

Washington Law Review

Volume 57 | Number 2

3-1-1982

Japan's Commission on the Constitution: The Final Report, **translated and edited by John M. Maki (1980)**

Frank K. Upham

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

Frank K. Upham, Book Review, *Japan's Commission on the Constitution: The Final Report, translated and edited by John M. Maki (1980)*, 57 Wash. L. Rev. 403 (1982).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol57/iss2/9>

This Book Review is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

BOOK REVIEW

JAPAN'S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT

Translated and edited by John M. Maki. Seattle: University of Washington Press, 1980.

Pp. x, 413. \$25.00.

Reviewed by Frank K. Upham*

Given a broad mandate to “investigate and deliberate on problems related” to the Constitution and to report their results to the Congress, what might a group of largely conservative, largely Republican Party politicians, academics, lawyers, and businessmen suggest? We will never know in the United States. Nor is it a matter of much concern, since even in these days of dissatisfaction with aspects of constitutional development no significant political group advocates the wholesale revision of the U.S. Constitution. Such is not the case in Japan. There, constitutional revision was a major political objective of the ruling Liberal Democratic Party (LDP) in the decade after the Allied occupation and is still debated today.¹ This translation now makes the contours of that debate much more accessible to Westerners.

The source of conservative dissatisfaction with the Constitution of Japan is plain. Drafted by a foreign general,² it articulates a value system antithetical to that which the prewar government had imposed on Japanese society.³ Its language and style were, at least to many older Japa-

* Associate Professor, Ohio State University College of Law; A.B., 1967, Princeton University; J.D., 1974, Harvard University.

1. For the rise and fall of revisionism, see Fukui, *Twenty Years of Revisionism*, in *THE CONSTITUTION OF JAPAN* 41 (D. Henderson ed. 1968). Contemporary debate on Japanese constitutional revision tends to focus on specific amendments, particularly the anti-war clause of Article 9, rather than on challenging the validity of the Constitution as a whole.

2. General Douglas MacArthur, as Supreme Commander, Allied Powers (SCAP), presided over the Allied occupation of Japan and the drafting by SCAP officials of the postwar Japanese Constitution. For an account of the drafting of the Constitution, see K. KAWAI, *JAPAN'S AMERICAN INTERLUDE* (1960). For a personal account by the official directly responsible for the drafting, see C. WHITNEY, *MACARTHUR* 241–62 (1956).

3. Many would go further to state that the Constitution is antithetical to Japanese values and traditions in general. Such an interpretation is, in my opinion, doubly mistaken. First, it underestimates the strength of liberal democratic tendencies in prewar Japan, generally included in the rubric of “Taisho democracy.” Second, it ignores the Japanese government’s affirmative role in creating and strengthening selected values and traditions in prewar Japan that suited their conception of Japanese society. For a description of the role of the legal system in that process, see Haley, *The Politics*

nese, offensively foreign and a constant reminder of the humiliating circumstances of its enactment. Its political and intellectual foundation in Western individualism was seen as destructive of many valued Japanese institutions, particularly the traditional family, and of the social ideal of harmony and consensus promoted by the government. The famous renunciation of war in Article 9 was considered both ridiculously idealistic and an obstacle to the full restoration of Japan's sovereignty.

It is not surprising, therefore, that in 1956 the LDP was able to overcome strong Japanese Socialist Party (JSP) opposition in the Diet to pass a statute establishing the Commission on the Constitution. The Commission's task was to study the enactment and operation of the Constitution and to report its conclusions to the Diet. The Commission was thus the political creation of the LDP and was viewed by opposition parties and most legal scholars at the time as merely a stalking-horse for reactionary constitutional revision. The result turned out to be somewhat different. Despite the refusal by the JSP and many leading law professors to participate, the Commission did not become the mouthpiece of the revisionist faction of the LDP. It did not, in fact, reach any collective conclusions whatsoever on revision and acted very unlike a politically controlled caucus with a predetermined ideological mission. Instead, it emphasized fact-finding and neutrality; the *Report* reads more like an agreement to disagree than a political call to action.

The Commission's workload alone was impressive: 131 plenary sessions and 325 committee and subcommittee meetings with 418 expert witnesses; fifty-six public hearings with testimony from 487 representatives of the public; and an accumulation of published documents occupying eight feet of shelf space. The unabridged *Final Report* is over 1,000 pages long and represents the culmination of close to seven years of fact-finding, deliberation, and drafting. Although inevitably one-sided in its approach to several constitutional issues, the *Report* can hardly be faulted for lack of coverage or for a failure to be balanced in its presentation of divergent views.

The credit for this transformation is due largely to the selection of Takayanagi Kenzō as chairman⁴ and the subsequent adoption of basic policies for fact-finding and deliberation that ensured openness and balance in the Commission's proceedings. First, all Commission meetings beyond those of the steering committee were open to the public and the media,

of Informal Justice: The Japanese Experience, 1922-1942, in 2 THE POLITICS OF INFORMAL JUSTICE 125 (R. Abel ed. 1981).

4. For Takayanagi's own account of his tenure as chairman and of the Commission's operations, see Takayanagi, *Some Reminiscences of Japan's Commission on the Constitution*, in THE CONSTITUTION OF JAPAN, *supra* note 1, at 71.

and transcripts were made available to any interested person. Second, the Commission called on the expertise and experience of non-members rather than relying solely on that of the commissioners. To that end, a group of expert witnesses, which eventually included many scholars who had initially refused to participate, was asked to testify, and public hearings were held throughout Japan to give ordinary citizens a chance to appear. Third, and perhaps most important for the character of the proceedings, the Commission decided not to use majority rule in drafting committee and final reports. Instead, the whole range of opinions were reported with a statement of their reasons.

The *Final Report*, which has been well translated and intelligently edited by John M. Maki, demonstrates to an almost excruciating extent this concern for fairness and balance. The first three parts of the *Report* chronicle the creation, structure, procedure, and central issues of the Commission's work. In doing so, they catalog issues and positions and explain the mechanics of the Commission, but do little else. For those interested in the substantive views espoused, Part Four, *The Opinions of the Commissioners*, will hold the most interest.

Part Four constitutes almost half of the volume and consists largely of a recitation of summarized views, pro and con, on each chapter of the Constitution. Fortunately these dutiful but, at times, rather bland restatements of varying positions, are frequently invigorated by verbatim quotations from individual commissioners. Here, one is reminded that behind the meticulous balance and neutrality of the *Final Report* were red-blooded men (and one woman) with strongly held and often emotional views on the Constitution and its role in Japanese society. Generally, though, the *Report* avoids controversy. Statements of both the revisionist and anti-revisionist views are included throughout. For example, the *Report* notes the revisionist view on individual rights: "[T]he present is not the age of the liberal state which overemphasizes respect for individual rights and freedoms, but the age of the welfare state which has as its aim the well being of the entire people, and accordingly Chapter 3 ['Rights and Duties of the People'] needs to be revised to conform to the contemporary age."⁵ There then quickly follows the anti-revisionist view: "[T]here is nothing contradictory between the principles of the welfare state and of respect for the rights and freedoms of the individual"⁶ The inevitable result of the "first A, then B" approach in drafting is the lack of a clear, well-developed argument for or against revision, and the creation

5. JAPAN'S COMMISSION ON THE CONSTITUTION: THE FINAL REPORT 273 (J. Maki trans. & ed. 1980).

6. *Id.* at 274.

of a document that is more of a laundry list of issues and opinions than a satisfying analysis of current constitutional problems and interpretations.

That does not mean that the *Report* is valueless or invariably tedious to read. The *Report* represents and catalogs the vast amount of material amassed by the Commission, and its coverage of the significant constitutional issues makes it as comprehensive a statement of the political and intellectual currents surrounding the Japanese Constitution in its first two decades as is likely to become available. The frequent excerpts from individual commissioners' opinions also give the reader a good sense of the social and political concerns and goals of the revisionist majority.

Not surprisingly, the aspects of the Constitution most galling to the commissioners were its origin—which for many meant that revision was necessary regardless of the substance of the Constitution—and the renunciation of war and the maintenance of war potential in Article 9. The latter was criticized not only for its idealism, but also because it meant that there were no appropriate constitutional provisions for civilian control of the Self Defense Forces (SDF), which, all agreed, were here to stay, and because Article 9 also supposedly made it impossible for Japan to participate in U.N. peace-keeping forces.

The commissioners were also concerned about the "Rights and Duties of the People," which makes up Chapter 3 of the Japanese Constitution. The commissioners' objections to strong guarantees for individual civil rights and liberties were not phrased in the common conservative American lexicon of national security and sexual morality. Instead, the Japanese commissioners' objections were based on fears that the assertion of individual rights would impede the realization of the modern welfare state, which all commissioners agreed to be the goal of postwar Japan.

Perhaps the most striking aspect of the *Report*, however, at least from an American perspective, is the almost total lack of discussion of the Japanese Supreme Court and its decisions. The *Report* discusses judicial review with general approval, but only at the abstract level of political theory rather than at the level of particular cases. General debate on other issues, likewise, is almost invariably on the level of constitutional theory, most frequently repeating the ritualistic "living constitution"/"strict-constructionist" arguments associated with all written constitutions. The dearth of concrete controversy is eloquent testimony to the peripheral role played by the Japanese Supreme Court up to the mid-1960's. There simply were not many constitutional precedents for the commissioners to discuss, and even fewer that would be objectionable to conservative politicians.

Had the JSP chosen to participate in the Commission, debate might have been considerably more focused. Lack of opposition participation is

clearly the *Report's* greatest weakness. Despite the Commission's sincere attempt to open debate to all positions, the *Report* remains basically a dialog between those in favor of conservative revision and those opposed to any revision, with the latter arguing that political practice and judicial interpretation will bring even the more idealistic provisions into line with political reality. Other possible positions, such as the argument that the Constitution should be interpreted literally to bar the SDF, are frequently not even mentioned. One regrets in particular the narrowness of perspective in the section on the role of the Emperor, which is otherwise quite complete and lively. Without a statement of the Left's position, this section leaves the reader with the inaccurate impression that the existence of the imperial institution is not controversial. A strong Marxist polemic on the political and psychological effect of the imperial institution, or even a summarized version of it, would have completed the circle of argument and made the *Report* a much fuller statement of the political context of the times.

Given the political origin of the Commission, however, an opposition boycott was inevitable. Certainly Chairman Takayanagi and the Commission made every effort to convince the JSP to reconsider its position and, thereafter, to conduct the proceedings in as open and democratic a manner as possible. Should wholesale constitutional revision again become a serious political concern, it is hard to imagine that conservative pro-revisionist and moderate anti-revisionist views could be articulated more completely or fairly in the ensuing debate than they were in this *Report*. The result, although perhaps not all one might wish for, remains an invaluable record of the political currents of the time and of the Japanese Constitution's first crisis of legitimacy.