

## The Political Participation and the Constitution in Japan

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### Introduction

Japan had established the first modern legislature, the Imperial Diet, in 1890 under the first modern Constitution of Japan, the Meiji Constitution of 1889. The Meiji Constitution was built upon the assumption that the Emperor was sovereign and had all the government powers. The Imperial Diet, consisting of the House of Representatives and the House of Peers, was supposed to assist the Emperor for his exercise of legislative power. It is only the members of the House of Representatives that must be elected by the public. The voting right was granted only to a limited number of male adults with a sufficient wealth and there were strict restrictions on political participation. It was hard to say that the democratic government was established under the Meiji Constitution.

The current constitution, the Constitution of Japan, enacted in 1946 after the defeat in the Pacific War, fundamentally changed the political system. The sovereign power is granted to the people and the Emperor is now a symbol of the nation and the people without any political power. The Diet, the legislature, consists of the House of Representatives and the House of Councillors. However, all the members of the Diet must be elected by the people; they are representatives of all the people. The voting right is granted to all Japanese citizens regardless of sex, wealth or education. The Constitution guarantees the political freedoms as fundamental human rights. The modern representative democracy is thus established.

Yet, Japanese Constitution allowed the citizens only to choose their representatives. As a result, there is no room for the public to participate in the legislative process directly. The government has also established the unique electoral system, which has allowed many small parties to be represented in the Diet. As a result, the political parties in Japan are fragmented. Moreover, the electoral system was not designed to facilitate voters to cast a vote. Furthermore, there still remain a gross mal-apportionment between rural over-represented districts and urban under-represented districts, which has given stronger political powers to rural voters. Finally,

there is a very strict limitation on political participation. The public is not allowed actively to participate in election and there is consequently strong apathy toward politics. Therefore, it is difficult to claim that Japan has established truly participatory democracy.

In this paper, I will outline these features of Japanese political participation to show some unique characteristics of Japanese constitutional politics.

## 1 The Electoral System

The Japanese Constitution is premised upon the popular sovereignty principle. The opening sentence of its Preamble declares that “[w]e, the Japanese people, acting through our duly elected representatives in the National Diet, ... do proclaim that sovereign power resides with the people and do firmly establish this Constitution.” It continues: “[g]overnment is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith.” Furthermore, in article 1, providing on the status of the Emperor, the Constitution makes clear 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.”

In accordance with this popular sovereignty principle,<sup>1</sup> the Japanese Constitution guarantees people’s voting rights. The Constitution stipulates that the people have “the inalienable right to choose their public officials and to dismiss them” (article 15, section 1) and that “[u]niversal adult suffrage is guaranteed with regard to the election of public officials” (article 15, section 3).

Although the Constitution protects citizens’ inalienable right to choose “public officials,” it merely guarantees that both Houses of the Diet “shall consist of elected members, representative of all the people” (article 43). Therefore, the people only have a right to choose their representatives to the Diet at the national level.

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<sup>1</sup> For different understandings of the popular sovereignty principle, see Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (Oxford: Hart Publishing 2010), pp 38-41.

According to the Constitution, the Diet shall consist of two Houses; namely the House of Representatives and the House of Councillors (article 42). Both Houses shall consist of elected members, representative of all the people (article 43, section 1). The number of the members of each House shall be fixed by law (article 43, section 2). The Japanese Constitution leaves the design of the election system to the discretion of the Diet; it simply provides that “[t]he qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income” (article 44) and that “[e]lectoral districts, method of voting and other matters pertaining to the method of election of members of both Houses shall be fixed by law” (article 47).

The Constitution apparently gives stronger power to the House of Representatives: the House of Representatives could override the decision of the House of Councillors by two-thirds majority (article 59, section 2), and it could approve treaties and budgets even when the House of Councillors disapproves them (article 60, section 2, article 61). The term of office for members of the House of Representatives is shorter than for members of the House of Councillors (articles 45 and 46). Furthermore, there is a possibility of dissolution of the House of Representatives (article 69). Clearly, the Constitution anticipates that the House of Representatives should be comprised of representatives much closer to the people.

The election of the members of both Houses is a combination of election in election districts and of proportional representation but there are some critical differences.

The number of the House of Representatives is set at 480: 300 members are elected from single-member election districts and the remaining 180 members are elected through proportional representation (Public Office Election Act, article 4, section 1) from 11 blocks all around Japan. The voter votes on two ballots: one for a candidate in the election district and another for a political party in proportional representation (Public Office Election Act, article 36). The candidate who receives the highest votes in the district will be elected as a representative (Public Office Election Act, article 95). The vote for a political party is calculated in each of the 11 blocks and each political party will receive a corresponding number of seats. Candidates on the list published by a political party will obtain House seats according to their priority on the list (Public Office Election Act, article 95-2). A candidate officially endorsed by the political party can

run for both the election in his or her district and proportional representation. As a result, even if a candidate is defeated in the election district, he or she can still obtain a seat based on proportional representation.

The number of the House of Councillors is set at 242: 146 members are elected in election districts and the remaining 96 members are elected by proportional representation at the national level (Public Office Election Act, article 4, section 2). Unlike the members of the House of Representatives, election districts for members of the House of Councillors are demarked by 47 prefectures. Since the term of office for the members of the House of Councillors is six years, and one-half of its members are chosen every three years, each prefecture has an even number of Councillors: two to 10 members. Therefore, in any given election, one to five members are elected in each prefectural constituency. Yet, regardless of the numbers of members to be elected in a single district, the voter has only one vote. The Councillors will be elected based on the number of votes each candidate receives in the district (Public Office Election Act, article 95). Each political party submits the list of its candidates for proportional representation. Each voter then casts an additional ballot for a party or a particular candidate listed in the proportional representation system. Votes are calculated all around Japan. Political parties will receive seats according to their votes and votes for listed candidates, and the candidate who has the highest number of votes will obtain his or her seat first (Public Office Election Act, article 95-3).<sup>2</sup>

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<sup>2</sup> Since a vote for a listed candidate is automatically calculated as a vote for the political party that endorsed that candidate, thus allowing that party to give seats to other candidates, this system was attacked as an infringement of the right to vote. Yet, the Supreme Court rejected the attack: Supreme Court, grand bench, 14 January 2004, 58 *Minshu* p 1.

## 2 No Direct Participation

The Japanese Constitution is apparently premised upon the representative democracy. It gives voting rights to citizens but does not provide for direct participation in the legislative process. The people have the power to approve any constitutional amendment (article 96), to approve local legislation, which will only be effective within the district (article 95), and to dismiss the Supreme Court Justices (article 79).

Yet, there has been no referendum on constitutional amendment because it requires the approval by two-thirds majority in both the Houses for referendum and no party was able to have two-thirds majority in both Houses to propose constitutional amendment. The local referendum for statute specifically applied to specific local government was conducted a dozen times before 1960, but the government came to be reluctant to resort to this procedure to enact statute. The government thus tended to enact generally applicable statute and apply to a specific locality, thus avoiding the local referendum. The popular review of the Supreme Court Justices has been introduced but it has never achieved the expected effect. No Supreme Court Justice ever has been dismissed and the public does not have strong interest in the judiciary.

Does this mean that the Constitution has limited direct participation of the people to these situations alone? Or, alternatively, is the Diet allowed to enact a statute such as the Referendum Act to allow citizens to directly participate in the legislative process or any other governmental decision making process? The answer to this question may be different depending upon varied understandings of the popular sovereignty principle. Yet, it is believed that the people no longer have any sovereign power after the enactment of the Constitution, that the only powers they have are those granted by the Constitution, and that representative democracy is meant to limit direct participation to situations listed in the Constitution. It would thus be unconstitutional to allow citizens to directly participate in the government decision-making process, even if it is made possible by legislation. As a result, there has been no legislation enacted to this day that allows citizens to directly participate in legislative process. Thus far, no referendum was conducted at the national level.

On the other hand, the local residents are granted broader right of participation. The Constitution guarantees the right to elect the heads of the local government as well as members

of the local assembly to local residents (article 93, section 2). Moreover, according to the Local Government Act, the local residents can collect certain number of signatures from local voters to call for enactment of local ordinance (article 74, section 1), dismissal of the head of the local government (article 81), and dissolution of the local assembly (article 76). These measures are often used to resolve the long-standing disputes in the local community. Furthermore, some local government conducts non-binding referendum on some locally important issues, such as acceptance of industrial waste disposal facility or nuclear power plant. Therefore, the local residents sometimes could directly show their opinion through referendum.

Yet, the fact remains that the public does not have such an opportunity with respect to national politics.

### **3 Political Instability**

The electoral system first introduced under the current Constitution was a unique one, in which three to five members of the House of Representatives were allocated to each district and voter was given only one vote. Although the conservative Liberal Democratic Party (LDP) had occupied the government since its creation in 1955, this electoral system brought significant chance for members of smaller political parties to be elected. As a result, the opposition parties are fragmented and there used to exist no political party that had a realistic chance of taking over the government from the LDP.

Moreover, since a multiple number of candidates must compete with each other in a district even among the candidates of the same party, each candidate had tendency to emphasize personal connection with the national government or pork barrel he or she had brought to the district or he or she can bring to the district. The election was not fought over the party platform.

The electoral system reform, or so-called “political reform,” had been thus the focus of debate for a while. The LDP wanted to change the electoral system for the members of the House of Representatives to election in single member districts. Yet, the opposition parties strongly opposed because it was more likely that the LDP would dominate the House under the election in single member districts. After the coalition government of previous opposition parties

successfully took over the government for the first time in 1993, the Diet, led by this new coalition government, managed to pass a political reform bill to introduce the current electoral system in 1994. Basically, the system remained the same since then.

There has been a controversy in Japan over what electoral system is best suited to the constitutional scheme. Some argue that the members should be elected in single-member districts, since the Constitution guarantees the right to dismiss the public officials in article 15. Others argue, however, that the single-member district election is unconstitutional. The single-member district election system would allow one party to dominate the Diet, thus preventing the split among voters from being reflected in the Diet; a violation of the mandate that all the members of the Diet must be representatives of all. They rather prefer the proportional representation. Some argue that the electoral system should be further reformed so as to create two big parties to provide the realistic choice for the voters to choose, while others argue that the two big parties are simply insufficient to reflect the various opinions of the voters and that the electoral system should be reformed to make it more easier for minority parties to obtain seats in the House.

The Supreme Court, however, held that the Constitution does not mandate the Diet to choose any particular election system and that the choice of election system is at the discretion of the Diet.<sup>3</sup> The Supreme Court therefore upheld the constitutionality of the 1994 reform and held that the Diet is free to adopt the single-member districts system, the proportional representation system, or a combination of the two.

The current system was introduced as a compromise. Therefore, it looks like there is no compelling argument that the current system is the best one. Although the current system introduced single-member district for the members of the House of Representatives, it also introduced proportional representation, thus allowing the minority parties to have seats in the House. Moreover, the election for the members of the House of Councillors is still a combination of proportional representation and election districts, which allow voters in significant number of districts to choose multiple numbers of representatives by giving only one vote for each voter. As a result, it is difficult to have stable majority in both Houses. After the coalition government created in 1993 collapsed in 1994, giving another chance for the LDP to come back to power, the

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<sup>3</sup> Supreme Court, grand bench, 10 November 1999, 53 *Minshu* p 1704.

LDP maintained the power mostly under the coalition government with other conservative parties. Especially, after 2003, the LDP created the coalition government with the Komei Party, supported by the Souka Gakkai, the largest religious organization in Japan.

It took almost 15 years before the opposition party, the Democratic Party of Japan (DPJ), to take over the government in 2009. Yet, the DPJ decided to form a coalition government together with Social Democratic Party (SDP) and NPN (New Party of Nippon) (later the SDP left the coalition in 2010), because it does not have a majority seats in the House of Councillors. The DPJ thus needed help from the SDP and NPN. With the departure of the SDP, the coalition government between the DPJ and NPN does not have a majority in the House of Councillors. As a result, it is expected that the DPJ government will have a hard time in passing necessary legislation.

These episodes will vividly show the difficulty of maintaining the stable majority in both Houses. Moreover, although the LDP had held the government during most of the post-war period, the LDP is a political party with so many factions, led by different leaders with different ideologies. Some of them are very conservative but others are more moderate and could be said as liberal. Some are in favor of the minimal state, preferring the deregulation and market economy but others are in favor of strong protection of farmers, fishery workers, or small business. It is often said that the LDP is a political party for anyone who want to remain in the government. We will be able to find the similar kind of division of opinions even inside the DPJ. The current election system thus failed to produce the political parties with coherent and uniform political ideologies.

#### **4 The Deprivation of Voting Right and the Difficulty of Voting**

The Constitution explicitly guarantees the right to vote to all adult citizens. Therefore, essentially, all adult citizens are granted the right to vote by the Public Office Election Act. The age of majority in Japan is 20. There has been a discussion whether to change this majority age to 18,



thus enabling the 18 years old and 19 years old to participate in the politics. Yet, there is still no consensus.<sup>4</sup>

There has been a controversy over whether the resident Koreans should be granted the right to vote. Before and during the Pacific War, Japan controlled Korea and Taiwan and treated all the people of Korea and Taiwan as the Japanese subjects. They were deprived of their original nationality and were forced to carry the Japanese nationality. Some were even granted the right to vote. Many Koreans were forced to come to Japan as labourers or decide to come to Japan to seek better living. At the time of the end of the Pacific War, there were over 2 million such resident Koreans. Yet, after the defeat in the Pacific War, Japan lost the authority over Korea and Taiwan. Japan thus started treating them as non-citizens. Since the Japanese Nationality Act vests the Japanese nationality to a child born from the Japanese parents, their children have been denied the Japanese nationality. There still remain some 400,000 such resident Koreans in Japan. Most of them are now treated as holders of special permanent resident status. Some thus argue that such resident Koreans should be granted the right to vote under the Constitution. Some argue that the Diet should be allowed to grant the right to vote to such resident Koreans by statute even if the right to vote is not constitutionally guaranteed. Some make a distinction between the national election and local election and argue that at least with respect to local election, such resident Koreans should be granted the right to vote either under the Constitution or by the statute.

Yet, the Supreme Court held that the Constitution vests the right to vote only to Japanese citizens under the popular sovereignty principle in the national election.<sup>5</sup> The Supreme Court also denied the constitutional right to vote for such resident Koreans even for local election, although it implied that the Diet might be allowed to grant the right to vote by a statute to such resident Koreans.<sup>6</sup>

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<sup>4</sup> The Popular Referendum Act (Act Concerning the Procedure for Amendment to the Japanese Constitution) enacted in 2007 gave the right to participate in the referendum on constitutional amendment to every citizen over the age of 18 on the condition that the Public Office Election Act was amended to give voting rights to 18-year-olds. This prompted the reconsideration of the age of majority in Japan. The Legal Council of the Ministry of Justice recommended the change of the majority age from 20 to 18 in October 2009: [www.moj.go.jp/SHINGI2/091028-2-1.html](http://www.moj.go.jp/SHINGI2/091028-2-1.html).

<sup>5</sup> Supreme Court, 2<sup>nd</sup> petty bench, 26 February 1993, 1452 *Hanreijihou* p 37.

<sup>6</sup> Supreme Court, 2<sup>nd</sup> petty bench, 28 February 1995, 49 *Minshu* p 639.

However, even among Japanese citizens, there are some people who are deprived of their right to vote. Those voters who have committed crimes and are imprisoned, for instance, are thus denied the right to vote (article 11, section 1). Those voters who have committed election law violations are also disenfranchised (article 252). The Supreme Court has upheld this disenfranchisement as a proper penalty for election law violation.<sup>7</sup> The voting right is generally viewed as having a dual nature: it is an individual right and a performance of official duty. The people are thus not only exercising their rights when they vote<sup>8</sup> but are also fulfilling their official duty as electors under the Public Office Election Act. As a result of this dual nature, restrictions on voting rights have been tolerated so long as they are reasonable to secure the performance of official duty.

Moreover, even though voters have the right to vote, some may have difficulties going to the polling station on the voting day. Persons with severe physical handicaps are among them. There once was a system that allowed these voters to vote at home, but the system was abolished after various abuses were discovered. As a result, many physically handicapped voters could not cast their votes because of difficulties visiting the polling station. The Supreme Court rejected a constitutional challenge against the repeal of the voting-at-home system in the *Voting at Home Case*.<sup>9</sup> In that case, a voter who could not vote in elections due to physical disability sought a damage award from the government. He argued that the Diet unconstitutionally infringed his right to vote when it abolished the voting-at-home system and failed to reinstate it. In rejecting his claims, the Supreme Court asserted that it could only order the government to pay damages when the Diet unequivocally violated the provisions of the Constitution, and such was not the case when the Diet abolished the voting-at-home system and failed to reintroduce it.<sup>10</sup>

On the other hand, Japanese citizens living abroad who had no address in Japan were deprived of any opportunity to participate in elections before 1998. Even after an amendment to

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<sup>7</sup> Supreme Court, 3rd petty bench, 27 April 1954, 8 *Keishu* p 568; Supreme Court, grand bench, 9 February 1955, 9 *Keishu* p 217.

<sup>8</sup> The people have a right not to participate in elections. Therefore, unlike in Australia, there is no penalty for failure to vote in Japan.

<sup>9</sup> Supreme Court, 1st petty bench, 21 November 1985, 39 *Minshu* p 1512.

<sup>10</sup> The government later decided to allow severely physically handicapped voters to cast their votes by mail: Public Office Election Act, art 49, s 2.

the Public Office Election Act in 1998, overseas voters were allowed to participate only in proportional representation elections; they were still shut out of elections in election districts. In a suit filed by overseas voters, the *Overseas Voters Case*,<sup>11</sup> the Supreme Court held that the Diet had an obligation to provide opportunities to these overseas voters so that they could participate in elections, unless there were exceptional circumstances that could justify deprivation necessary to accomplish compelling interests. In this case, the Supreme Court found no compelling interests to justify the failure to provide the opportunity to overseas voters before the amendment. It also held that the failure to allow overseas voters to participate in elections in election districts after the amendment infringed their right to vote. The Supreme Court therefore affirmed the overseas citizens' status as voters and their eligibility to vote. It also held that the government should be liable when there was a clear and serious infringement of their constitutional rights. Applying this standard, the Court concluded that the failure to provide an opportunity to vote to overseas voters was a clear and serious infringement of their constitutional rights and ordered the government to pay damage awards to the overseas voters.

This decision is remarkable, for it stands for the requirement that the government must grant voting rights to all adult citizens unless there are compelling reasons for refusing to do so. The government finally amended the Public Office Election Act in 2006 to allow overseas voters to participate in elections in election districts (articles 30-2 to 30-16, 49-2). This decision might cast doubt on the constitutionality of deprivation of right to vote from other citizens.

Yet, the current electoral system is not still designed to facilitate the voter participation. Basically, the voter must go to the polling station on the voting day (Public Office Election Act, article 44) and write down the name of the candidate to choose on the ballot (article 46). It is not a multiple-choice ballot. Those voters who are physically handicapped and cannot write the name or who are illiterate can ask the supervising officer to cast a vote for them (article 48). Those voters that have a conflicting schedule can cast a vote in advance (article 48-2) or cast an absentee ballot (article 49, section 1). Those voters who have serious physical handicap can cast a vote through mail (article 49, section 2). Overseas voters can vote at the Embassy or by mail (article 49-2). The fact remains that for those vast numbers of voters who do not have conflicting schedule they must go to the polling station on the voting day.

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<sup>11</sup> Supreme Court, grand bench, 14 September 2005, 59 *Minshu* p 2087.

## 5 Gross Mal-apportionment

When the number of representatives to be chosen in one election district was initially distributed, the apportionment was based upon the population of each district. Reapportionment after every census in five years was anticipated in the appendix. Then, the reapportionment was to be taken place every ten years after the census.

Yet, during 1960s, the rapid economic expansion brought large-scale influx of rural farmers to urban centers as company workers. As a result, the number of population drastically declined in the rural areas, while the population swelled in the urban areas. Yet, the Diet was quite slow to respond to this rapid change of demography. The slow response was largely due to the reluctance of the ruling conservative LDP, because they used to have very strong support in the rural districts. They simply did not want to give additional seats to urban workers who are more willing to vote for opposition JSP.

Frustrated with the slow response, some of the voters came to file suit challenging the apportionment scheme. They argued that the gross disparity in apportionment was an infringement of equality right guaranteed in article 14 and the right to vote guaranteed in article 15. Leading constitutional academics supported their arguments and argued that the maximum disparity should be set at 1-to-2. The basic assumption of this argument was as follows: the Constitution prohibits the discriminatory voting system, banning the grant of two votes to some voters and one vote to other voters. If the disparity among the election district exceeds 1-to-2, that means that voters in the over-represented district has two time more effective voice in the election compared with voters in the under-represented districts, thus violating the ban on discriminatory voting system. Then, these voters sought invalidation of the election result conducted according to unconstitutional apportionment provision under the Public Office Election Act.

The initial response of the Supreme Court was not promising. Yet, in 1976, the Supreme Court came to admit that there are limitations on the discretion of the Diet to apportion the members under article 14, 15, and 43. The population is an important consideration for apportionment, but it is not the only permissible one. The Diet can consider other factors, such as the compactness of the district or city or town boundary line. The Court thought, however, if

the disparity reached to the level of unreasonableness in light of all the factors to be considered, the Diet then had a constitutional obligation to revise the apportionment provision within a reasonable period. In this case, the maximum disparity at issue was 1-to-4.99 in the 1972 general election and the Court concluded that this disparity could not be said as reasonable. Having thought that the Diet failed to revise the provision during a reasonable period of time, the Court concluded that this provision was unconstitutional.

Yet, the Court refused to invalidate the election result conducted under this unconstitutional provision. The Court believed that the apportionment should be viewed as inter-connected. Thus it held that the provision was unconstitutional not only in the under-represented district but also in all districts. The invalidation of the election result in all districts, the Court feared, might disqualify all the members of the House of Representatives, casting doubt on the validity of all legislations passed by them, and preventing them to revise the apportionment provision to conform to the Constitution. The Court apparently believed that the invalidation would be unwise. As a result, the Court dismissed the voters' claim, while declaring in its judgment that the underlying apportionment provision was unconstitutional.

Although the Court did not make clear the limits of disparity, judging from its past decisions,<sup>12</sup> it looks like the Supreme Court is willing to uphold the maximum disparity up to 1-to-3 as reasonable. This means that the rural voters could have three times more powerful effect upon the election result compared with urban voters.

## 6 Strict Limitations on Political Participation

Finally, there is a strict limitation on political participation. Many of these limitations were introduced under the Meiji government. Even after the Meiji government decided to introduce universal adult suffrage in 1925, it wanted to limit the public participation to a minimum.

Many such restrictions are maintained even after the end of the Pacific War. The Public Office Election Act strictly limits the period of election campaign to a short period of time starting from

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<sup>12</sup> The Supreme Court later held that the maximum disparity of 1-to-4.40 was also unconstitutional. Supreme Court, grand bench, 17 July 1985, 39 *Minshu*, p 1100. Yet, once again, the Supreme Court refused to invalidate the election result obtained under the unconstitutional apportionment provision.

the announcement of the election and official candidacy and the day before the voting day (article 129). It thus prohibits any election campaign before this period.

During the campaigning period, there are many restrictions on the campaigning method. No minors are allowed to engage in election campaigning (article 137-2). Those not eligible to vote are also precluded from the election campaigning (article 137-3). The door-to-door canvassing is totally prohibited (article 138, section 1) as well as door-to-door notification of assemblies and talks (article 138, section 2). The candidate can put up certain number of election posters on the bulletin boards prepared by the local election commission. No other posters or documents can be distributed (article 142). Documents related to election cannot be displayed except for those specified (article 143). The candidates could have personal assemblies using public facilities (article 161) and private houses (article 161-2). The public election speech is prohibited unless exempted (article 164-5). The only available election campaigning method is to repeat the names of the candidate by support car equipped with sound amplifier, waving hands to voters by wearing the white globes. As a result, it is difficult for ordinary public to participate in election in support of a particular candidate.

The candidate can publish advertisement for limited times on newspaper during the election campaign (article 149). The NHK, the national public broadcasting corporation, will broadcast personal history of each candidate (article 151) and the political party whose candidates are running for election in the district as well candidates for the proportional representation of the House of Representatives and candidates for the House of Councillors can also broadcast the political view of the party or candidates (article 150). Otherwise, no one is allowed to broadcast for election campaign (article 151-5). It is doubtful whether the voters can obtain sufficient information regarding the candidates and political stance of the political party through such a limited information.

Moreover, it is doubtful whether such a sweeping ban on election campaigning can be sustained under the Constitution, which guarantees freedom of expression to everyone (article 21). The Supreme Court has sustained the constitutionality of ban on election campaigning

before the election period,<sup>13</sup> door-to-door canvassing,<sup>14</sup> and distribution of documents.<sup>15</sup> Yet, there are strong criticisms against the Court.

The Supreme Court believed that the total ban on door-to-door canvassing was necessary to prevent the election fixing, to secure the fairness in voting, to secure the equality among candidates, and to protect the privacy of the residents. It is without doubt that door-to-door canvassing may be used to buy votes. Yet, the government could prohibit the fixing of election (it does prohibit it in the Public Office Election Act, article 221) and there is no need to prohibit the door-to-door canvassing altogether. The door-to-door canvassing is a most convenient way for supporters to solicit votes. It is inexpensive way of political participation. It is absurd to curtail it for the sake of equality. Surely, the door-to-door canvassing would be the most effective election method for political parties that have many supporters, such as Japan Community Party (JCP) or Komei Party. On the other hand, since the LDP do not have many volunteers to support them, they will have to hire workers to cope with other parties, thus necessitating expensive campaign cost. But that could hardly be a legitimate justification to curtail the election method that could be used free by volunteers. Some of the residents would surely be unwilling to see the visitors. Yet, they could simply put “no solicitor, please” sign. Moreover, there may exist some residents who do not oppose to such visit and there is no necessity for a total ban.

The same could be said as to the almost total ban on distribution of documents. The Supreme Court believed that such a ban is necessary because the unregulated distribution of documents might bring undue competition, thus eroding the fairness of the election. Yet, aside from the false and defamatory documents, there is no compelling reason why the distribution of documents should be restricted and distribution of false and defamatory materials is already subject to criminal punishment (Criminal Code, article 230) as well as civil liability (Civil Code, article 709).

Moreover, this ban on distribution of documents has been interpreted to be applicable also to the Internet. As a result, no candidate has been allowed to renew the webpage after the

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<sup>13</sup> Supreme Court, grand bench, 23 April 1969, 23 *Keishu*, p 235.

<sup>14</sup> Id; Supreme Court, 2<sup>nd</sup> petty bench, 15 June 1981, 35 *Keishu*, p 205.

<sup>15</sup> Supreme Court, grand bench, 6 April, 1955, 9 *Keishu*, p 819; Supreme Court, 3<sup>rd</sup> petty bench, 23 March 1982, 36 *Keishu*, p 339.

start of the election campaign period, send e-mails to all the registered supporters, or publish a mail magazine for the voters. The Internet is the most open communication method and is the most inexpensive but powerful method of communication. What on earth is there any ground to prohibit the use of the Internet during the election campaign?

Since it is impossible for average citizen to participate in election, it is no wonder that not many citizens are deeply interested in politics. According to a recent poll, 53% of the public does not have any political party to support.<sup>16</sup> Generally, political parties in Japan do not have many party members. In 2008, with the total population of some 127 million, the LDP has almost 1.1 million party members, the DPJ has 270,000 members, and the Komei Party and the JCP has some 400,000 members.<sup>17</sup> The total number of party member is less than 2% of the total population. Moreover, most of the LDP members are not active members but rather members merely registered on the papers. The participation ratio in the general election for the House of Representatives is somewhat between 59% and 69%.<sup>18</sup> This means that roughly 30% to 40% of the voters have not participated in the election.

## Conclusion

Although the Constitution guarantees representative democracy and protects voting right, it is hard to conclude that the Japanese people are granted sufficient opportunity for political participation. It is also doubtful whether the public actively participates in politics. One hundred and twenty years have passed since the establishment of the modern representative legislature in Japan. There is still a long way to accomplish the truly participatory democracy.

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<sup>16</sup> Jiji.com (13 August, 2010); [http://www.jiji.com/jc/v?p=ve\\_pol\\_politics-support-pgraph](http://www.jiji.com/jc/v?p=ve_pol_politics-support-pgraph).

<sup>17</sup> Gender Equality Bureau, Cabinet Office;  
<http://www.gender.go.jp/research/sankakujokyo/2008/pdf/1-1-e.pdf>.

<sup>18</sup> The Association for Promotion of Fair Election; <http://www.akaruisenkyo.or.jp/070various/sg.html>. The participation rate in the 2009 election was 69.28%. The lowest was the general election for the House of Representatives in 1996 that registered 59.65%. It must be noted that the voter registration is automatically created by the local election commission based on the residents' registration and there is no need to register in order to cast a vote in election. The participation ratio in the House of Councillors election is slightly lower than the general election for the House of Representatives; 56 to 58% during the recent decade. The lowest was the 1995 election that registered only 44.52%. Id.; <http://www.akaruisenkyo.or.jp/070various/sang.html>.