

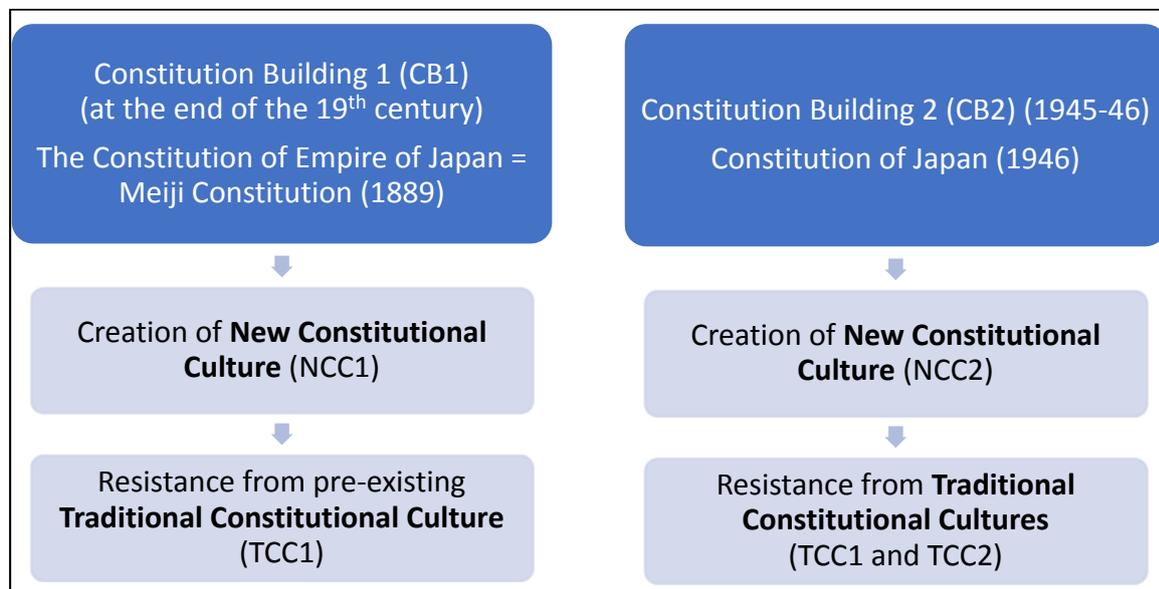


‘Implications of culture for constitution-making in Japan: constitutional culture or cultures?’

Akiko Ejima

Background: Two constitution building processes in Japan

In Japan there have been two major constitution building processes. The first occurred at the end of 19th century (Constitution Building 1 [CB1]) with the *Meiji Constitution* (1889). The second occurred after World War II (Constitution Building 2 [CB2]) with the present *Constitution of Japan* (1946).



The CB1 was Japan’s first experience in writing a Western style constitution which includes a bill of rights and separation of powers. Japan managed to fulfil this difficult task by sending Japanese bureaucrats and academics abroad to learn Western constitutional law and by inviting Western legal scholars to Japan. Acceptance of a Western legal system encouraged the birth of democracy (*Taisho Democracy*) and nurtured a new constitutional culture (NCC1). However, NCC1 was in conflict with the pre-existing traditional constitutional culture (TCC1) because TCC1 attached more importance to collectivism (particularly divine authority of the Emperor and traditional family values).

In reality, the Meiji Constitution (and NCC1) did not play a substantial role in controlling and restraining the government. CB2 was the consequence of the Potsdam Declaration (1945) which required the demilitarisation, democratisation and liberalisation of Japan. A unique aspect of CB2 is the strong involvement of ‘outsiders’ in the constitution building process. The Government Section of the Supreme Commander for the Allied Powers (SCAP) which occupied Japan wrote a first draft on which the Japanese government’s draft was modelled. The government draft was later discussed and accepted by the Japanese legislature which was for the first time elected by the universal suffrage

including women. The controversial drafting process has created a conflict between the post-war democratic and liberal constitutional culture (NCC2) fostered by the CB2 and the traditional constitutional culture (TCC2) which has a resonance with TCC1.

How did constitutional culture affect the processes chosen for constitution building? How were those choices made?

In the case of CB1, constitutional culture in a Western sense scarcely existed because of the ‘seclusion’ policy of the Edo government (1603-1868).¹ However, if a wider concept of constitutionalism, in which the constitution is understood ‘to frame the institutions of government and to determine who exercises the power and authority of the state, how they do so and for what purpose’² is used, it is possible to say that Japan has had a kind of constitutional culture which appreciates legal stability (respect for law and judicial precedent) which goes well with the idea of the rule of law. After all, the Edo government provided one of the most peaceful and prosperous times in comparison to preceding periods. TCC1, as the indigenous traditional constitutional culture, must have played a role to help drafters understand the purpose and significance of a new constitution which sought to frame and control a governing body in order to make a stronger country against the great powers of the world.³ On the other hand there were new elements of Western constitutional culture, such as the value of democracy and respect for human rights, which TCC1 could not understand or even accept.⁴ However, once the parliament was established and elections were introduced under the *Meiji Constitution*, demand for democracy increased and political movements flourished (called *Taisho Democracy*). Therefore, a new constitutional culture (NCC1) emerged and prospered until a rise of militarism and nationalism in the 1930s.

In the case of CB2, the constitution building process itself was under the control of the SCAP. Once the present Constitution was promulgated there were many efforts to promote the content of the Constitution such as publishing an easy-read booklet and events for promotion. The experiences of the Japanese people during the Meiji government and the wars (particularly World War II) also contributed to the acceptance of new features of the Constitution such as pacifism and equality under the law.

How did constitutional culture affect choices about the substantive changes to be made?

The pre-existing constitutional culture TCC1 played a role in making the status of the Emperor as authoritative and divine under the *Meiji Constitution*. It also characterised the rights of nationals as ‘benefits’ given by the Emperor to his subjects, which could be easily curtailed by law or the Emperor’s order when it was necessary. At the same time the Meiji Government understood the necessity to make its constitution look modern. Therefore the outcome of CB1 is a mixture of elements supported by TCC1 and new elements imported from the West. A new input of Western elements into the constitution created a new constitutional culture NCC1 which was appreciative of Western

¹ The Edo government strictly prohibited Japanese people traveling overseas for the purpose of the Christianity ban and trade control, restricting the travel of foreign ships. However, on the other hand, it allowed trade with the Netherlands and China at Nagasaki Dejima and accepted a tribute mission from Korea and the Ryukyus. In this way, the Edo government tried to monopolise information and trade from overseas by restricting ports.

² Markus Böckenförde, Nora Hedling & Winluck Wahiu, *Practical Guide to Constitution Building* (International IDEA, 2011) v.

³ On the contrary if a narrower definition of constitutionalism - which put more emphasis on separation of powers, human rights and democracy is used - Japanese TCC1 cannot be called a constitutional culture.

⁴ Some thinkers privately wrote constitutions including a bill of rights, one of which is a draft written by Ueki Emori, which influenced on the content of another private draft during the CB2 process.

constitutional values. On the other hand the TCC1 was reinforced as TCC2 and played a role in interpreting the *Meiji Constitution* in a more traditional way to emphasize the divine status of the Emperor, which was used by the military to start war.

In the case of CB2, the NCC1 played a substantial role in the drafting process. Some Japanese academics and civilians who embodied NCC1 immediately contrived a private draft of a new constitution (which contained popular sovereignty and social rights) after World War II ended. The Government Section of the SCAP consulted this draft and obtained inspiration from it when they prepared their draft. After the occupation ended, the government attempted to change liberal aspects of the constitution. Particularly, the Kishi Cabinet established the Constitutional Research Council in order to change the Constitution. Since then there have been several proposals to change the constitution, none of which has reached the Diet (the Japanese legislature).

Where constitutional culture had implications for constitution building, what are the sources of origins of this culture? Was it simply assumed? Was it contested?

In the case of Japanese constitution building processes there is a mixture, co-existence or collision of different cultures. One is traditional constitutional culture whose origins can be found in the laws of the Edo government, religion or social custom, which emphasise hierarchy and collectivism which can contribute in stability and prosperity. However stability can also lead to stagnation and inequality, while prosperity is not necessarily shared by everyone. Therefore other constitutional cultures (particularly newly imported culture) plays an influential role to criticise and change the status quo. Some Japanese philosophers and politicians have been inspired by the idea of democracy and human rights. It should be emphasised that during the CB1 process, Japan was not forced to accept democracy and human rights by outsiders. It was a spontaneous import under certain conditions, particularly the necessity of modernisation.

What advantages or disadvantages followed from accommodating or not accommodating existing constitutional culture?

Accommodating existing constitutional culture facilitates efforts to put a new constitution in practice smoothly. In the case of CB1, the *Meiji Constitution* made use of the authority and legitimacy of the Emperor supported by the traditional constitutional culture. It made it possible to establish a new nation in a relatively short period. Moreover the traditional constitutional culture, which put emphasis on authority and order, facilitated acceptance of some elements of Western constitutional law such as the rule of law and the guarantee of peace and security with moderation. On the other hand, newly imported Western ideas were changed or limited by the TCC1. In this, the existing constitutional culture worked as an obstacle for the implementation of some aspects of the constitution. The bill of rights in the *Meiji Constitution* was nominal.

In the case of the present Constitution, in general CB2 did not take into account existing constitutional culture. On the contrary, the SCAP considered that the traditional culture had supported the tendency of militarism and collectivism to some degree and was keen on discarding or ameliorating it until the Cold War started. Therefore one of the merits of not accommodating TCC1 and TCC2 was the acceleration of democratisation and liberalisation. For example, Shinto is an indigenous religion based on polytheism and widely believed in Japan. During the Meiji government era, its status was elevated as State Shinto and played an influential spiritual role in supporting the government's militaristic policy. Therefore, the present Constitution stipulates a separation between the state and religion in

the Constitution (Article 20) under the strong influence of the SCAP.⁵ The separation realised religious freedom greatly. However, one disadvantage is that the distinction between Shinto and social custom is difficult as Shinto is connected to daily customs. The Japanese Supreme Court has made efforts to clarify the meaning of 'separation' through a number of cases. The disadvantage of not accommodating existing constitutional culture is that people tend to perceive the content of the bill of rights in the Constitution as a new and foreign concept, despite the common features between TCCs and NCCs.

What lessons might be learnt from these experiences by other states, embarking on a constitution building project?

Time

It is not so difficult to adopt a constitution as a written document, but it takes many years to make it a workable constitution. Japan could not have a constitution by one-time constitution building, but twice. The first one - the *Meiji Constitution* - played a very limited role in controlling the government and preventing wars. During the Meiji Constitution era Japan experienced incessant wars: the First Sino-Japanese War (1884-85); Russo-Japanese War (1904-5); World War I (1914-18); Second Sino-Japanese War (1937-45) and World War II (Japan was involved during 1941-1945). It is too exaggerated to say that it is because of the present constitution that Japan has not started or been involved in any war since World War II. However, whenever Japan considers a change in its defense policy – such as the deployment Self-Defense Forces (SDF), ratification of the Treaty of Mutual Cooperation and Security between the United States and Japan, or the recent legislation in 2015 which enables the SDF to participate in foreign conflicts which would affect Japanese security - serious concerns relating to the constitutionality of Article 9 are raised. Moreover, whenever any amendment of the pacifism clause (Article 9) is considered, intense and serious discussion takes place because of NCC2 as peace-loving culture. Over time and experience a living constitution is realised.

The effect of the constitution outside its jurisdiction

A domestic constitution does not legally bind a foreign country or a foreign nation. However, the fundamental principles and goals of a constitution are relevant not only for its nationals but also neighboring countries and/or the world as a whole, especially after war or civil war in which the country was involved. In the case of Japan, neighboring countries have considered Article 9 as a promise of peace vowed by Japan. Moreover, remorse shown in the Preamble of the constitution, which 'resolved that never again shall we be visited with the horrors of war through the action of government',) and repetition of the word 'peace' five times has worked as a soft guarantee for peace for all stakeholders. The external effect of the constitution should be highlighted in a globalised world. If the content of a constitution reflects the interests of the international community, the effect of the constitution can be more fruitful in the international sphere.

Value of 'outsiders'

The significance and merits of the participation of 'outsiders' in constitution building should not be underestimated. It is needless to say that if the constitution is imposed by an outsider, it will not be

⁵ One of the first actions taken by the occupation authorities in 1945 was the Shinto Directive (SCAPIN-448) which ordered the abolition of state support for the Shinto religion.

acceptable nor workable. However, when it is fruitful or even necessary to adopt a new idea and/or system of government for the people of a country in question, the efficient and effective way is to learn from successful and unsuccessful experiences of other states. In order to avoid the problems Japan experienced, there are certain conditions that outsiders should have to meet.

Democratic and Open Process

It is essential to have a democratic and open process for constitution building. The view that the Constitution of Japan was imposed by an outsider (the United States) remains strong among some people and political parties in Japan, including the present ruling party, the Liberal Democratic Party (LDP) because of the covert involvement of the United States in Japanese constitution building (CB2). The LDP has been arguing for the amendment of the Constitution for more than six decades since the LDP was established in 1955. Therefore, the LDP government often considers the Constitution as a block which hinders some government policies, and feels awkward to be proud of some of the progressive aspects of the Japanese Constitution. The process of constitution building will be more fruitful if it is based on a dialogue between national and international actors who are equal.

Akiko Ejima

Akiko Ejima is Professor at the School of Law, Meiji University, Tokyo. She teaches constitutional law, comparative constitutional law and international human rights law. Her research focuses on the relationship between constitutional law and international human rights law. Her current research project explores the possibility of a pluralistic, non-hierarchical and circulatory system for human rights protection which combines constitutional law and international law and increases the effectiveness of human rights protection. Akiko Ejima has been a Liaison Member of the Science Council of Japan since 2014. She was a visiting scholar at Wolfson College, Oxford, a visiting scholar at Faculty of Law and Hughes Hall, Cambridge, a visiting fellow at Harvard Law School, a study visitor at the European Commission on Human Rights, and a visiting scholar at King's College, London.