the possibility of amendments more probable and more dangerous. Following the unilateral announcement by Beijing of an air defence identification zone over the East China Sea (covering the disputed Diaoyu/Senkaku islands), and the provocative response by Abe Shinzō of officially visiting the Yasukuni shrine on 27 December 2013, a "successful" amendment to the Japanese Constitution could be interpreted as a further step towards a major confrontation in the Asia-Pacific region.

The re-emergence of this question in the international media in December 2013

means that an analysis of the Prime Minister's possible interactions with the Japanese-American Security Treaty and with the American strategy in the Asia-Pacific region is now needed. However, it is important to note that current discussions are based on the reports and work of internal LDP committees created by Abe Shinzō himself[1]: the aim of this 32nd issue of *Japan Analysis* is to address the complex tangle of political motivation and legal arguments that characterise these discussions. The complexity is highlighted in the detailed analysis by Amélie Corbel (in partnership with Sophie Buhnik), of changes made to several sections of the 1946 Constitution as part of an amendment project drafted by a Liberal-Democratic Party commission. The analysis by Arnaud Grivaud shows that the discussion surrounding these constitutional amendment projects is characterised by its volatility: the discussion has been refocused on the amendments to Article 9, following the outcry caused by attempts to change Article 96, which governs the process for any constitutional review. Next is a translation (by Sophie Buhnik) of an article by Yanagisa Kyōji, which deconstructs the arguments made by the majority party to justify an increase in the right to self-defence in order to consolidate the Japanese-American alliance. Finally, a translation (by Arnaud Grivaud) of an extract from an interview between Hasebe Yasuo and Kakizaki Meiji, published in the August 2013 issue of *Juristo* magazine, explores the problems created by the possible relaxation of conditions to submit any constitutional amendment project to a referendum, in accordance with the regulations set out in Article 96.

Sophie Buhnik et Arnaud Grivaud

[1] During Abe Shinzō's first term in office (2006-2007), a project government bill aimed to set up a National Security Council. This was finally opposed by a veto from Prime Minister Fukuda Yasuo in 2008.

CLOSE UP ON THE NEWS

1. The Abe government and the thorny question of constitutional change: ambition mixed with prudence

- Arnaud Grivaud

Although the discussion surrounding constitutional changes in Japan is not new, it was a particular feature of the end of 2013 and it would be safe to bet the same will be said of the coming year. An exhaustive overview of the various and numerous constitutional review projects outlined over the last few years[2] would take up many pages on its own. It is enough to remember that the discussion on constitutional changes (*kaikenron*) has experienced two more prolific periods since the beginning of the 2000s.

The first occurred approximately between 2005 and 2007, during which time several parties – in particular the Liberal-Democratic Party (LDP) – drafted various amendment projects[3]. Also during 2005, extensive reports[4] were published by the constitutional review committees of the two Houses of the Diet, set up in 2000 (*kempō chōsakai*), following several hundred hours of discussion. Furthermore, from 2006, specific advances towards a constitutional amendment can be seen, particularly with the famous law relating to the constitutional amendment process, commonly known as the referendum law (*kokumin tōhyō hō*). However, this law, which was the first step to any eventual amendment[5], was specifically adopted by the Diet during the Abe Shinzō's first government (2006-2007).

[2] These projects are drawn up by parties, politicians, national newspapers, constitutionalists, private think tanks, *etc*.

[3] Morohashi Kunihiko, *Omo na nihonkoku kempō kaisei shi.an oyobi teigen* (Key constitutional amendment projects and proposals), *Kokuritsu toshokan Issue Brief*, nº537, 24 April 2006, http://www.ndl.go.jp/jp/data/publication/issue/0537.pdf (last accessed on 6 December 2013).

[4] Over 1000 pages in total.

[5] No law relating to this issue had yet been proposed, realistically making any constitutional amendment procedurally impossible!

Like his grandfather Kishi Nobusuke (Prime Minister from 1957-1960), Abe has never hidden his aim of changing a Constitution that he believe was imposed (*oshitsukerareta kempō*) by the American authorities occupying Japan at the end of the war.

The fall of Abe's government, one month after his crushing defeat in the Upper House elections of August 2007, had the effect of relegating the discussion of constitutional change to the back burners. In the end, the referendum law which came into force in 2007 stated that no constitutional amendment project could be submitted to the Diet for a period of three years (until 2010).

A stated desire to change the Constitution

The publication of a new constitutional amendment project (see the article by Amélie Corbel in this issue) by the LDP in April 2012, followed by its landslide victory at the last general elections in December 2012, have kick started a new period of intense discussion about this delicate constitutional issue. As soon as it came to power, the Abe government made an increasing number of statements on its ambition to change the Constitution, especially the infamous Article 9 that denies Japan the right to maintain a true army[6]. In addition, all parties have been obliged to take up their positions on the question very quickly, thereby provoking a political divide between the "pro-change" (*kaikenha*) group, the "anti-change" (*gokenha*) group and the, more reserved, open to debate (*shinchōha*) group[7]. The first group includes the LDP, Watanabe Yoshimi's *Minna no tō* (Everyone's Party), Ishihara Shintarō's[8] Japan Restoration Party and Ozawa Ichirō's *Seikatsu no tō*; the second group includes the Japanese Communist Party, the Japanese Socialist Party and the Tomorrow Party, which are fiercely opposed to any changes; the Kōmeitō, a key electoral partner for the LDP, represents the third, undecided, group. For its part, the Japanese Democratic Party seems relatively divided but clearly opposed to any changes to Article 9 that would transform the JSDF into a national defence army (*Kokubōgun*).

Throughout 2013, various media outlets continuously polled individual opinions to these declarations using opinion polls with somewhat mixed results[9]. The current state of affairs and the large section of undecided and changeable voters means it is relatively difficult to predict the outcome of any referendum.

An initial change to Article 96: the government's "faux pas"

Although a favourable majority is needed for any successful referendum on constitutional amendment, for the changes to be definitely adopted they initially need to receive two thirds of the vote from each of the Houses in the Diet

[6] This article, *i.e.* constitutional pacifism, is considered to be one of the "three pillars" of the Constitution.

[7] It should be noted that like the DPJ or the LDP, one party can bring together politicians who do not always share the same opinion of this issue.

[8] A result of the merger between Hashimoto Tōru's Osaka Restoration Party (Ōsaka Ishin no Kai) and the Sun Party (Taiyō no tō), the specific aim of this party is a radical reform of local governments that would require a constitutional amendment (or this is what the party claims. In reality, legislative changes would probably be enough), followed by the subsequent introduction of regional levels (*dōshūsei*).

[9] With the exception to two polls carried out by the Yomiuri shimbun in February and March, which announced that 54 and 51%, respectively, of those asked were in favour of constitutional reform, polls are often evenly distributed between those "for", those "against" and those who "don't know or abstain". There has, however, been a progressive drop in the number of positive answers across the year. See polls in the *Asahi shimbun*: http://www.tv-asahi.co.jp/hst/poll/2013.html (last accessed on 6 October 2013).

(due to Article 96). Given the balance of power in the Lower House, this condition would not cause the current government any problems[10]. However the situation in the Upper House is much more delicate. Therefore, the very day after the general elections of December 2012[11], the Prime Minister was already submitting his ideas for an initial amendment to Article 96 before moving on to other articles. In this way he was hoping to reduce the current requirement (*hatsugi yōken*) of a qualified two thirds majority to only a simple favourable majority prior to any amendments being put to the public vote by referendum. In addition to the usual argument claiming that these requirements made any changes almost impossible, the government tried to turn the situation to its favour by using another classic argument which holds that the opposition of only one third of parliament members of one of the Houses could prevent the direct consultation of the people via a referendum. Unfortunately, the positive aspects of direct democracy were not enough to convince the majority of the public who remained opposed to a two-phase amendment where any subsequent changes remained unknown[12].

It would seem that the Abe government actually managed to obtain the opposite result to the one they were expecting. Seen by its critics as a direct attack on the very principle of constitutionalism (*rikkenshugi*) and the state of law, the plan to relax the amendment process (*kempō no nanseika*) caused real uproar among the general public[13], tarnishing the government's image[14] and forcing it to backtrack. Although it has never been as well covered in the media, the discussion surrounding changes to Article 96 is not new and the inflexibility of the Japanese Constitution has often been mentioned[15].

Is the Japanese Constitution inflexible?

A quick comparison with several foreign constitutions confirms that, in light of its amendment process, the Japanese Constitution is in fact particularly inflexible (*kōsei kempō*). However, it is far from being an exception. In Germany, a constitutional amendment law must also receive two thirds of the votes from both the Bundestag and the Bundesrat (Art. 79 of the fundamental law) before being adopted (there is, however, no need for a referendum). The same rules exist in Portugal (Art. 286). In Spain, the vote needs to be 3/5ths in favour across both Houses, or two thirds from the Lower House as long as the Upper House has adopted the constitutional law with an absolute majority (Art. 167). In Italy, an absolute majority in both Houses is enough, although a referendum may be required in some situations. If the constitutional law is passed with a two thirds majority in each of the Houses, there is no need for a referendum (Art. 138). Despite

[10] The LDP and the Japan Restoration Party hold 72.5% of the seats (348 out of 480).

[11] Mizushima Asaho "[Kaiken] ni dō taikō suru ka" (How to resist the destruction of the Constitution), *Sekai*, March 2013, p.95.

[12] 54% of those asked declared themselves to be against changes to Article 96 on 3 May 2013 (day on which the adoption of the Constitution is commemorated) in two polls published by the *Sankei shimbun* and the *Asahi shimbun*.

[13] As an example, a committee to defend Article 96 (*96 jō no kai*) led by the respected constitutionalist Higuchi Yō.ichi, launched a petition on 31 May 2013 which collected 37 signatures of renowned constitutional law and political science professors. A vast number of articles written by subject specialists criticising the government's project were published during the year.

[14] It benefited from a support rate of around 69% in April, although this dropped to 56% in June and 46% in July. In September the approval rating was back up to 62% after the adoption of a "more prudent" attitude in relation to constitutional reform.

[15] See reports mentioned above from Constitution review committees in the two Houses or the LDP amendment project of April 2012, for example.

this need for a qualified majority, all these countries have amended their Constitutions at least once. In France, where the Constitution is relatively relaxed, a constitutional law must receive a majority of votes across both Houses and be approved by referendum before it can be passed. This means it needs 3/5ths of the votes from both congressional assemblies (Art. 89)[16].

In summary, the proposal to relax the process put forward by the Abe government would see Japan align its constitutional amendment process with that of France (majority across two Houses followed by a referendum). Some conciliatory voices, trying to pacify both groups, suggested a relaxation of the process that would retain the requirement of two thirds majority for any amendment to specific sections (particularly the "three pillars": pacifism, democracy and human rights) as is the case in Spain (Art. 168). A discussion on the limits of any constitutional amendment also reappeared (*genkaisetsu*), with some stating that the "three pillars" should benefit from a supra-constitutional position and not be "changeable"[17].

Prioritising collective self-defence: choosing amendments through interpretation

The government now seems to have stepped away, at least momentarily, from the relatively unpopular option of amending Article 96. It has, however, refocused its attention on its primary aim: recognition that the exercise of collective self-defence is consistent with the Constitution [see the translation by Sophie Buhnik in this issue]. The Japanese Prime Minister made this a priority as he was convinced that a stronger Japanese-American alliance would be unthinkable without this recognition[18]. Furthermore, as any amendment to the Constitution currently seems to be a delicate issue, the government has obviously given priority to an alternative they were considering from the beginning, changing Article 9 through interpretation.

To achieve this, they first had to find a way of bypassing the traditional opposition to this type of interpretation in the Cabinet Legislation Bureau (CLB, *naikaku hōseikyoku*)[19]. This was achieved on 8 August 2013 with the dismissal of its director general and the very exceptional nomination[20] of a new Cabinet Legislation Bureau Director (*naikaku hōseikyoku chōkan*) On 26 August, the new director, a high-level civil servant from the Ministry of Foreign Affairs and previously the Japanese ambassador to France, declared in an interview that it was the Cabinet and not the CLB that

[16] According to the practice of Article 11, implemented in 1962 by General De Gaulle, it is possible to avoid Parliament and go directly to a popular referendum.

[17] For example, in France (Art. 89), Italy (Art. 139) and Portugal (Art. 288), the republican aspect of the Constitution cannot be amended. In Germany (Art. 79), it is the organisation of the Federation and Länder that cannot be changed.

[18] This is also the conclusion of the third Armitage-Nye report on the Japanese-American Alliance, published on 15 August 2012. See the article on this published on the Navy Officers School website: http://www.mod.go.jp/msdf/navcol/SSG/topics-column/col-033.html (last accessed on 7 October 2013).

[19] This organisation is similar to the French Council of State due to its advisory role and its review of government proposed laws. Furthermore, it can "block" a law that it believes does not conform to the Constitution, which has led it (inappropriately) to be called the "Constitutional guardian" (*Kempō no bannin*). See, for example, Delamotte Guibourg, *La politique de défense du Japon* (Defence policies in Japan), Paris, PUF, p. 140-142.

[20] Traditionally, it is the Deputy Director (*jichō*), who is always a high ranking civil servant with plenty of experience within the CLB, who succeeds the Director. This is the first "nomination by political power" (*seiji nin.yō*) for this position.

had the ultimate power to decide[21], leaving the ball in the government's court. Despite this, he subsequently stated that the CLB would actively participate in any discussion surrounding the right to exercise collective self-defence[22].

Maintaining the government's initial aims: still a long way to go

For 60 years now, Japan has amended its interpretation of the Constitution as the government cannot change the written text[23]. This does not, however, mean that the government has abandoned its constitutional amendment project over the medium term. For example, the referendum law should be revised soon to lower the voting age for a constitutional referendum for Japanese citizens from 20 to 18[24]. In the same vein, on 29 September, the Prime Minister gave a speech to the United Nations General Assembly, during which he guaranteed that the change in interpretation for Article 9 and constitutional amendments would allow Japan to contribute to international peace, using the term "active pacifism" (*sekkyokuteki heiwashugi*)[25].

The country's American allies do not seem entirely convinced. On the eve of Abe's speech to the United Nations, American Secretary of Defence, Chuck Hagel, stated that if their ally requested it, the United States could play an advisory role, but that it would not interfere in any attempts to amend the Constitution as this was a decision that could only be taken by the people of Japan[26]. However, three days later, a member of the American military authorities stationed in South Korea confided to Korean journalists that the changes would, according to him, bring no benefits (*mueki*) to the region[27].

If it wants to succeed, the LDP will have to overcome yet another, not insignificant, obstacle. Despite its victory at the last Upper House elections in July 2013, the LDP will not achieve the crucial two thirds threshold with only the support of those parties in favour of the amendments. It will therefore have to partner with the Kōmeitō, a party that has several times confirmed that it would not hesitate to leave the coalition if "it were to become necessary". The balancing act will be even more delicate as the LDP will initially have to convince the Kōmeitō to agree to recognise the right to exercise collective self-defence.

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21 "Shūdanteki jieiken [saigo ha naikaku ga kettei] Komatsu hōseikyokuchōkan" (The Director of Cabinet Legislation on collective self-defence: "Ultimately, the Cabinet decides"), *Asahi Shimbun Digital*, 27 August 2013.

22 "Shūdanteki jieiken : kōshi yōnin [sekkyokuteki ni giron] [kimeru no ha naikaku]" (The CLB will actively participate in the discussion on the right to exercise collective self-defence, but the Cabinet will decide), *Mainichi JP*, 31 August 2013.

23 Any article in any constitution is inevitably subject to interpretation, due to their more or less general, and sometimes purely declarative, nature. The evolution of the interpretation of Article 9 in the Japanese Constitution remains unique.

24 The law enforcement decree had already addressed this possibility, on the condition that the age at which a Japanese citizen would be eligible to vote was also dropped to 18 (Article 3).

25 "Shushō, nennai ni kodawarazu – shūdanteki jieiken no ketsuron" (The Prime Minister does not require a resolution to the issue of collective self-defence this year), Sankei News, 2 October 2013.

26 "Kempō kaisei, dōmeikoku no tachiba kara jogen – beikokubōchōkan ga hyōmei" (Declaration of the Secretary of Defence of the United States: 'As an allied country, we can give advice relating to the issue of constitutional change'), *Kyōdō tsūshin*, 29 September 2013.

27 "Nihon no kenpō kasei [chi.iki ni yūeki jan ai] – zaikoku beigun tōkyokusha ga irei no genkyū" ('Changes to the Japanese Constitution would not benefit the region': an unusual declaration by a member of the American military authority stationed in South Korea), *Sankei News*, 2 October 2013.

This will go against the grain for a party that is still known as the "peaceful party" (heiwa no tō). Although the Kōmeitō is in a surprising position of power given its numbers in the Diet[28], its situation is far from comfortable. It will have to choose between abandoning either an important part of its identity[29] or its status as a governing party, which currently allows it to influence LDP projects.

A constitutional amendment voted in by an unconstitutional Diet?

According to some[30], another, more rarely mentioned, obstacle could stop the government from amending the Constitution. In the past, several elections have been declared unconstitutional by the Supreme Court due to the existing difference between the number of electors represented by a member of parliament representing an urban constituency and one representing a rural constituency (*ippyō no kakusa*)[31]. This was the case for the general elections of 2009 as well as the 2010 Upper House elections. Until now, conscious of the trouble that could be caused by invalidating the elections held only two years later, the Supreme Court has only declared them unconstitutional without going as far as to invalidate their results (*iken jōtai*). This means that it is now up to legislators to revise electoral law in order to reduce the recorded differences.

However, both the general elections of 2012 and the election of Councillors in July 2013 took place before electoral law could be changed significantly[32]. It is for this reason that, for the first time in Japan's history, the elections of 2012 and 2013 were declared null (*mukō*) by both the Hiroshima and Okayama Appeal Courts. It was no surprise that on 20 November 2013, the plenary assembly of the Supreme Court once again declared the general elections of 2012 unconstitutional without invalidating their results (*iken jōtai*). Invalidating the results would have had the effect of retroactively invalidating any act passed by the Diet since December 2012. Furthermore, it is unlikely that the Supreme Court will confirm the invalidation[33] of the latest election of Councillors of July 2013. So, the possibility of a constitutional change being adopted by a Diet that has sometimes been qualified as unconstitutional (*iken kokkai*) seems rather problematic[34]. Given that there is no organisation that could deprive the Diet of its constitutional power, this obstacle is really only theoretical. In any case, the LDP will first have to confront a much more specific obstacle: creating a consensus that would

[28] Only 51 politicians out of the 722 present in the two Houses. The LDP has 409 and the Japan Restoration Party has 63.

[29] The disastrous electoral results achieved by the Japanese Socialist Party, following its recognition of the constitutionality of the JSDF, are testament to the danger of this choice, had it been a way of participating in the coalition government of 1994 with the LDP.

[30] For example, the famous political journalist Hasegawa Yō.ichi

[31] As the value of a voter in a rural constituency is more important than that of a voter in an urban constituency, the latter is "less represented" in the Diet. Furthermore, when the difference is too great, the Supreme Court considers that the electoral law does not conform to the principle of equality set out in Article 14 of the Constitution.

[32] More specifically, a so-called "urgent" change was adopted but the redistribution of voting districts had not yet been completed so the 2012 elections took place under the same conditions as preceding elections. Another minor review transferring 4 Upper House seats from the Fukushima and Gifu departments to the Kanagawa and Osaka departments was also adopted.

[33] The decision by the Okayama appeal court cited previously was delivered eight days after the decision by the Supreme Court relating to the 2012 elections, on 28 November 2013.

[34] This remains the case although a referendum is still required for the constitutional law to be adopted.

allow its project to receive at least a two thirds majority in the two Houses.

2. The Jimintō's (Liberal-Democratic Party) Constitutional amendment project.

– Amélie Corbel, in partnership with Sophie Buhnik

We hope the [new] preamble will make you think, not of what the State can do for you, but of what you can do to save the State." It is with these words that Katayama Satsuki, Jimintō member of parliament in the Upper House and a member of the party's internal commission to draft a constitutional amendment project, expressed herself on Twitter on 6 December 2012. This constitutional amendment project that a Jimintō[35] internal commission finished drafting in April 2012 was a party document and was in no way a legal project or proposal to be discussed by the Diet; Katayama's tweet on this subject is nevertheless part of a long tradition of contesting the spirit of the 1947 Constitution by the conservative fringe of the LDP.

The constitutional amendment project currently promoted by the Jimintō replaces that proposed in 2005. 2012 was particularly favourable for this type of initiative as it saw the 60th anniversary of the restoration of sovereignty to Japan and the prospect of early elections. The publication of an up-to-

[35] This constitutional amendment project, drafted by a Jimintō commission, remains a party document; it is not a government project or bill to be discussed in the Diet.

date constitutional amendment project at the end of April 2012 must therefore be placed in this pre-electoral context, when the Jimintō was looking to stand out from other parties. The inclusion of conservative articles, such as those on the role of family, revealed the party's electoral strategy to differentiate itself from Minshutō (Democratic Party of Japan), accused of being the enemy of families and other Japanese traditions[36].

In this respect, Jimintō's status as an opposition party in 2012 – for only the second time in its history – paradoxically gave more freedom to the more conservative fringes of the party. As they were not constrained by the need to seek consensus with Japanese public opinion, satisfy a coalition partner or answer to left-wing opposition, Jimintō was able to move forward with its latest proposals on constitutional change. As noted by some analysts[37], the current constitutional change project was even more interesting to study as it was closer to the "true intentions" (*honne*) of the Jimintō.

Given this ideological direction at the heart of the Liberal-Democratic Party and the existing political context, we will be analysing the contents of the document written by the drafting commission. We will particularly focus on putting the document into perspective in relation to other constitutional change projects originating from conservative circles[38]. These circles will include all participants – political parties, associations or intellectuals – who call themselves or are labelled as conservatives in the political sense of the term[39].

A recurring desire to "Japanify" the 1947 Constitution

True to the commitments made by the party when it was founded in 1955[40], the Jimintō's current constitutional amendment project aims to "Japanify" the country's fundamental laws by basing itself on two distinct ideas. The first defends the theory of a Constitution "imposed" by allied forces. Under such conditions, the "post-war"[41] period will only end once the Japanese people have reclaimed their Constitution. The second, developed by Yagi Hidetsugu[42] in an article published in the Jimintō magazine[43], regrets that the preamble to the current Constitution rejects

[36] Aikyō Kōji, « Jimintō « nihon kenpō kaisei sōan » no doko ga mondai ka », *Sekai*, 03/2013, p. 128-136.

[37] Mori Hideki, « Seiji no konmei to kenpō » (Political nervousness and the Constitution), *hōritsu jihō*, 12/2012, cited in Aikyō Kōji, *ibid*.

[38] To achieve this, we based ourselves heavily on the work of Christian G. Winkler
Christian G. Winkler, *The Quest for Japan's New Constitution – an Analysis of Visions and Constitution Reform Proposals 1980-2009*, New York, Routledge, 2011, 215 p.

[39] There is no majority definition of political conservatism. Nevertheless, it is generally accepted that it contains a desire to identify changes within the framework of existing traditions and established institutions (Winkler, p. 2). According to Kitaoka Isao, political conservatism only appeared in Japan after 1945. In the same way that, without the French Revolution of 1789, European political conservatism (particularly surrounding Edmund Burke) would not have been developed, Japanese politics would need to undergo radical changes such as the American occupation, to create a modern political conservatism. (Winkler, p. 2-4)

[40] See Éric Seizelet, "Le référendum d'intérêt national en matière de révision constitutionnelle au Japon" (A referendum of national interest relating to constitutional change in Japan), Revue française de droit constitutionnel, n°85, January 2011, p.3-40.

[41] "The post-war period" (sengō) is a chronological reference mentioned regularly in Japan to signify Japan in the 1950s as well as modern Japan.

[42] Yagi Hidetsugu, constitutionalist and Professor of law at the Economic University of Takasaki, is a key figure in Japanese conservatism.

[43] Yagi Hidetsugu, « Nihon kenpōhe ni ha, 'Nihon' ga tarinai », gekkan jiyūminshu, May 2004, n° 614, p. 54-60.

any continuity with Japan's past. It is true that there are no references to the centuries of national history and/or Japanese traditions in this essential text. The only mention of Japan's past (in the preamble: "We, the Japanese people, […] resolved that never again shall we be visited with the horrors of war through the action of government, […]") has the single aim of justifying the very detachment from this past. For Yagi, "reintegrating Japan" within the Japanese Constitution should therefore be the main motivation for any constitutional reforms.

It is for these reasons that the Jimintō's amendment project focuses on "re-Japanifying" the Constitution, which would start with: "Japan, as a country with a long history and independent culture […]" before concluding with the Japanese people's commitment to continuing "good traditions" and the Japanese State. These declarations of "national pride" would certainly not have any direct legal implications. As highlighted by Kobayashi Setsu[44], in this respect, the project differs from the 2005 attempt, which read: "The Japanese people [led by] its love and sense of responsibility […] shares a duty to support and protect the country and society to which it belongs" [preamble]. The current project[45] has only kept the general idea of that patriotic love which led to a "duty" of national defence, without using the word "duty", thereby removing the legal implications that could have arisen from the use of that word.

The other issue that receives particular attention in conservative circles relates to the position of the Emperor. The current first article of the Japanese Constitution states that "the Emperor shall be the symbol of the State and of the unity of the people; deriving his position from the will of the people with whom resides sovereign power[46]". Anxious to confirm the Emperor in his duties, many conservatives would like to see him given the status of "Head of State". Some, however, would prefer to leave Article 1 untouched for fear of inciting negative reactions from the public. The Jimintō's position has changed on this point: in its 2005 project, Article 1 remained unchanged while its 2012 project recognised the Emperor as Head of State. The significance of the term "Head of State" in this context has been questioned, particularly with reference to the degree of associated political participation. The Jimintō, along with the majority of conservative projects, is based on traditional values that give the Head of State a formal role far removed from political life. It would therefore not be a question of returning the Emperor to political involvement in State affairs, as was the case in the Meiji Constitution. Furthermore, Christian Winkler[47] notes that many conservatives have learned to appreciate a system that gives the Emperor only symbolic powers. Indeed, the system not only benefits from support among the Japanese population, it has avoided any allochthonous criticism[48]: the Emperor's political non-intervention is considered to be a Japanese "tradition". According to conservative logic, making the Emperor Head

[44] Kobayashi Setsu, Itō Makoto, « Jimintō kenpō sōan ni damedashi kuwarawasu ! », Tokyo, Godoshuppan, 2013, 167 p.

[45] Jimintō constitutional amendment project (2012), preamble, paragraph 3: "The Japanese people, proud of its homeland […], protects it independently […]".

[46] All extracts of the French translation of the Japanese Constitution of 1946 are taken from the following link: http://mjp.univ-perp.fr/constit/jp1946.htm#1 (All extracts of the English translation of the Japanese Constitution of 1946 are taken from the following link: http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html)

[47] Winkler Christian G., *The quest for Japan's New Constitution – an Analysis of Visions and Constitution Reform Proposals 1980-2009*, New York, Routledge, 2011, 215 p.

[48] Word that is the opposite of autochthonous and literally means "foreign land" or that which has a foreign origin.

of State would only "formalise" a status from which he already benefits in practice. However, this interpretation is far from unanimous among constitutionalists.

If the Emperor were to be named Head of State, the Constitution would then have to ensure that the Emperor's powers were strictly limited. However, as highlighted by the constitutionalists Kobayashi and Itō, the current Jimintō project is not clear on this issue. These two analysts call into question the introduction of acts that require neither advice nor approval by the Cabinet. The current Constitution states that "the advice and approval of the Cabinet shall be required for all acts of the Emperor in matters of State and the Cabinet shall therefore be responsible [Article 3]". However, the Jimintō's project states that "aside from [acts] mentioned in paragraphs 1 and 2, the Emperor [may] attend ceremonies organised by the State, local governments and other public organisations and take part in other official acts" [Article 6, paragraph 5]. The new category of "official [or public] acts" is therefore added to "acts in matters of State". These new acts would not require prior Cabinet approval and can be wide ranging. Several constitutionalists have warned of the increased risk that the Emperor may be used for political reasons.

Another controversial subject indirectly linked to the Emperor is found in the requirement to respect the flag and national anthem. A traditional difference between right and left within the Japanese political context is the use of national symbols. This is exacerbated by a discussion surrounding the words of the national anthem (or *Kimigayo*) that honour the Emperor[49]. For some Japanese, a requirement to respect the national anthem would signify a return to respecting a symbol of the imperial system and would consequently infringe the right to freedom of opinion[50]. For others, however, reference must be made to the Emperor as a metaphor for the unity and sovereign will of the people, from whom the former derives his position[51]. Introducing this type of requirement into the Constitution would aggravate tensions that arose at the end of the 1990s and in the early 2000s, following the adoption, in June 1999, of a law giving the Hinomaru and "Kimigayo" the status of official national flag and anthem.

Finally, conservatives want to "rehabilitate" the family within the Constitution, as they link Japan's current demographic situation to the supposed collapse of family values. Family, as described in the current Article 24[52], is based on equality of the sexes, free choice by spouses and respect for an individual's dignity. Although it has been severely criticised by conservatives for the excessive individualism that it has supposedly introduced into family relationships, Article 24 is not, according to Winkler (*ibid*.), subject to any systematic amendments. The Jimintō's position to this article has evolved: while Article 24 was left as is in the 2005 project, it is now subject to the

[49] Kimigayo lyrics: "May your reign / Continue for a thousand years, for eight thousand generations, / Until the pebbles / Grow into boulders / Lush with moss".

[50] Takahashi Tetsuya, « Jimintō kenpō kaisei sōan tettei hihan shirīzu – tennō, kokki, kokka », *Shūkan kinyōbi*, 9 July 2013, n° 967, p. 36-37.

[51] This is how Keizō Obuchi, member of the Liberal Democratic Party and Prime Minister from 1998 to 2000, specified the meaning of the Kimigayo, during the ceremony which accompanied the official recognition of the national anthem in 1999.

[52] The current article 24 of the Japanese Constitution states that "Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes."

following proposed amendment: [paragraph 1 – newly drafted] "Family, as the natural basic unit of society, must be respected. Members of a family must help each other; [paragraph 2] "Marriage is based[53] on the consent of spouses and it is maintained by a mutual cooperation based on the equal rights of husbands and wives."; [paragraph 3] "With regard to family[54], **maintenance**, **guardianship**, **marriage** and **divorce**, and other issues relating to **kinship**, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes".

These changes are in line with an expanded view of the family. While the text does not explicitly mention the three generation cohabitation family model (grand-parents, parents, children), it refers to it through the requirement for families to help each other expressed in paragraph 1. For conservatives, members of a family that help each other and support each other financially without recourse to State support represents a model that strongly resembles that of the "Japanese-style welfare society"[55].

Weakening the spirit of 1946?

The conservative fringe of the LDP is currently questioning the relationship between the State and its citizens. Linked to a "re-Japanification" of the 1947 Constitution, the change in relationship between the State and its citizens that some conservatives - including Abe Shinzō – are hoping for is raising fears of a growing distance from the spirit of 1946 that gave rise to the current Constitution, even if there is no intention of challenging the Constitution as the ultimate legal standard. For this reason the statements made by parliamentarian Katayama justify Jimintō's amendment project by referencing one of the most famous quotes from John F. Kennedy's inauguration speech of 20 January 1961: "Ask not what your country can do for you; ask what you can do for your country", a speech during which Kennedy praised the superiority of unity over division for American citizens facing the challenges of the Cold War.

Analysing the content of the amendment project drafted by the internal LDP commission shows that the conservative wing of the Liberal—Democratic Party is worried by the "excess" of individualism that threatens the public good. This has given rise to its well documented desire to rebalance the protection of individual liberties and the defence of the common good in favour of the latter. This rebalancing

[53] Note that the word "only" has disappeared.

[54] The underlined words are those that have been changed by the Jimintō project.

[55] The neoliberal trend of questioning the welfare state has affected Japan since the early 1980s (Sébastien Lechevalier, La grande transformation du capitalisme japonais [The significant transformation of Japanese capitalism] (1980-2010), Presses de Sciences Po, 2011, p.416). In 1979, the book "[For a] Japanese-style welfare society" (*Nihon gata fukushi shakai*) was published, in which the Jimintō gathered together previously disjointed proposals and submitted a society building project. Specifically, the Jimintō proposed to move away from the welfare state to embrace a new model of social protection, that of the "welfare society". In contrast to the welfare state system which delegates an increasing number of responsibilities to the State, the "welfare society" model bases social protection on three participants: individuals, their entourage and, finally, the State. Self-management by individuals is at the heart of the concept. If individuals are not able to care for their own needs, it falls to their entourage to manage this responsibility. Entourage is used to mean family, company and community. The State would only intervene when the first two links have failed and only if the person is disabled, *i.e.* actually unable to work. The balance between these three links is the cornerstone of this "welfare society": a complete delegation of social welfare to the State is taken to be a quick route towards weak families and public morals. Amélie Corbel, *La femme, le fisc et l'époux – les réformes de l'abattement pour conjoint au Japon* (Women, taxes and husbands – allowance reforms for spouses in Japan), Ecole doctorale de Sciences Po. Paris, Master's thesis, June 2013, 154p.).

act requires changing the **conditions** for restricting the right to freedoms, in the sense that the current Japanese Constitution only authorises the State to limit the right to freedoms where this right would go against the "public welfare" or *kōkyō no fukushi* (articles 12 and 13). Jimintō conservatives would prefer to use the expression "public interest and order" (*kyōeki oyobi ooyake no chitsujo*) rather than the former, which they judge to be too imprecise in its application. While some constitutionalists such as Itō Makoto warn against the dangers of such a change in terminology, others (such as Kobayashi Setsu) temper these concerns by highlighting that the risks of a radical change in the jurisprudence surrounding the issue are very low as other countries (particularly the United States) have adopted similar terminology without drifting towards tyranny.

The fight against "excessive" individualism is also visible in the desire to instil a sense of duty towards the State in the population. Without going so far as to introduce new obligations, the preamble included in the Jimintō project clearly expresses the contributions that everyone can bring to the growth and preservation of the State. Thus, the phrase "the people […] become aware that [any right] involves responsibilities and obligations" is included in Article 12.

Elsewhere, the "obligation to respect and defend the Constitution" as mentioned in Article 99 of the Constitution[56] obliges any person with political power or any State representative to respect and protect this basic law. However, the current clause, which links the Emperor, Regent, State Ministers, politicians, judges and other civil servants, is significantly modified by the Jimintō project[57]. State ministers, politicians, judges and other civil servants would no longer only be obliged to "defend" or protect the Constitution, they would also have to teach the public to "respect" it.

National sovereignty is a post-war acquisition which the vast majority of conservatives, and especially the Jimintō, hold dear. However a linguistic analysis reveals the following assessment: the only grammatical subject within the current preamble is "We, the Japanese people" (paragraph 1, 2 and 4 – and "we" in paragraph 3); the one proposed by the Jimintō contains two initial paragraphs starting with "Our country" (paragraph 2) and "Japan", with the latter being the first word in the Constitution. The "Japanese people" appears later to "protect [their homeland]" (paragraph 3), "[contribute] to the [economic] growth of the country" (paragraph 4) and "continue good traditions and the Japanese State" (paragraph 5).

Constitutionalists have also issued warnings over Article 47[58], to which the Jimintō project adds a second paragraph stating that "*each electoral district shall be defined following comprehensive consideration of the population – which remains the main gauge -, administrative divisions and topography*". According to this, population would only be one factor among many in defining electoral districts. While giving each voter a vote of "equal value" is difficult to achieve without adopting a single constituency for the entire

56 Japanese Constitution, Article 99: "The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution."

57 Jimintō project (2012), Article 102: "The whole population must respect the Constitution. [Paragraph 2] Members of the Diet, Ministers of State, judges, and all other public officials are required to defend this Constitution".

58 Japanese Constitution, Article 47: "Electoral districts, method of voting and other matters pertaining to the method of election of members of both Houses shall be fixed by law".

country, the current situation in Japan is particularly unbalanced. The disparities noted between the weight of votes from the various electoral districts (*ippyō no kakusa*) were so high during the last few legislative elections that several elections have been declared unconstitutional by the courts. As the Jimintō benefits from this imbalance due to its stronghold in the Japanese countryside, the addition of the second paragraph indicates a desire to make the current electoral system constitutional.

Nevertheless, the Jimintō's project leaves intact the passage that sees the Emperor "derive his position from the will of the people [...]". This is not the case in other constitutional amendment projects (not issued by the Liberal-Democratic Party)[59] that aim to place the Emperor "out of reach" of popular sovereignty in order to avoid any risk of abolishing the imperial system.

More "realistic" and "active" pacifism

Japanese pacifism and the methods surrounding it remain at the heart of the discussion on constitutional reform. Article 9 and the preamble to the Constitution are particularly criticised by conservatives for their "idealism" and "lack of realism".

Although there are significant differences in the interpretation of Article 9[60] among the political classes, there is an official way of reading the article that has been influenced by successive governments. This recognises Japan's right to maintain a legitimate defence force as part of its right to self-defence. This interpretation uses paragraph 2 ["In order to accomplish the aim of the preceding paragraph"] to support restrictions to the ban on maintaining an armed force to only those situations stipulated in paragraph 1, i.e. to "settle international disputes". Japan's political left has long fought this interpretation, believing that Japan should defend itself without the use of force (diplomacy, UN involvement). It is for this reason that the Socialist Party of Japan took until 1994[61] to recognise the constitutionality of the Self-Defence Forces (JSDF). As a verbal mention within the Constitution is better than an interpretation, even if this is favourable, it is not surprising to note that the Jimintō's current project aims to clarify both of these points. Paragraph 1 of Article 9 proposed by the Jimintō, entitled "pacifism", contains these lines: "[Paragraph1] *Aspiring sincerely to an international peace based on justice and order, the Japanese people renounce war as a sovereign right and will not use the threat or use of force as a means of resolving disputes. [Paragraph 2] The directions of the preceding paragraph do not prohibit the exercise of the right to self-defence.*"

Following criticism of Japan due to its lack of military contribution to the 1990-1991 Gulf War, many conservatives and supporters of reforms for the right to self-defence were concerned by Japan's position in the world and turned JSDF participation in international peace-keeping operations into a key foreign policy issue.

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[59] According to Christian Winkler, projects by Nishibe Susumu (2004) and the second project by Jishu Kenpō Kisei Giin Dōmei (Alliance of Members of the Diet for the promotion of our own constitution) modify the phrase "will of the people", while around a dozen projects simply omit the passage in question (Winkler Christian, *ibid.*, p. 140).

[60] Japanese Constitution, Article 9: "[paragraph 1] Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. [Paragraph 2] In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized."

[61] Recognition was given during the newly elected Socialist Prime Minister Murayama Tomiichi's declaration to the Diet.

The result of this was the adoption of several laws initially authorising the JSDF to participate in UN peace-keeping missions and then subsequently in humanitarian missions outside the UN framework (in Afghanistan and Iraq for example[62]). As a continuation of their aim to strengthen Japan's global position and Japanese-American cooperation, supporters of reforms to the right to self-defence have, for several years, focused their efforts on the question of the right to exercise collective self-defence[63]. Until now, this has been considered to be incompatible with paragraph 2 of Article 9[64]. Within this context, there are two possible strategies: change the Constitution or change the official interpretation of paragraph 2. The current Abe government seems to be increasingly in favour of this second solution[65], although it has not yet abandoned its aims of greater constitutional reforms in the medium term. While the Jimintō did not specifically mention the "right to collective self-defence" in its 2012 project, it removed the cause of its unconstitutionality (paragraph 2 of Article 9), thereby legalising the exercise of this right (Winkler, *ibid*.).

The Jimintō continues to push for other significant changes to Article 9, including renaming the army. The 2005 Jimintō project preferred the term "self-defence army" to the currently used "self-defence force". This in turn was changed to "defence army" in the 2012 project. The other key change relates to the increased number of missions for the army, which now include the very anticipated "*joint international operations to maintain peace and security within international society*", as well as "*operations to maintain public order*" and other "*operations launched with the aim of protecting the freedom or life of citizens*" [Article 9, paragraph 2, (3)]. Several constitutionalists and opponents of any change have highlighted the dangers of specifying the "operations to maintain public order" among the roles given to the army[66]. The other divisive proposal introduced in 2012 involves the creation of military tribunals[67]. Finally, the Prime Minister would become "Supreme Commander of the defence army" [Art. 9, paragraph 2, (1)].

[62] In order to respect constitutional constraints, JSDF operations in Iraq could not be seen as a demonstration of the use or the threat of the use of force. As a consequence, only activities limited to humanitarian, medical or civil engineering work or logistical support for affected Iraqi populations or for troops from other member States participating in reconstruction operations were allowed. Furthermore, these activities could only take place outside of combat zones or in areas that were unlikely to be affected by fighting during the deployment period. Consent from local Iraqi authorities was also a condition of deployment for the JSDF.

[63] See the translation by Sophie Buhnik in this issue.

[64] The interpretation of the Cabinet Legislative Bureau could evolve over the coming months. For clarification, see the article by Arnaud Grivaud in this issue.

[65] See the analysis by Arnaud Grivaud in this issue.

[66] The 2005 Jimintō project had already introduced this mission but restricted its application to periods of State emergency only.

[67] Jimintō constitutional amendment project, 2012, Article 9, paragraph 2 (line 5): "Any crime committed by military personnel or other officials belonging to the defence army while performing their roles, or any crime relating to defence army secrets will be judged by a tribunal set up for that purpose within the Defence Army. The accused will be guaranteed the right to appeal to [civil?] tribunals."

Conclusion

The latest constitutional amendment project by the Jimintō is built around three recurring themes that can be considered the cornerstones of this type of conservative project: the "re-Japanification" of the Constitution, a critical position in relation to so-called "modern" constitutionalism and changes to Article 9. The positions taken by the party's more conservative fringe seem to have grown in influence, due to cyclical economic reasons. In this respect, the Jimintō project should be studied in even more detail as other important points have not been addressed within this article. These include, among many others, proposals to relax the separation of Church and State[68], to introduce new rights relating to the environment and the respect of the environment and changes to the constitutional amendment process itself.

[68] Some commentators see a link with visits to the Yasukuni shrine. For more detail see Itō Asahirō, "Jimintō kenpō kaisei sōan tettei hihan shirīzu – shinkyō no jiyū, seikyō bunri", *Shūkan kinyōbi*, 09/07/2013, no967, pp.36-37.

POINTS OF NEWS

3. YANAGISAWA Kyōji,

"The right to exercise collective self-defence and the Abe government: ambiguities surrounding the discussion on its implementation" [shūdanteki jieiken to Abe seiken – kōshiyōninron no imifumei], *Sekai*, May 2013, p. 38-42. *Translated from the Japanese source by Sophie Buhnik*.

Born in 1946, Yanagisawa Kyōji was awarded his diploma from the University of Tokyo and subsequently started work at the Ministry of Defence. Former manager of the Defence Agency (he became Defence Minister in 2007); Yanagisawa was Assistant Secretary to the Cabinet of the Prime Minister from 2004 to 2009. As Director of the Geopolitics Institute of Japan, he has expressed his opinion on the exercise of the right to collective self-defence on numerous occasions, such as in November 2013 during a round table discussion with Kitaoka Shinichi for the Foreign Correspondents' Club of Japan.

On 22 February 2013, during a press conference held in Washington following his meeting with President Obama, Prime Minister Abe Shinzō called for the "restoration of a strong Japanese-American alliance". It was believed that the Prime Minister focused on efforts to consolidate the Japanese-American alliance with a review of the defence programme and a re-examination of the right to collective self-defence and that this initiative was well received by President Obama as it also presents benefits for the United States.

We should remember that during the Japanese-American meetings at the summit, the leaders of the two countries had a habit of appearing together in a conference room and that the call for proximity between the two states was the order of the day. It would therefore seem there was a discrepancy between Abe's speech focusing on the "restoration of the alliance" as part of an individual conference, and the other party that kept up a "business-like" attitude,

expressing coolness and not wanting to put more emphasis on this alliance.

Abe planned to visit President Obama from the beginning of 2013 (NB: He was elected as Prime Minister for the second time at the end of 2012]. He was therefore at the beginning of his new mandate when he met the President of the United States during a meeting at the summit and he used this meeting to appeal for a restoration of the Japanese-American alliance centred on the right to exercise collective self-defence. For their part, the United States wanted Japan to clarify its position in relation to specific problems, such as its participation in the Trans-Pacific partnership agreements or the relocation of bases in Futenma. From the beginning, the discrepancy in expectations between the two parties was clear.

I would like to analyse in greater depth the four types of scenarios [which would require the use of the right to self-defence] expressed by Prime Minister Abe during the "round table discussion on restructuring the legal basis for the Japanese-American Security Treaty" which was held during his first term in office in 2007.

My initial conclusions are that the problems set out by the Prime Minister during this round table are based on the premise of military situations where resorting to collective self-defence seems unlikely. Furthermore, in terms of participating in UN peace-keeping operations, asking how far Japan can go when accepting missions turns an essentially political subject into a legal one: I can't help but think that the logical order of ideas is being reversed.

1st scenario: protecting American ships in international waters.

If any American ships are attacked in international waters when they are in the vicinity of Self-Defence Force ships and so that the trust relationship with their allies is not damaged if the latter participate in any response, the question of whether it is necessary to protect American ships must be raised.

With reference to a national emergency (*nihon yūji*) (as mentioned above), even if the government's position is that the Japanese Self-Defence Forces have the right to support the American navy individually, for example during joint military exercises during peace time or while engaging the American navy in information gathering activities (on missile launch surveillance for example), this scenario could not be qualified as a national emergency.

However, if a sudden attack on the American navy when it is in the vicinity of the Self-Defence Forces is not defined as a national emergency, what is it?

Firstly, the American navy could be subject to an unexpected attack if, for example, it were to engage in information gathering activities in areas close to North Korean waters, or in exercises perceived as threatening to North Korea. As it seems unlikely that the American navy would undertake this type of action without issuing appropriate warnings, if, in this scenario, American ships were subject to a surprise attack and were to suffer damage without reacting, the captains and commanders of these ships would be court-martialled.

In the hypothesis of a premeditated attack of an American ship, the "attacker", whoever this may be, must expect significant reprisals and should be prepared to go to war, with its entire army ready to attack. This type of military activity would not go unnoticed, and the American army would itself adopt a similar stance. This is exactly what the government calls "American military deterrence", where

an attack is preventatively "deterred". Furthermore, any enemy planning such an attack would have to consider attacking American military bases in Japan as well as Self-Defence Force bases which could serve as a launch point for reprisals.

In other words, any premeditated attack [against the American army] that would affect Japan at the same time would certainly be considered as a national emergency. In this situation, the Self-Defence Forces would be in a position to protect American military bases and secrets – and even marines – due to the independent right to self-defence and, where necessary, an "attack of enemy bases" would be possible.

As a result, the possibility of American marines being attacked in the vicinity of the Self-Defence Forces becomes a situation similar to a "frictional collision", where neither of the two parties has the intention of actually going to war. In this case it would be important to expect early control of the situation in accordance with diplomatic crisis management rules and the United States would not appreciate a reckless response from the Self-Defence Forces aggravating the situation (escalation). *In fact*, since the Cold War, the United States does not counter-attack immediately after provocation from China or North Korea, nor does it counter-attack anything that interrupts naval information gathering or aerial surveillance missions: they prefer diplomatic resolutions.

Incidentally, when the Aegis naval defence system was deployed in the Japan Sea to monitor the launch of missiles by North Korea, it was even reported that combat planes had flown over the country. Despite the fact that the Aegis radars are very sophisticated, when they are being used for missile detection, they cannot monitor the approach of North Korean planes and some deplore the resulting dangerous situation. This may well be established, but it is a fact that if it had deliberately monitored North Korean missiles, the American army would have considered itself not to be in a situation where it could come under imminent North Korean attack.

2nd scenario: intercepting missiles aimed at the United States.

Should America be subject to a missile attack, Japanese homeland defence would also be hampered. In addition, the analysis of missile trajectories requires a certain amount of time and the report raises the issue of the need for early interception of missiles, including if they are directed towards the United States.

To intercept a missile, its orbit must be correctly analysed. For a correct orbit analysis, the missile must reach the stage at which the warhead is detached from the booster and starts a parabolic motion due to inertia. By calculating and determining the trajectory taken by the warhead, an intercept missile can be launched to meet the first missile at a specific point in its orbit.

In general, intercept missiles have a slower cruising speed than that of warheads: if Japan is targeted, it is possible that the enemy could hit the country with a warhead aimed at a close target. This assumes being closer to the implementation of an ambush than a pursuit [of the missile launched]. On the other hand, long-distance missiles launched towards the United States will have already passed over Japan once they have achieved their cruising speeds and altitudes. It would be physically impossible to bring them down by launching a slower intercept missile (which would be flying at a lower altitude) "in pursuit" of the original missile.

It would be possible with the development of weapons that destroy missiles as soon as they are launched, using powerful lasers. There is,

however, little chance of such a weapon being developed in the near future.

In July 2006, North Korea carried out military exercises that ended in the launch of seven missiles, including the new Taepodong-2, as well as Nodong and Scud missiles. Although the Taepodong 2 test failed, the significance of these exercises was clear: the country was boasting of its simultaneous ability to attack targets located in South Korea, with the Scud, Japan, with the Nodong, and Guam or Hawaii, with the Taepodong. Simultaneously targeting the United States, South Korea and Japan for an attack is the same as if these weapons combined an attack on American territory with a "national emergency" in Japan.

In these conditions, the United States would expect Japan to ensure its own defence as well as that of the American bases located in the archipelago but not a protection of American territory itself. The United States has published a plan focused on the deployment of lasers with additional x-rays capable of detecting missiles, thus equally matching developments in the North Korean nuclear arsenal. The fact that our own country is able to provide an autonomous and conclusive military force is part of the American military strategy. If the responsibility for destroying missiles in order to protect Japanese-American territories rests with Japan – an allied but foreign country – it is as if responsibility for the American superpower's nuclear umbrella depended on a foreign country, or even, as if American military strategy was influenced by a foreign country. Is this really what the United States wants?

3rd scenario: using weapons as part of UN peace-keeping operations.

Within the framework of peace-keeping operations (PKO), the use of weapons is only permitted in self-defence. However, if it is not possible to use armed force to remove obstacles hindering the missions or to protect foreign nationals (including on "convoy surveillance" missions), participation in international peace-keeping operations becomes restricted which creates disagreements with armed forces from other countries.

Along with the 4th scenario, this is a problem linked to partnerships between several countries and to collective UN measures rather than one that relates to the right to self-defence that each nation has individually, as well as the right to collective self-defence.

If the government's interpretation is to be believed, the Constitution prohibits the use of armed force as a means of resolving international conflicts. This means that each time armed force is used as part of a peace-keeping operation, if the enemy "is a State or equivalent institution" it is possible that this use of armed force falls within the definition of an international conflict.

As noted in the legal basis for the Japanese-American Security Treaty, this interpretation leaves room for a review which identifies the actions of the international community for the termination and resolution of international conflicts as international conflicts in which Japan would be one of the parties involved.

This can subsequently be generalised to any situation where Japan could be required to taken on a more active role to support a stable international order.

However, whether Japan, or any other State (including the United States), commits completely or not at all to actions that could lead to battles against other armed forces is another problem. This involves much more than Japan's image or even a legal debate. If we suppose that the usual perception of Japan is that of a country "which does not commit to military missions abroad", even if

this is part of the jurisprudence, the question of whether it is a good idea to refute this perception unconditionally remains.

This argument is based on reasoning which states that "if Japan cannot be armed like an average country, then it cannot fulfil missions like an average country". It is not, however, weaponry that determines a mission. Rather, it is the mission that determines the weaponry and, initially, the question that needs to be addressed is whether Japan should accept all types of mission.

[…]

4th scenario: supporting third party countries participating in peace-keeping operations.

In a hypothetical situation where Japan is fulfilling a logistical support mission for the armed forces of any country participating in a UN peace-keeping operation, if the foundations of a "unification for military purposes", specific to the interpretation of the Japanese situation, is applied and the situation were to change while in the field, a situation could arise where Japan could no longer fulfil its two main roles, transporting weapons and munitions or providing medical care to the wounded.

UN regulations outlining peace-keeping operations address this matter by mentioning cease-fire agreements, consent of countries involved, the "five participation regulations" to maintain neutrality. However, the concept of a "civilian zone (to protect civilians)" is not defined. I can recall the unease created by this issue in the past, as no one could remember any discussion of the idea of "unity for armed action" linked to the implementation of UN peace-keeping operations.

On the contrary, what stands out in my memory is the Iraq war[69]. For the deployment of the Self-Defence Forces in Iraq, there were discussions surrounding the protection of the Dutch army[70] (…) as well as the transport of weapons belonging to the various members of the coalition. Deployment in Iraq was recognised as a "supporting activity based on a UN resolution" by the government, but in scenarios 3 and 4, the possibility of another "Iraq situation" remains high in our thoughts.

What does the United States want?

During the Cold War, the aim of the United States was to limit the advance of the Soviet navy across the Pacific ocean, to protect shipping lanes surrounding Japan to a distance of 1000 miles as well as the Tsugaru, Souya and Tsushima Straits. Japan therefore became an indispensable part of the American strategy in the Asia-Pacific region, particularly due to the development of its anti-submarine and anti-aircraft defence systems as part of an "independent self-defence sphere".

At the end of the Cold War, the United States, involved in the first Gulf War, required Japan to cooperate financially and to provide transport for equipment and men. Private civilian aircraft and ship building companies initially refused to answer this request and, from a financial perspective, the amounts offered were too low; the United States did not hide their dissatisfaction, "*too little, too late*". However, our country remembers the "trauma of the Gulf War": not being able to receive international recognition if no human resources

[69] Following a request by the United States, the Koizumi government authorised (by voting in a special law relating to humanitarian aid and reconstruction in Iraq) the deployment of the JSDF in a foreign country, for the first time since the end of the Second World War. This mission started in 2004 and ended in 2008.

[70] The first Japanese troops arrived at the Dutch military base of Samawah on 19 January 2004.

are provided.

As the North Korean threat faded, a review of the *guidelines* governing the Japanese-American relationship was performed between 1996 and 1997. I participated in this review as the person responsible for discussions within the Defence Agency [*Bōeichō*, which became the Ministry of Defence in January 2007]. As we were signing the agreement, my American counterpart spoke of the "glass half empty, glass half full" that had been his aim. While he was not able to understand the ins and outs of the right to collective self-defence, his aim was to obtain significant concessions in relation to Japan's obligations and to clarify what the United States could expect. In this sense, it was an important step forward.

Before he became the thirteenth Deputy Secretary of State of the United States in 2001, as part of the Bush administration, Richard Armitage had openly expressed his intention to get to the core of the JSDF issue. Following 9/11, and even as Japanese troops were being deployed around the Indian Ocean and in Iraq, this request was strongly reiterated within the American government.

In order to build the framework for a new international order based on an alliance led by the United States, it became clear that Japan, as a member of this alliance, would have to take on a more active role, overstepping the restrictions imposed upon it by its own Constitution. Following the stalemate in the Iraq war, Obama's rise to power signified a change in the United States' priorities. These were now focused on strategic balance in the Asia-Pacific region where Chinese growth had flourished since the "war on terror". The lone voice calling for the formation of a global allied coalition, as in Iraq, could not be heard.

So now, once again, among those in charge of the Japanese-American Security Treaty, the argument as to whether the "ban on Japan resorting to collective self-defence restricts the scope of the alliance" continues. Nevertheless, there is no specific argument questioning the impact this "limit" has on America's military strategy against China.

In an interview (dated 21 February 2013) given to the *Asahi shimbun*, Michael Green, a supporter of development within the JSDF, mentioned "growing difficulties" that require the United States to support the Japanese government during "parliamentary question sessions" with the aim of overcoming restrictions to the right to self-defence. He then explained that the most important obstacle was "an obstacle caused by information sharing; if the American army engages in military actions using information that comes from Japan, in violation of the right to self-defence" and "there is no intention of putting the JSDF onto the front line".

In my opinion, and based on my experience, the Japanese government has no intention of denying that it receives minor orders from the American government. In relation to information sharing, tactical information sharing is already implemented as the JSDF air force and navy already make use of the American *data link*. The government has responded that "collaboration with an armed force (…), if it consists of sharing basic information, including information on enemy positions, does not contradict our Constitution". This is why I do not understand why Michael Green defined information sharing as an obstacle.

That said, and looking beyond what Michael Green said, it should be noted that he did not give any specific examples of situations in which an alliance using collective self-defence has not worked for the United States.

4. Interview between HASEBE Yasuo and KAKIZAKI Meiji

"About changes to Article 96 of the Constitution", [Kempō 96 jō 'Kaisei' wo megutte], *Juristo*, no1459, August 2013, p. 68-73. *Translated from the Japanese source by Arnaud Grivaud.*

Born in 1956, M. Hasebe Yasuo is a Professor of Constitutional law at the University of Tokyo since 1995, after having been a lecturer at Gakushūin University. M. Kakizaki Meiji, graduated with a degree in literature from the University of Waseda in 1984 and is a political journalist working for the Kyōdō tsūshin agency.

Movements around the changes in Article 96 of the Constitution

Kakizaki: The discussion surrounding constitutional amendments has picked up steam recently, with the Koizumi government The faction to which the latter belonged, the Seiwakai, was originally founded by Kishi Nobusuke. It's at this point that the LDP factions that supported economic questions were replaced on centre stage by the faction that focused on political questions.

Hasebe: This is in fact the case for Koizumi and Kishi.

Kakizaki: In other words, it was the first time since Kishi that supporters of this LDP trend held their heads high. In the constitutional amendment project the party drafted in 2005, under Koizumi, the issue of changing Article 96 to go from a qualified two thirds majority to an absolute majority had already been raised. However, at this time, the spotlights were mainly trained on the changes to Article 9 and this limited the discussion of Article 96. In 2006, the Abe government succeeded Koizumi, and got to grips with the constitutional amendment project but had to abandon it due to the

resistance to the proposed changes to Article 9. […]

For this reason, in the early 2000s, there was a movement to change the Constitution within the LDP. The "pro-change" group, having learned their lessons from the failure of their previous strategy that focused on Article 9, now turned towards Article 96. However, against all expectations, this strategy was rather poorly received by the general public. The public were able to read the intentions of the LDP clearly and were aware that its ultimate aim was still to change Article 9.

[…]

Hasebe: For now, the preliminary amendment project for Article 96 seems to be losing ground. The main reason for this is that, surprisingly, the general public remained calm and were able to make sense of things. The fact that the LDP and the government must now take this into account must not be overlooked.

Kakizaki: It is true that people may have perceived this as a "vile attempt to trick them", to put it plainly.

Hasebe: Aside from this, from a political point of view, should we also be paying attention to future decisions made by the Kōmeitō, one of the coalition parties?

Kakizaki: It would seem that the Kōmeitō will refuse any preliminary amendments to Article 96.

Hasebe: While a partial relaxation could be possible but, in relation to the pillars of the Constitution, which are human rights, pacifism and popular sovereignty, it would seem that the Kōmeitō is opposed to any relaxation of the two thirds rule. It would be interesting to know how many articles in this Constitution are not linked to one of these three fundamental principles.

Kakizaki: Nevertheless, the opposition of the Kōmeitō is not as pronounced as it was. This is not part of the constitutional discussion as such, but more relevant to the Kōmeitō's current situation and its participation in the majority coalition. However, it must take steps to reassure its Women's Committee (*fujinbu*) and Youth Committee (*seinenbu*), both of which are firmly attached to pacifist ideals, while maintaining its position within government.

Hasebe: Overall, we could say that all political parties, whether they are in favour or against, have made their opinions clear on the amendments to Article 96.

Kakizaki: That's true, but what is also interesting is that the LDP did not mention this issue in its manifesto during the Upper House elections this year.

Hasebe: Are you saying they didn't mention the idea of a two-phase amendment process for the Constitution, with initial changes to Article 96?

Kakizaki: That's right; it was not one of their main policies. In contrast, the Japan Restoration Party clearly included it in its manifesto. For its part, the DPJ is against the idea. On the basis that public opinion was not as supportive of the idea as they'd hoped, the LDP chose to avoid electoral consequences in the Upper House and went with the politically realistic choice of not including this policy in its manifesto.

[…]

The idea of an initial change to Article 96 came about because Hashimoto[71], inherited

[71] Former co-president of the Japan Restoration

a political style that was developed from the Koizumi government, in which compromise and in-depth discussions were considered to be a waste of time and where it was preferable to rely on public opinion through elections. In this sense, the true heir to Koizumi is not Abe, but Hashimoto. By extending this idea, we can see that supporters of this trend aim to impose popular opinions and sovereignty onto the Constitution, in the same way as ordinary laws.

[…]

Hasebe It could be said that by not including the idea of an initial change to Article 96 in its manifesto for the Upper House elections, the LDP voluntarily avoided putting the idea to the public vote.

Problems linked to a relaxation of the conditions required to submit a constitutional amendment project to a referendum.

Hasebe: The starting point for constitutionalism is that idea that there are different values, ways of seeing the world and ways of thinking throughout society and that many people have different opinions to each other. Despite this fact, common rules are needed to govern society and these need to be chosen democratically. However, the Constitution determines the basic framework needed to carry out this democratic process. If this framework needs to be modified, it is important to gather a large consensus that includes a majority of individuals with differing points of view. It is for this reason that any constitutional amendment project must receive two thirds of the votes in both Houses before being put forward to a referendum. If this condition is relaxed to an absolute majority, the risk is that the fundamental rules governing society would be changed constantly according to political whim, rather than being protected in the medium and long term.

[…]

Kakizaki: A member of the LDP's constitutional amendment project drafting committee told me that there had been a discussion of this idea of an "overly rigid" or "overly relaxed" Constitution. The members of the committee decided that calling for an absolute majority because the current Constitution was "overly rigid" represented too great a risk and so looked for an intermediate solution. They considered a ratio of between one half and two thirds.

Hasebe: I understand.

Kakizaki: In the end, no ratio made sense.

[…]

Were these discussions looking at an intermediate solution between the two thirds majority and an absolute majority of any use?

Hasebe: As I was saying before, for a constitutional amendment project to be submitted to a referendum, there needs to be a consensus which represents the majority of people. However, there really is no rational explanation for the two thirds ratio. There is no reason why a three fifths majority wouldn't work, or why the threshold couldn't be increased to three quarters.

[…]

On the contrary, the question that should be asked is why the two thirds majority wouldn't be suitable. Given that the regulations currently require a two thirds majority, it is up to those who think this isn't suitable to prove that it needs changing.

Party and current mayor of Osaka..

Furthermore, the discussion could have been different if people could see that there was a real desire among politicians to amend the Constitution, as well as efforts to obtain the two thirds majority required to bring any amendment proposals to a referendum. However, although there has never been a serious effort to achieve this, they still say that the two thirds requirement is too rigid. In this situation, it is difficult to believe their arguments.

Kakizaki: The reason for which constitutional amendments have never been seriously deliberated is well-known. The same member of the LDP's constitutional amendment project drafting committee told me that he believes that the LDP would break up if any amendments were made. He added that he would then side with those defending the current Constitution.

[…]

Hasebe: In the current situation, we still can't say that the politicians ready to change the Constitution at any cost make up a significant majority within the LDP.

Possible scenarios following the Upper House elections

Hasebe: If the LDP won half the seats and could, for example, count on two thirds support by building a coalition with the Japan Restoration Party and the Kōmeitō, would constitutional reforms be based on the LDP's current project or would Article 96 be amended first?

Kakizaki: Yes, because realistically, the Kōmeitō could not consent to the constitutional changes requested by the LDP.

Hasebe: There is therefore a chance that the Kōmeitō might consent, willingly or unwillingly, to the initial changes to Article 96.

[…]

Another possible scenario is that the LDP and the Japan Restoration Party do not achieve the required two thirds majority. They would then have to start again from scratch.

Kakizaki: True. The government would then have to gather support for existing proposals, such as recognising that the right to collective self-defence does conform to the Constitution.

Hasebe: In this situation, the government would temporarily abandon any plans to change the text and would focus on reviewing the official interpretation of the Constitution in relation to collective self-defence.

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ISSN: 1777- 0335