

**CHALLENGES FOR CONSTITUTIONAL PRACTICE:**

**SUMMARY OF ISSUES**

**BASED ON A SERIES OF INTERVIEWS WITH THE FORMER  
HEADS OF THE THREE BRANCHES OF THE GOVERNMENT**

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WORKING GROUP ON CONSTITUTIONAL PRACTICE

COLLABORATOR: PHP RESEARCH INSTITUTE

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## WORKING GROUP ON CONSTITUTIONAL PRACTICE

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# **Challenges for Constitutional Practice: Summary of Issues Based on a Series of Interviews with the Former Heads of the Three Branches of the Government**

## **Working Group on Constitutional Practice**

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## **Agenda and Overview**

1. Constitutional debate on a national scale is crucial. In addition to obtaining adequate feedback from the sovereign people, smooth deliberation is needed to reflect on the direction of the country in light of the realities of constitutional practice.
2. In understanding ‘constitutional practice’, we should respect and embrace the empirical knowledge of the former heads of the three branches of the government, who were once at the helm of constitutionalism in the legislative, executive or judicial institutions. However, such knowledge used not to be fully visible to the outside.
3. This working group was set up as a forum for joint discussion to shed light on the actual operation of the Constitution and the realities of constitutional practice. Members included researchers with an interest in constitutional law and parliamentary politics. Eleven working group sessions were held to gain valuable insight and empirical knowledge regarding constitutional practice from the former heads of the three branches of the government.
4. Through the discussions, the working group found that ‘constitutional practice’ driven by the heads of the three branches of the government is the key collective entity integrating attached organic laws, as well as constitutional and judicial precedents, whose empirical knowledge comprises extraordinary insights that should be highly respected and taken seriously in considering constitutional issues. The group also identified a new approach to the discussion of constitutional law going forward, including on the direction to be followed in the discussions on constitutional issues and the underlying perspective to be adopted in the discussions.
5. In this context, the group decided to prepare for the publication of a ‘Summary of Issues’ regarding the challenges for constitutional practice based on the empirical knowledge of the former heads of the three branches of the government. The group hopes that the Summary will assist further deliberation on the Constitution going forward.

# **Background of the Working Group**

## **1. Objective of the working group**

### **Dawn of a new trend of constitutional debate**

The working group considers that in practice, the Japanese Constitution is applied basically through the constitutional provisions, i.e. the Constitution of Japan enacted in 1946 and never amended since then. It is supplemented by attached organic laws including the Imperial House Law, the Diet Law, the Cabinet Law, the Court Act and the Local Autonomy Act, as well as unwritten constitutional precedents and the Supreme Court's precedent to give shape to constitutional practice. This canon of mixed constitutional structure should be an important focus of attention. However, discussions on constitutional issues tend to focus mainly on the interpretation of the provisions of the written constitutional code and their validity. Constitutional debate thus far has also tended to highlight specific areas, but a new dimension of debate will be required going forward, in view of the historical development of the unwritten constitution led by the three branches of the government – legislative, executive and judicial. Constitutional issues represent crucial challenges on a national scale. In addition to obtaining adequate feedback from the sovereign people, smooth deliberation is needed to reflect on the future direction of the government.

### **Respect for empirical knowledge on the realities of constitutional practice**

The working group also considers that the realities of constitutional practice have been accumulated through the operation of the legislative, executive and judicial branches of the government, but are rarely made available to the outside. In understanding such realities, we should highly respect and embrace the empirical knowledge of the heads of the three branches of the government, who were once at the helm of constitutional practice in the legislative, executive or judicial institutions, in our constitutional debate going forward.

For discussions on how constitutional practice should be in the future, it would be highly beneficial to have a forum for deliberation on the Constitution of Japan, attached organic laws, as well as constitutional and judicial precedents among those who, after their distinguished careers as leading actors in constitutional structure, have been considering the future direction of Japan from a broad, supra-partisan perspective. Facilitating free discussions among persons who fulfilled great responsibilities as heads of the three branches of the government is expected to be highly useful.

### **Creating a deliberative forum**

The working group was organised mainly by researchers in constitutional law and parliamentary politics as a forum for such deliberation and conversation. It was expected to invite former heads of the three branches of the government to share their empirical knowledge and insight built on experience, and to develop them into collective wisdom to guide the future direction of discussion, and basic perspectives on constitutional issues through deliberation. Thus, it was intended to be a forum for joint discussion to shed light on the operation of constitutional provisions and constitutional practice.

## **2. Activities and outcomes of the working group**

### **Activities**

The working group, launched in October 2016, brought together Makoto Ohishi (Chair, Mr.), Reiko Oyama (Ms.), Hajime Yamamoto (Mr.), Masahiro Sogabe (Mr.) , Sachiyo Onishi (Ms.), who have a keen interest in constitutional practice. With the intention of carrying out activities for two years, it held 11 sessions by April 2019. It was based in Kyoto, in order to ensure smooth deliberation and avoid becoming involved in politics, and it benefited from the generous support of PHP Research Institute to bridge the gaps in financial and other resources.

The working group also invited guest speakers: six former heads of the legislative, executive or judicial branches of the government (including acting heads), who have retired as members or Justices after gaining much experience in constitutional practice in the latter half of the Heisei era (2007-2019), and who shared their empirical knowledge through reports. In particular, Mr. Satsuki Eda, a former President of the House of Councillors (the Upper House), provided valuable support in inviting guest speakers. However, we refrain from naming the other speakers for they were invited on condition that they would remain anonymous.

### **Outcomes**

The working group was given a unique opportunity to hear from key actors in constitutional structure with experience in leading the three branches of the government about the realities of constitutional practice that they had shaped and their distinguished empirical knowledge. There have been no other cases of such smooth deliberation on constitutional practice with input from the heads of the three branches of the government. In Japan, each head – both current ones and former ones – does not have any official opportunity to have a conversation face to face and share their insights, even though they may get together unofficially on rare occasions, including at some events hosted by the Emperor. Due to their busy schedules, it was impossible for the guest speakers to gather in a single session, obliging us to hold separate interviews, but the group succeeded in directly hearing about the realities of the Constitution. This is our first achievement.

The Constitution of Japan emphasises the separation of powers and independent relationships among the legislative, executive and judicial branches, with proper checks and balances among them. In reality, however, the heads do have points of face-to-face contact that are not explicit in the constitutional provisions, with observable cases of mutual understanding and cooperation. The traditional discipline of constitutional law has focused on the interpretation of the provisions of the Constitution of Japan. Not only the existing constitutional structure but also the interpretive approach are largely unknown in the legal academic literature. Remarks by the former heads of the three branches at the working group sessions yielded many new discoveries about the realities of constitutional practice. Although such insights might have been shared with practitioners, the Summary of Issues based on the talks of the former branch heads seems to have helped disseminate the insights as research information. This is our second achievement.

The former heads not only lead their respective branches but also stand at the top of the whole government. We were impressed to learn that all the guest speakers met their great responsibilities with awareness of the importance of their power, mandate and authority and exercised them in a coordinated manner as the proper way to ensure that the constitutional structure functions smoothly. The political system of modern democracy sometimes precipitates unilateral majority decisions, with the risk of self-righteous operation in extreme cases. It may be said that democracy within the context of the Constitution of Japan was enriched by the practice of the heads seeking common ground between majority and minority to explore compelling conclusions in the eyes of most of the people. Although this ‘self-awareness’ among the key figures in constitutional practice is not explicit in the Constitution of Japan, our third achievement is that we gained the understanding that it is indeed embedded in the current constitutional structure.

### **3. Publication of outcomes**

#### **New discoveries from the ‘empirical knowledge of the six former heads’ and the Summary of Issues**

The working group witnessed part of the vibrant scene of constitutional practice that is only visible to the former heads of the three branches of the government. Constitutional practice as acted out by the heads is a collective entity comprising attached organic laws, constitutional and judicial precedents, as well as the constitutional provisions. In this respect, their empirical knowledge provided extraordinary insights that are worthy of substantial attention as a key constitutional issue. The members of the working group learned much and were inspired at each session from the talks and ensuing discussion. The sessions also allowed them to discover new issues to be addressed in discussions on the Constitution, parliamentary politics and the Supreme Court’s precedent going forward.

In concluding its activities, the working group decided to summarise the issues regarding necessary viewpoints for deliberation on the direction to be adopted for constitutional debate based on the collective wisdom obtained through discussion with the former heads of the government, and to publish them as ‘Challenges for Constitutional Practice’ along with the comments of individual members. The working group thinks this is of great value, creating a basis for more developed constitutional debate in the years ahead.

It should be noted that the guest speakers were invited on condition that the details of the discussions at the sessions would not be made fully public. In publishing the outcomes, therefore, it was decided not to attribute any remarks to a specific speaker, and to summarise the issues on the working group’s own account (please refer to Summary of Issues below).

#### **Next steps**

Not all issues of constitutional practice were fully elucidated in the activities of the working group over the two years. Although a gender balance was achieved among us, it could not invite any female guest speakers as there are very few women who have served as the head of one of the three branches of the government. Hopefully, the working group will see the launch of the second and third rounds of meetings or a separate initiative with

similar interest. In future, some former heads of the three branches of the government might gather at the same meeting to engage in a candid exchange of opinions based on their valuable experience. Also, people interested in the operation in general, and not only researchers in constitutional law and parliamentary politics, might initiate similar discussions on constitutional practice. It would be beneficial for the discipline of constitutional law to seek further collaboration with institutional actors involved in its practice, based on the theory of constitutional interpretation supported by compelling facts and robust logic.

The working group strongly hopes that the outcomes of the group will help demonstrate wisdom regarding constitutional practice in a more organic manner for further deliberation on constitutional matters.

Finally, the working group would like to extend its heartfelt gratitude to the guest speakers who shared their extraordinary insights, understanding the objective of our rather iconoclastic attempt to elucidate the realities of the Constitution from a novel and original approach focusing on the empirical knowledge of the heads of the three branches of the whole government, as well as all those who supported our activities in every possible way, including Mr. Yoichi Eda, the former Executive Secretary to Mr. Satsuki Eda, the President of the House of Councillors. The empirical knowledge of the heads of the three branches of the government was more than we could have imagined. Once again, we sincerely thank the guest speakers, who met their great responsibilities by tackling the complex challenges for constitutional law and politics head on.

The working group would also like to express its great appreciation to PHP Research Institute, especially Mr. Masafumi Kaneko and Dr. Toshio Nagahisa, for their sincere support and cooperation in financial matters, arrangement of meeting venues and preparation of transcripts, as well as publication of the outcomes.



## **Challenges for Constitutional Practice: Summary of Issues**

The empirical knowledge and insights shared by the former heads of the three branches of the government – legislative, executive or judicial – covered a wide range of subjects including: practical activities as the ‘head’ of each branch and the roles of supporting institutions and officials; unwritten constitutional precedents prevailing in each institution; the intent of ‘one of the three institutional actors in the whole government in exercising its constitutional authority’ and interaction among the institutions. Specifically, the following issues were taken up for discussion.

First, regarding the relationship between the legislative and executive branches, the issues included: the change of government and parliamentary government; bicameralism and the implications of the ‘divided Diet’; the feasibility of changing the position as majority and minority in each house; the exercise of the power to dissolve the House of Representatives (the Lower House); the power of each House to investigate administrative matters; appointments of senior officials requiring the consent of the Diet; the roles of the ruling and opposition parties; initiatives of politics handled by the Cabinet or the members of the Diet; bills submitted by members of each House and bills submitted by the Cabinet; and the purpose of international cooperation and contributions. The discussions also extended to the internal problems of the each branch. As regards the legislative branch, such issues included: parliamentary procedures and proceedings; electoral system; the roles of each House; and the supremacy of the House of Representatives versus the powerful House of Councillors. With regard to the executive branch, issues included the role and operation of the Cabinet.

Second, regarding the relationship of the juridical branch with the legislative and executive branches, the issues included: the approach to constitutional interpretation of the Supreme Court as observed by the legislative and executive branches, and response to rulings of the Supreme Court on the unconstitutionality of the government. For the judicial branch, issues included: relationships among the Chief Justice of the Supreme Court, other Justices and the General Secretariat of the Supreme Court; and the management of panels to discuss judgements, etc.

Third, regarding the overall picture, the issues included: the roles of the Diet (and/or House of Representatives and House of Councillors), the Cabinet and Supreme Court as major actors in constitutional practice; the roles of subsidiary bodies and staff; document management and information disclosure; the constitutional settlement of political parties; relationship with the Emperor and the Imperial Family; the operation of the Diet, Cabinet and Court in a globalised society; the relationships of the constitutional code with attached organic laws, precedents and the case law; and the future direction of discussion on constitutional reform.

Based on the empirical knowledge and insights of the former heads of the three branches of the government, the working group summarised the issues related to the challenges for constitutional practice. Future discussions on the Constitution of Japan should preferably take the form of deliberation taking the following matters into account.

## 1. Introduction

### **Relationships among the constitutional code, attached organic laws, and constitutional and judicial precedents in the framework of constitutional practice**

Practical implementation of the Constitution is based on the constitutional provisions. It also takes the form of constitutional politics, supported by attached organic laws, precedents, the unwritten constitution and the case law. In Japan, constitutional issues typically involve the interpretation and application of the provisions of the constitutional code, and whether their amendment or repeal is right or wrong is debated, but constitutional debate should also consider its canons and the realities of constitutional practice.

## 2. Relationship between the legislative and executive branches

### **Parliamentary government and bicameralism**

- The Constitution of Japan assumes the possibility of a change of position of the majority and minority in each house of the Diet, and hence the possibility of changes of Cabinet and government. Based on this assumption, any changes of Cabinet and government raise the issue of how to ensure continuity of policy through a smooth transition. The possibility of such changes also requires action to reduce the policy information gap between the ruling and opposition parties.
- The Constitution of Japan assumes the possibility of a ‘divided Diet’, where different parties form a majority in the House of Representatives and the House of Councillors. In the event that the ruling and opposition parties change places, both should provide the wisdom obtained in their former positions for the operation of each House if constitutional practice is to navigate through the change of government.
- When the Diet malfunctions due to sharp divisions between the ruling and opposition parties, the leadership of the Speakers and the President of each House and the Prime Minister in breaking the deadlock is institutionally limited. Parliamentary management and system reform are needed to demonstrate the significance of bicameralism through the advancement of joint meetings to deliberate and discuss consensus-building in the Conference Committees of both Houses.
- Each of the Houses should be managed so that the power to investigate administrative matters functions adequately. Furthermore, it is important to promote the disclosure of information held by government, as well as the proper preparation, management and storage of government archives.

### **Role and operation of the legislative branch**

- The legislative branch, dubbed the ‘forum for debate’, should further evolve the discussion method to allow sufficient time for deliberation and for listening to minority opinions, in order to build consensus, instead of rushing to majority rule decisions.
- It should not be forgotten that under a parliamentary government, the legislative branch is also the ‘forum for decisions’. This is why the Constitution paves the way

for the House of Representatives to re-adopt a bill rejected by the House of Councillors. Since this mechanism only works where the ruling party has a qualified majority of at least two thirds in the House of Representatives, care should be taken not to drive the ruling and opposition parties to a stalemate.

- The core part of the legislative process is implemented at informal forums outside the Diet, such as a preliminary review by the ruling parties and multiparty consultation for amending a bill outside the Committee of each House. It is important to examine the possibility of opening these processes of building consensus so that conflict points and discussions to break the deadlock become widely known.
- Both Houses are required to disclose to the general public the information materials presented or distributed to members in their committee deliberations, in addition to publishing the minutes of the House.
- In exercising the power to investigate administrative matters, each House should consider ways to respect the opinions of minority parliamentary groups, while recognising the importance of unanimity in exercising any such power.
- Parliamentary reform is at a standstill. Each House, and the Diet as a whole, urgently need to review their election system and time period for election campaigning, as well as rules and procedures, from the perspective of whether they are fully playing their roles in democracy, in light of the differences in the roles of the two Houses and their members.

### **Role and operation of the Cabinet**

- The Prime Minister's leadership in the workings of the Cabinet and its relationship with the Diet has been exercised in moderation from the perspective of separation of powers, a key component of constitutional practice. Now, discussion needs to focus on how it should be exercised going forward or whether the required moderation should continue to be ensured by the conscience of the Prime Minister, or by institutional constraints.
- The exercise of the power to dissolve the House of Representatives has been left to the sole discretion of the Cabinet. Now, we need to consider whether some kind of restraint should be introduced, such as unwritten rules calling for moderation or codified written rules.

## **3. Relationship between the judicial branch and the legislative and executive branches**

### **Supreme Court's approach to constitutional judgement**

- Depending on the case to be handled, the Supreme Court should be required to consider a constitutional commitment of the issue to coordinate legislative and executive departments, in addition to its role to make the final legal judgement on the case in question.

### **Ruling of Unconstitutionality of Law**

- The relevant institution is required to respond to any ruling of unconstitutionality of the law by the Supreme Court, in light of its role as an actor in the constitutional exercise of its constitutional authority and in the doctrine of separation of powers.

### **Role and operation of the Supreme Court**

- Thus far, the acting Chief Justice of the Supreme Court has been designated in accordance with internal regulations and precedents. Given that the scope of duty for the acting Chief Justice is invisible and that the Supreme Court also plays a role in ‘judicial administration’, however, it is recommended to improve its governing structure in preparation for contingencies, including how to respond to the vacancy of the Chief Justice due to an accident.

## **4. Other issues that have emerged as crucial challenges**

### **Political parties**

- Political parties and parliamentary groups place restrictions on their members regarding the division of roles in the Diet, voting behaviour and the preliminary review of bills, among others. It is not clear whether these practices are desirable or not, given that they might detract from the meaningfulness of parliamentary debate. It is necessary to discuss how those practices should be positioned in the framework of parliamentary government and bicameralism.

### **Sustainable government finance**

- The proper roles played by the Diet, the Cabinet, the Supreme Court and the Board of Audit in order to ensure the sustainability of government finance should be examined.

### **Relationship between the Emperor and actors in the whole government**

- By the constitutional precedent, the heads of the three branches of the government have an audience with the Emperor in the Imperial Palace at the time of their appointment. The heads rarely get together except on the occasion of events held at the Imperial Palace, such as Their Majesties’ New Year Reception and *Niinamesai* (rice-harvesting ritual performed by the Emperor to give thanks for good harvests), as well as some of the events attended by the Emperor, including the Memorial to the Nation’s War Dead. It would be worth reconsidering the approach to such rituals.

### **Operation of the Diet, the Cabinet and the Supreme Court in a globalised society**

- Discussion is needed on: how we should distinguish among relationships with foreign countries and international organisations, Imperial diplomacy and parliamentary members including the Speaker, the President and members; how we should position involvement in and the control of international administration and frameworks within constitutional practice; and above all, how we should address the division of roles among the three branches of the government in responding to globalisation of the world.

### **Procedures to amend the Constitution (constitutional provisions)**

- It should be discussed whether the process of amending the Constitution requires the same procedure as ordinary legislative procedures (for the enactment and revision of

laws), i.e. a review by the ruling party, followed by the preparation of bills by lawmakers, restrictions on party debate and voting. It is necessary to consider a better way, including a new technique of lawmaker-initiated legislation, such as the preparation of bills by a supra-partisan project team and/or a joint meeting of the members of both Houses, for example.

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