

“Mystery” of the House of Councilors and Political Turmoil: Constitutional Issues Posed by the Reiwa Rotation

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Abstract

What is the House of Councilors in Japan? Most Japanese people would promptly reply that it is the “chamber of wisdom”. However, what does this “chamber of wisdom” mean? Few are able to answer this question. In fact, the Reiwa Shinsengumi party’s announcement of their Reiwa rotation system sparked a chaotic wave of legal and political commentaries, both in favor and opposed. These discussions on the Reiwa rotation symbolically implied that there were not the essential considerations of the House of Councilors in Japan.

This article provides an opportunity to consider the essential issues of the House of Councilors and the bicameral system in Japan in the context of the Reiwa rotation. It consists of three sections. The first section explains the constitutional issues inherent in the Reiwa rotation. The second section explores the background of the constitutional issues presented by this Reiwa rotation system. In a sense, this issue is obliging us to resolve constitutional problems that we seem to have unconsciously neglected and left unaddressed. Finally, the third section offers a response to the inquiry of how the House of Councilors should be constitutionally positioned. Now is the time to delve into the mystery of the House of Councilors through these discussions.

1. Introduction

There are various forms of bicameralism in the world. For example, in the United States, the House of Representatives is the representative body of the people, and the Senate is the representative body of the states. In the United Kingdom, the House of Commons is the representative body of the common people, whereas the Senate equivalent remains the

House of Lords¹⁾. Such functional differentiation is usually stipulated by the Constitution. We then ask, what form does bicameralism take in Japan? This article aims to consider certain fundamental issues with the House of Councilors in Japan through the following case of the “Reiwa rotation system”.

In January 2023, SUIDOBASHI Hakase, who belongs to the “Reiwa Shinsengumi political party”, resigned from the House of Councilors for health reasons. After his resignation, OSHIMA Kusuo, who was the runner-up in third place on the proportionality list, was elected. Up to this point, everything was within expectations. However, YAMAMOTO Taro, leader of the Reiwa Shinsengumi party, enacted a management policy, in which five members below third place, including OSHIMA, would repeatedly resign and be elected every year, effectively serving as rotating members of the House of Councilors. And he named it the “Reiwa rotation” system (January 16, 2023). There are several issues with this approach, including consistency with the will of the people expressed in the non-binding list-based proportional representation elections. This article provides some considerations on the constitutional issues with this system.

2. Constitutional Issues with the Reiwa Rotation System

Article 46 of the Constitution of Japan stipulates that “the term of office for members of the House of Councilors shall be six years²⁾”. “Term of office” refers to a certain period during which members of the Diet may hold office. However, members of the House of Councilors lose their membership qualifications not only when their terms of office expire. Under current law, in addition to being expelled as punishment or losing their eligibility due to a qualification dispute trial, members are also allowed to resign (Article 107 of the Diet Act³⁾). In this context, as long as freedom from bondage and involuntary servitude (Article 18 of the Constitution of Japan⁴⁾) and freedom to choose any occupation (Article 22 of the

1) At present, there are almost no hereditary peers in the House of Lords in the United Kingdom, and the majority are specialists who were given titles as life peers. In this context, the House of Lords in the United Kingdom can be described as “the group of experts”. See Meg Russell, *The Contemporary House of Lords: Westminster Bicameralism Revived* (Oxford University Press, 2013).

2) The term of office of members of the House of Councilors shall be six years, and election for half the members shall take place every three years (Article 46 of the Constitution of Japan).

3) A House may accept the resignation of its members. While the Diet is out of session, however, the resignation may be accepted by the presiding officer of the House (Article 107 of the Diet Act of Japan).

4) No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited (Article 18 of the Constitution of Japan).

Constitution of Japan⁵⁾) are guaranteed under the Constitution, members of the House of Councilors enjoy the right to resign. Therefore, there is nothing legally preventing members of the House of Councilors from resigning for various reasons, including health problems.

The Public Offices Election Act of Japan stipulates that if a member elected to a proportional representation district resigns, the next-ranked candidate on the list submitted by the political party at the time of the election will replace them (Article 112 of the Public Offices Election Act⁶⁾). Under current law, there is no provision limiting the number of resignations and replacements. Formally, the Reiwa rotation system appears to be simply a repeated process of resignations and replacements that are legally sanctioned, and technically there is no legal issue. However, while there is apparently no issue with the form, the situation changes when it is systematically and continuously employed by a political party.

On this point, YAMAMOTO appears to believe that proportional representation elections are party-oriented and that all votes cast for a political party belong to that party; therefore, a party may freely replace members of the Diet within the limits of the votes it received. Certainly, in recent years, judicial precedents in regard to the proportional representation system of the House of Councilors have tended to consider elections as “party-oriented” (Japan’s Supreme Court decision on January 14, 2004⁷⁾) and have respected the “internal autonomy of political associations such as political parties” (Japan’s Supreme Court

5) Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare (*Id.*, Article 22).

6) (2) In the event that a vacancy arises for a member of the House of Representatives (elected by proportional representation), if there is a person listed in the House of Representatives’ list of the member concerned who has not been elected, an election meeting shall be held, and from among those persons, the elected candidates shall be determined according to the order of the elected candidates in the list of the House of Representatives (Article 112 (2) of the Public Offices Election Act of Japan).

(4) The provisions of paragraph 2 shall apply *mutatis mutandis* in the event of a vacancy in the House of Councilors (elected by proportional representation). In this case, in the same paragraph, “a person listed on the House of Representatives’ list in the House of Representatives list” shall be read as “a person listed in the House of Councilors’ list on the House of Councilors list”, and “the House of Representatives’ list” shall be read as “among those persons listed on the House of Councilors’ list pertaining to the House of Councilors list” (*Id.*, Article 112 (4)).

7) In this case, the constitutionality of the non-binding list-based proportional representation election introduced in the 2001 House of Councilors election was contested. Specifically, the law does not recognize the will of voters who want to vote for an individual candidate but not for the party to which that candidate belongs. Therefore, it was argued that it violated the people’s right to vote and was unconstitutional. On this matter, Japan’s Supreme Court stated, “Although the Constitution does not mention political parties, it naturally presupposes them. It is constitutional to adopt a party-oriented electoral system, considering that political parties are an essential element in supporting parliamentary democracy”.

decision on May 25, 1995⁸⁾). However, these issues relate to the electoral system and the qualifications of elected persons, not the qualifications of members of the Diet themselves. Furthermore, regarding the status of members of the Diet, once elected to the Diet, other constitutional constraints apply to members of the Diet.

In other words, Article 43 of the Constitution of Japan stipulates that members of the Diet are “representatives of all the people⁹⁾”. Under the Constitution, the significance of the “representation of all the people” is interpreted as guaranteeing the free political activities of members of the Diet without being bound by the electoral body, while applying the principle of free representatives. It should be noted that once elected, such members are never representatives of their “political party”, but rather “representatives of all the people”. In addition, constitutionally, it is not the “party” but the “members of the Diet” that voters choose in elections. Certainly, voters may vote for a political party in a proportional representation election, but that is just a matter of the political party “intermediating” the selection of members of the Diet. If this is the case, members chosen by the electorate are “representatives of all the people”, and thus replacing members based solely on a single party’s policy is seemingly a constitutional violation. In the first place, there is a constitutional problem with a political party’s policy that forces members of the Diet to resign. Similarly, there is a constitutional concern with a system that intentionally has higher-ranked candidates on the party list resign for their replacement with lower-ranked candidates, which ignores the popular will as indicated by the non-binding list-style voting system. An argument can thus be made that this violates the principle of direct elections (Article 43 of the Constitution of Japan¹⁰⁾).

Furthermore, the implications for the House of Councilors as a whole should be considered. If such a system as the Reiwa rotation were approved and generalized to other political parties, what would the repercussions be? The composition of the following

8) According to the law, in the event of a vacancy, the next candidate on the list submitted at the time of election will be elected. The Japan New Party won four seats in the 1992 House of Councilors election. Subsequently, the first- and second-place candidates resigned, such that the fifth- and sixth-place candidates would have been elected. However, the Japan New Party expelled the fifth-place candidate, and then the sixth- and seventh-place candidates were elected. The fifth-place candidate was dissatisfied with the decision and filed a lawsuit. In 1995, Japan’s Supreme Court dismissed the claim, ruling that “the internal autonomy of political associations such as political parties should be respected as much as possible”. However, it should be noted that the issue in this case was that of a candidate’s election, not the qualifications of an already-elected member of the Diet.

9) Both Houses shall consist of elected members, representative of all the people (Article 43 of the Constitution of Japan).

10) Article 43 of the Constitution of Japan does not explicitly state the principle of direct election. However, constitutional interpretation generally recognizes such a principle.

year’s House of Councilors would likely be completely different from the current House of Councilors. If the composition of the House of Councilors changes yearly, the constitutional term of office will be drained of significance, because the constitutional term of office stipulates not only the “tenure period of members of the Diet” but also the “existence period of the House”. Substantial changes in the House from year to year are by no means provided for by the Constitution. However, as long as the operation of the Reiwa rotation remains a de facto one, it might be difficult to assess whether it is unconstitutional or illegal. That said, even if it is not formally illegal and there are no grounds for litigation, as long as members of the House of Councilors have a duty to respect and protect the Constitution (Article 99 of the Constitution of Japan¹¹⁾), they are required to operate in accordance with the spirit of the Constitution.

3. Reiwa Rotation and the House of Councilors

Finally, I would like to highlight a more fundamental problem. Until now, there has been pointed criticism that the Reiwa rotation is inappropriate for the House of Councilors as a “chamber of wisdom”, which is constitutionally tasked with reflecting the long-term public opinion. On this point, YAMAMOTO failed to recognize this as a constitutional issue, rather viewing the purpose of the House of Councilors as reflecting the diverse opinions of the people. By introducing such a rotation system, he said, “We aim to have a diverse and varied membership that can respond to the mandate of the people” (January 16, 2023). They seem to be arguing on different planes and will never get anywhere. Because, ultimately, the practical validity of the Reiwa rotation system should be questioned in terms of the compatibility of its purpose under the Constitution. However, the constitutional status of the House of Councilors remains unclarified in Japan.

Certainly, under the current Constitution, a bicameral system is adopted, where the House of Councilors serves a six-year term and is not dissolved. In addition, the House of Councilors, which seeks to embody the politics of “reason”, has been called the “chamber of wisdom” as a restraint on the House of Representatives which is dominated by the strength in numbers. Even elementary school students are aware of this fact. However, no one really knows what the concepts of “long-term public opinion” and “chamber of wisdom” mean. Constitutionally, the role of the House of Councilors is not clear at all. Nevertheless, have

11) 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 (Article 99 of the Constitution of Japan).

efforts ever been made to define the concept?

In this context, for example, through the introduction of a system of specific quotas and discussions on the abolition of joint districts, it is often seen that the House of Councilors is self-evidently regarded as a “representative of the region”. It is unclear how seriously they have considered the accuracy of this portrayal. These examples demonstrate that the Japanese people have neglected the essential issue of what the constitutional status of the House of Councilors is. In particular, in the context of the current state of social confusion over the Reiwa rotation, it seems the time to address this has finally arrived. Thus, to develop a head-on debate on this issue from the constitutional perspective of the House of Councilors, we must begin by clarifying the “mystery” of what the House of Councilors should be.

4. Constitutional Status of the House of Councilors

(a) Guardian of the Constitution

The adoption of a bicameral system introduced by the framers of the Constitution of Japan aimed to restrain and balance political powers, even if derived from temporary popular fervor, to prevent tyranny and arbitrary rule. The current Constitution was designed based on the principle of checks and balances to limit the exercise of such power. Its purpose is to ensure the protection of fundamental human rights and the Constitution itself from abuses of government¹²⁾ power. Here, some may wonder whether this should be the role of the judicial branch and not of the House of Councilors. Indeed, this is correct from the perspective of the separation of powers. However, while the judicial branch is primarily expected to play this role through constitutional review, the actual judicial review in Japan is limited to incidental constitutional review, which is tightly constrained by the requirements of legal disputes involving subjective rights violations. This branch is not designed to ensure the “objective” constitutional order. Moreover, even when a case is brought before the judicial branch, in Japan this branch adheres to the doctrine of judicial passivity and traditionally has been reluctant to interfere with the political branch. Given these circumstances, it is questionable to rely solely on the judicial branch to protect the Constitution. Evidently, this does not mean that the institutional framework protecting the Constitution through judicial review should be rejected, but that relying on it exclusively is

12) In this article, “government” means a public body that runs the country and has responsibility for developing and implementing policy and for drafting laws. It is also known as “the Executive”.

insufficient¹³⁾.

From a global perspective, it is not only judicial review that plays the role of protecting the Constitution. In fact, another trend has been observed in the world. A typical example is the United Kingdom, where the House of Lords safeguards the Constitution through a special legislative process. Similar cases can be observed in Nordic countries and Israel. Interestingly, the House, guided based on specialized knowledge, supervises and controls government legislation in these countries. Regardless of legal disputes, the House, backed by expertise, protects the objective constitutional order and human rights from abuses of government power. These foreign systems are worth considering for reference, as there is room for similar models in Japan. Indeed, the Constitution of Japan does not directly refer to the institutional framework or the entity that guarantees the “objective” constitutional order. However, its silence on the matter does not negate the need for the establishment of an institutional framework to protect the “objective” constitutional order. Rather, the current framework, which relies solely on judicial review, should be regarded as an institutional flaw, and a supplementary system could be created even under the current Constitution. In other words, in Japan, the government and the House of Representatives generally lead political processes, and the House of Councilors is positioned as a separate entity from them under the current Constitution. Therefore, the House of Councilors, which was expected to play a role as the “chamber of wisdom”, is the only entity that can ensure the maintenance of an “objective” constitutional order.

(b) Constitutional Analysis

In this regard, we consider whether the Constitution allows for such a system design. When examining the constitutional provisions regarding the bicameral system in Japan, we can find confirmation of the House of Representatives’ precedence over the House of Councilors. This superiority of the House of Representatives is the most significant feature of the bicameral system in Japan. Under such conditions, is the House of Councilors’ power to regulate the government constitutionally acceptable? Indeed, under the Constitution, when the decisions of two Houses diverge, the will of the House of Representatives takes precedence over the will of the House of Councilors in matters such as budget decision¹⁴⁾,

13) There are strong opinions advocating in favor of the establishment of a continental-style constitutional court to address this issue. However, as this would require a constitutional amendment, it is necessary to first consider feasible options under the current Constitution.

14) (1) The budget must first be submitted to the House of Representatives.

(2) Upon consideration of the budget, when the House of Councilors makes a decision different from that of the House of Representatives, and when no agreement can be reached even

treaty approval¹⁵⁾, the designation of the Prime Minister¹⁶⁾, and the passage of bills¹⁷⁾. However, we should take a closer look at these articles. That is, when the decisions of two Houses diverge, the decision of the House of Representatives shall be considered as the decision of the Diet in matters relating to budget decisions, treaty approvals, and Prime Minister designations (Articles 60 (2), 61, and 67 (2)). On the other hand, with regard to bills, the Constitution specifically does not allow for a second resolution unless a special majority of “two-thirds or more of the members present” of the House of Representatives is obtained, rather than a simple majority (Article 59 (2)). In general, it is extremely difficult to secure a majority of two-thirds or more in the House of Representatives. Furthermore, in the process of amending the Constitution, the Constitution requires a “two-thirds or more affirmative vote of the total membership of each House” for the submission of proposals for constitutional amendments (Article 96 (1)¹⁸⁾) and provides for a fully equal bicameral system. It should be noted that the Constitution adopts such a system design. In other words, given these constitutional provisions, it is also possible to interpret that

through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councilors to take final action within thirty (30) days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet (Article 60 of the Constitution of Japan).

- 15) The second paragraph of the preceding article applies also to the Diet approval required for the conclusion of treaties (*Id.*, Article 61).
- 16) (1) The Prime Minister shall be designated from among the members of the Diet by a resolution of the Diet. This designation shall precede all other business.
 (2) If the House of Representatives and the House of Councilors disagree and if no agreement can be reached even through a joint committee of both Houses, provided for by law, or the House of Councilors fails to make designation within ten (10) days, exclusive of the period of recess, after the House of Representatives has made designation, the decision of the House of Representatives shall be the decision of the Diet (*Id.*, Article 67).
- 17) (1) A bill becomes a law on passage by both Houses, except as otherwise provided by the Constitution.
 (2) A bill which is passed by the House of Representatives, and upon which the House of Councilors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two-thirds or more of the members present.
 (3) The provision of the preceding paragraph does not preclude the House of Representatives from calling for the meeting of a joint committee of both Houses, provided for by law.
 (4) Failure by the House of Councilors to take final action within sixty (60) days after receipt of a bill passed by the House of Representatives, time in recess excepted, may be determined by the House of Representatives to constitute a rejection of the said bill by the House of Councilors (*Id.*, Article 59).
- 18) (1) Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify (*Id.*, Article 96).

the Constitution provides a certain active role for the House of Councilors in ensuring the rationality of norms establishment in Japan's legal system. This is clearly distinct from the function of the House of Representatives. Under the parliamentary cabinet system, the House of Representatives is constitutionally responsible for creating and maintaining the government, while the House of Councilors is responsible for monitoring them and restraining abuses of government power. It can be thus said the function of protecting the Constitution.

(c) Political Analysis

Politically, the role of the opposition party is important in the context of controlling the government. Given that the current Constitution assumes unity between the government and the House of Representatives, in practice, the checks and balances between the government and the Diet are usually ensured between the ruling and opposition parties. If that is true, then does the House of Councilors need to play the role of controlling the government within such a political structure? While it cannot be denied that the opposition's role as critic is important in the context of controlling the government, in the House of Representatives, where the ruling party with strict party discipline holds a majority, it is unlikely that the opposition party would be able to effectively exert any control. In other words, government's policies will not be halted in the House of Representatives as long as they have been approved through the prior examination of the ruling party. Currently, both formally and practically, the government and the House of Representatives (the majority) are fully integrated. In this case, how should the Diet, which maintains checks and balances against the government, be defined? If we consider the government and the House of Representatives (the majority) as a unified entity, we have no choice but to find another actor that is detached from this structure. Constitutionally, if any actor could supervise and control the government supported by the House of Representatives (the majority), it would be none other than the House of Councilors.

5. Conclusion

The role of the Senate in a bicameral system is usually determined based on the political and social background of each country, in correlation with House of Representatives. Japan is no exception. Certainly, several approaches are thus available for consideration in Japan. However, the approach opted for must overcome the negative views associated with the Senate, which is along the lines of, “If the Senate agrees with the House, it is useless, and

if it opposes the House, it is harmful". A House of Councilors that merely parrots the same deliberations as the House of Representatives or one that inserts itself in the midst of political turmoil only to slow national affairs down is not worth existing. In the future, the proposal in this article may be a possible approach for restructuring the House of Councilors as an entity that is neither "useless" nor "harmful". As mentioned above, the proposal in this article aims to reconceive of the House of Councilors as a "guardian of the Constitution" that can objectively and rationally monitor and regulate government legislation (including delegated legislation) based on constitutional norms, in order to prevent the government from deviating from constitutional discipline. In other words, the House of Councilors would be restructured as a "watchdog" over the government, relying on constitutional norms to fulfill its oversight and control functions. When the government, due to its own political ambitions, attempts to forcibly implement significant policies for which there is no social consensus, or when it unreasonably restricts constitutional (human) rights of minorities while relying on the majority's popular will, the House of Councilors, as an entity distinct from the government, would be responsible for regulating such actions. Therefore, recognizing the House of Councilors as the guardian of the Constitution would likely be an effective approach for Japan¹⁹⁾.

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19) See TANAKA Yoshitaka, *House of the Councilors to Protect the Constitution* (Horitsu Bunka Sha, 2021).