



“DEMOCRACY, CONSTITUTIONS & DEALING WITH THE WORLD”

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Session 1: International approval of new constitutions

Japan as a case study

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Japan had two experiences of drafting constitutions where international approval played a very important role in a unique way. The first modern constitution of Japan, the Constitution of the Empire of Japan (1889) was drafted by a small group of Japanese elites who were committed to the modernization of Japan and the repeal of unequal treaties between Japan and Western countries.¹ Western powers considered that they could not treat Japan as an equal partner because Japan did not have a bill of rights, democracy or a Western-style legal system (rule of law). In response, having a constitution which was compatible with the modern Western constitutionalism in the 19th century became a top priority for Japanese elites, rather than hearing the voice of the Japanese people.

The second constitution, the present Constitution of Japan (1946), was the consequence of the Potsdam Declaration (1945) at the end of World War II. The Japanese Government immediately undertook to draft a constitution but could not provide a satisfactory draft in the eyes of the US Occupation Army. In the end, the Government Section of the US Occupation Army prepared a draft. Again, the reason why Japan needed a constitution was externally driven.

The Japanese people have not had experience participating in the drafting process of a constitution, either by constitutional assemblies or national referendums. However, the longevity, stability and even popularity of the present Constitution is unparalleled: the oldest unamended written constitutional code in the world. Moreover, Japan has been free from war and civil war since World War II. This short paper focuses on the present Constitution in order to analyse the impact of international approval/acceptance/recognition on the Japanese Constitution.

1. Drafting process of the Constitution of Japan (1946)

Japan is a story of how chance resulted in an occupation army undertaking the mission of drafting a constitution for a foreign country. The Japanese Government understood the necessity of amending the 1889 Constitution to be compatible with the Potsdam Declaration (1945), which required demilitarisation, democratisation and liberalisation of Japan.² The Government established a team that presided over the process, with a Minister to develop a new constitution, but the draft was leaked by a newspaper. Upon seeing that the draft content maintained the sovereignty of the Japanese

¹ Arrival of Commodore Perry with four US Navy ships (1853) led Japan to open ports and signed the Kanagawa Treaty (1854).

² The Potsdam Declaration stipulated the condition for surrender.

Emperor, General MacArthur, the Supreme Commander for Allied Powers (SCAP) realised it would take too long if he waited until the Japanese Government arrived at a satisfactory constitutional result.

General MacArthur ordered the Government Section of the US Army to draft a new constitution which reflected MacArthur's Three Principles: (i) the Emperor as the ceremonial head of state (constitutional monarchy), (ii) the abolition of war and the (iii) abolition of the feudal system. Work on the new draft started on 4 February 1946 and lasted until 10 February 1946 – only seven days. The principal members among the 25 people in total included Americans Mr Charles L. Kades (40 years old), Mr Alfred R. Hussey (44 years old) and Mr Milo E. Rowell (42 years old), who were all educated in law and had experience as practising lawyers.³ On the other hand, there were also some people who had vast knowledge and experience concerning Japan, including Ms Beate Shirota-Gordon (22 year old) who lived in Japan for 10 years as a young girl before World War II and was not only fluent in Japanese but had also adapted to Japanese culture.⁴

The so-called “MacArthur draft” was handed over to Japanese Foreign Minister Yoshida and Minister Matsumoto on 13 February 1946. The Japanese Cabinet officially accepted it on 22 February 1946 and completed its own draft based on the MacArthur draft on 2 March 1946. The Japanese Government draft was carefully examined article by article by the US Government Section on 4 March 1946 and was publicly announced on 7 March 1946. On 25 June 1946, the Government draft was submitted to the Diet, the Japanese national legislature whose lower house was elected by universal suffrage (including women for the first time) on 10 April 1946. The draft was amended during this process and passed the Diet on 23 September.⁵

2. *Impact of the international approval and international reaction*

Because the international (US) involvement in the constitution-making process was so direct, the US and international community had no reason to criticize the final 1946 Constitution of Japan. Japan regained independence after signing the Peace Treaty in 1951 and could be accepted by the international society.

The drafting process was criticized by some as resulting in an “imposed” constitution, after the fact of the heavy involvement of the US was publicized.⁶ It is true that the Japanese Government did not stand in a position to refuse the MacArthur Draft. However, it is too simple to call the Japanese Constitution an “imposed” one. Firstly, Japan and the US separately had their own goals to achieve through the constitution-making process. The top priority for the Japanese Government was to maintain the role of the Emperor, whereas one of the Allies was considering trying the Emperor at the International Military Tribunal for the Far East. On the other hand, the US wanted to settle the Japanese occupation as smoothly and quickly as possible in order to achieve hegemony in East Asia. Therefore, they could find a compromise by getting what they both wanted, namely, the maintenance of the Emperor for Japan and the smooth occupation for the US.

³ C L Kades, ‘The American Role in Revising Japan’s Imperial Constitution’ (1989) 104(2) *Political Science Quarterly* 215-247. Sirota’s name is appeared at 225.

⁴ B Shirota-Gordon, *Only Women in the Room* (the University of Chicago Press, 1997).

⁵ See, S Koseki, *The Birth of Japan’s Postwar Constitution* (Westlaw, 1997).

⁶ Y Negishi, ‘The Constituent Power of the “imposed” Constitution of Japan: An Amalgam of Internationalised Revolutionary Power and Nationalist Devolutionary Power’ in R Albert, X Contiades and A Fotiadou (eds.), *The Law and Legitimacy of Imposed Constitutions* (Routledge, 2019).

Secondly, the Japanese draft of the constitution was not a simple translation of the MacArthur draft. The Japanese Legislation Bureau “Japanized” the document as much as possible.⁷ One of the results of Japanization is the deletion of the protection of foreigners, which the American draft guaranteed. Thereafter, the draft was discussed at the Diet (legislature) and passed after several significant amendments, including the addition of social rights. Thirdly, there were approximately 10 drafts or proposals by private groups, which also influenced the final outcome. The draft prepared by a study group run by Yasuzo Suzuki (1904–1983) is particularly famous for its influence on the American drafting team.

Public perception

If the Japanese people did not participate in the drafting process, then how have the Japanese people accepted the present Constitution? Every Constitution Day (3 May) is a national holiday and the mainstream media publish the results of a public survey on the Constitution. Typical questions concern whether the Constitution should be amended, especially whether Article 9 (renunciation of war) should be amended.

According to a 2017 poll by the Japan Broadcasting Corporation (NHK), public understanding of the Constitution has improved.⁸ The percentage of people who correctly picked the subjects covered in the Constitution from among six choices – popular sovereignty, respect for fundamental human rights, renunciation of war, national holidays, the prohibition of alcohol for minors and the national anthem (the first three choices are correct) – increased from 35% in 1974 to 51% in 2017.

The same poll also showed that 82% of people are proud of the present pacifist Constitution. 73% believe pacifism has been established in Japan, up from 58% in 1974. More than 80% think that Article 9 is useful for Japan’s peace and security, and 57% do not consider it necessary to amend Article 9 (25% think it is necessary to amend it). At the same time, there is widespread popular support for the Self-Defense Forces (SDF), based on the role the SDF has played during natural disasters. Most Japanese citizens now consider the SDF useful (80%) and constitutional (60%) despite the fact that their constitutionality was once at the heart of heated constitutional debates. As natural disasters, such as earthquakes, typhoons and flooding frequently hit Japan, the SDF’s contribution is evident. Since its establishment in 1954, the SDF has never participated in military combat.

Education

What can explain the Japanese people’s understanding of and support for the Constitution? Following the promulgation of the current Constitution, there were ceremonies and awareness-raising events, textbooks published and memorabilia issued (by the Government and the private sector).⁹ Under the influence of the occupation officials, the Constitution Popularization Society (CPS) was established in December 1946. It was headed by Hitoshi Ashida, then a member of the House of Representatives (the lower house of the Diet), who later became Prime Minister. The CPS held seminars and lectures for public servants and the general public, published textbooks and promoted activities to increase interest in the Constitution.¹⁰ The CPS even asked the three major film companies to produce films on

⁷ Koseki, supra note 5, Chapter 6 (To Struggle to Japanize the American Draft).

⁸ NHK Broadcasting Research Institute, Changes in the Public Attitudes towards the Constitution https://www.nhk.or.jp/bunken/english/research/yoron/20171001_9.html (English summary) and https://www.nhk.or.jp/bunken/research/yoron/20171001_9.html

⁹ <https://web.archive.org/web/20130613084743/http://www.ndl.go.jp/constitution/e/shiryu/05/141shoshi.html>

¹⁰ <https://www.wdl.org/en/item/7372/>

three constitutional themes: equality of men and women, popular sovereignty and the renunciation of war.

The Government considered education about the Constitution important, not only because it would familiarize the Japanese people with its content but also because it saw it as essential for developing public citizens (*komin*) who could understand and support democracy. A textbook for junior high school first-year students, published by the Ministry of Education in 1947, is a good example.¹¹ Some illustrations in the book remain popular, and contemporary textbooks often reuse them, even though the book lost its status as a textbook immediately after the US occupation ended.

The tradition of constitutional education continues today. Currently, from Year Six of elementary school onwards, school textbooks cover various aspects of the Constitution. By way of illustration, students in junior high school read about 35-40 pages concerning human rights and pacifism, and 35-40 pages covering the constitutional institutions (in total, constitutional issues amount to 40% of the textbook of *komin*, which is a mandatory subject). High school students can choose to take subjects with titles like *Political Economy* and *Modern Society*; the relevant readers include several chapters discussing the Constitution and government institutions (making up roughly one-third of each of the textbooks).

3. *International involvement and constitutional amendment*

The direct international involvement in the 1946 constitution-making process created a difficult constitutional question: legitimacy of the constitution. Since the birth of the constitution, the Liberal Democratic Party (LDP) Government has tried to amend the Constitution to regain their nationalistic pride and to delete Article 9 in order to re-introduce army. Article 9 of the Constitution (the Pacifism Clause) was considered, at the time and even now, as a concrete promise not to repeat the past by renouncing war as a sovereign right of the nation and not maintaining “land, sea, and air forces, as well as other war potential”. Each time the constitutional amendment of Article 9 has been proposed by the LDP, the long-lasting ruling party since 1955, the effort has attracted attention and reaction from neighbouring countries. Interestingly, although after the occupation was over, the US did not exercise their influence in terms of the Constitution, in recent years it has appeared that the US would rather appreciate if Japan could amend Article 9 to strengthen mutual military cooperation.

The LDP’s efforts to amend the Constitution have not been successful so far. They have not managed to initiate an official constitutional amendment process to amend the Constitution despite the new electoral system (a combination of the first-past-the-post system and proportional representation system), even though the system has allowed the LDP to achieve a two-thirds majority at both Houses (with the support of other political parties who support constitutional amendment), which is the condition for the Diet to initiate an amendment process (Article 96).

Instead, the Government has changed the interpretations of Article 9 in order to legitimize the existence of the US army in Japan, establishment of the SDF and engagement of the SDF with UN peacekeeping operations. Those interpretations have been contested at the Supreme Court. However,

¹¹ Ministry of Education, *Atarashii Kenpo no Hanashi [The Story of the New Constitution]* (Jitsugyo Kyokasho, 1947) <https://dl.ndl.go.jp/info:ndljp/pid/1113070> (visited 31 October 2021)

the Court has avoided deciding these constitutionality questions by relying on the “political question” doctrine or technical issues such as standing.¹²

4. Conclusion

It can be said that because of the direct involvement of international actors/outside, the Japanese people has obtained a better outcome for the final context of the Constitution. If there were no intervention, the Japanese people could have had another authoritarian constitution. That said, lacking participatory experiences of making constitutions may have contributed to a weaker belief in democracy and apathy towards politics.

Biography: Akiko Ejima is Professor at School of Law, Meiji University (Tokyo). She teaches constitutional law, comparative constitutional law and international human rights law. She has been studying the relationship between constitutional law and international human rights law. Her current research project is exploring a possibility of a pluralistic, non-hierarchical and circulatory system for human rights protection which can combine constitutional law and international law and increase the effectiveness of human rights protection. She has been a Liaison Member of the Science Council of Japan since 2014, 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. Beyond her teaching and research, she has been engaged in supporting and promoting democracy and human rights globally, including by giving lectures on the constitutional law to parliamentarians and public servants from developing countries JICA invited to Japan and visiting the Afghan Constitution Commission at Kabul. She was educated in Japan, graduating with LLB (summa cum laude) from School of Law of Meiji University and LLM and Doctor of Law from Graduate School of Meiji University.

¹² A EJIMA, “How to compare constitutional amendments in the world: Some Reflections from an empirical perspective” *Yonsei Law Journal* Vol.11, No. 1, 2021, 39-58.
https://ils.yonsei.ac.kr/ils/journal/yonsei_law_journal.do?mode=view&articleNo=124657&article.offset=0&articleLimit=10