

JAPAN'S CONSTITUTION ACROSS TIME AND SPACE

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Constitutional reform is a matter of time, the time when the original and the revisions were drafted; and of space, the global context which comprises the transnational constitutional expanse that influenced all modern constitutions from the late eighteenth century on. Of the some 198 written constitutions now in force, more than half were promulgated during the past sixty years.¹ The U.S. Constitution of 1787 is the oldest, and if one counts the 1947 Constitution as an amendment of the Meiji Constitution of 1889 – which formally and technically it was – Japan's is the world's tenth oldest written constitution still in effect.²

Constitutional lifespans tend in fact to be exceedingly short: Of the 900 constitutions written since 1789, the average duration was a mere 19 years, exactly the timespan advocated by Thomas Jefferson.³ It is said that the average citizen outside North America and Western Europe (and Japan, we might add) can expect to see six or seven constitutions in one lifetime.⁴ Despite such mortality rates, the history of written constitutions is quite long, coinciding with the emergence of modern nation-states. Led by the United States, France, and Poland in the late eighteenth century, constitutions came to seem a necessity for sovereign states by the middle of the nineteenth century, with their numbers rising steeply as new nations proliferated in the decades after the Second World War.⁵ Equally or perhaps more important was the entrenched belief in constitutionalism, once famously (and ironically)

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¹ For data on written constitutions see “Comparative Constitutions Project,” <https://comparativeconstitutionsproject.org/>.

² Japan is preceded by the U.S., 1787; Norway, 1814; the Netherlands, 1815; Belgium, 1831; New Zealand, 1852; Argentina, 1853; Canada, 1867 Luxembourg, 1868, and Tonga, 1875. <https://www.constituteproject.org/search?lang=en>

³ Thomas Jefferson to James Madison (Sept. 6, 1789), *The Papers of Thomas Jefferson*, Vol. 15 (Princeton: Princeton University Press, 1958), pp. 392-98. Tom Ginsburg, “Written Constitutions Around the World,” *Insights on Law & Society* 15, no. 3 (Spring 2015), pp. 4-7; Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009), p. 1.

⁴ Thomas Ginsburg, Zachary Elkins and James Melton, “The Lifespan of Written Constitutions,” University of Chicago Law School (October 15, 2009), <https://www.law.uchicago.edu/news/lifespan-written-constitutions>.

⁵ Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, p. 41.

defined as “the trust which men repose in the power of words engrossed in parchment to keep a government in order.”⁶ However defined, Japan now has 130 years of constitutionalist tradition, against which to consider contemporary questions of constitutional reform.

CONSTITUTIONALISM IN IMPERIAL JAPAN

The words “engrossed in parchment” in the Meiji Constitution of 1889 formally initiated the constitutional order of Imperial Japan. It is worth considering the document across four dimensions often used to take the measure of a constitution: context, origins, commitment, and practice. The historical context impels the need to set out a framework of government, whether for a new nation, a new regime, or a state in the throes of reform. In Japan, the “rules of the country” (*kuni no okite*) were deemed necessary to establish the new Meiji state. The constitutional movement in the 1870s and 1880s was fervent, even feverish, especially among adherents of the oppositional Freedom and Popular Rights movement. Local elites, village youth, and others produced numbers of draft constitutions, some with extremely liberal provisions for popular representation, rights, and parliament. Following the then current models of constitutional monarchy, even the most liberal constitutions included the emperor, as in Ueki Emori’s draft calling for a kind of parliamentary sovereignty which defined the functions of the ruler (*kōtei*) but also provided for popular overthrow if necessary to preserve people’s rights.⁷ In 1876 the emperor issued an order to the Council of Elders (*Genrōin*) to create a constitution “based on the system established at the time of the founding of the nation and which gives due consideration to the law of various nations.”⁸

The key phrase here was “the law of various nations.” For the nineteenth century saw what one historian described as a “contagion of constitutions.” They came one after another in “global waves.”⁹ Some

⁶ Walton H. Hamilton, “Constitutionalism,” *Encyclopedia of Social Sciences*, Vol. 4 (Macmillan, 1931), p. 255. This definition is often cited because of its skeptical tone.

⁷ Tōyō Nihonkoku ken’an (1881), full text at <https://www.ndl.go.jp/modern/e/cha1/description14.html>. Bob Tadashi Wakabayashi, *Modern Japanese Thought* (Cambridge: University of Cambridge Press, 1998), pp. 8-9.

⁸ Translated in George H. Beckmann, *The Making of the Meiji Constitution: The Oligarchs and the Constitutional Development of Japan, 1868-1891* (Lawrence, KS: University of Kansas Press, 1957), p. 46, n.25.

⁹ “Contagion of constitutions,” Linda Colley, “Writing Constitutions and Writing World History,” in James Belich, John Darwin, Margret Frenz, and Chris Wickham, *The Prospect of Global History* (Oxford: Oxford University Press, 2016), p. 162; “Global waves,” e.g., “‘We the Peoples’: The Global Origins of Constitutional

even suggest a “global script,” by which nations use their constitutions to participate in global discourse.¹⁰ In the beginning many were modeled after the U.S. Constitution, and also the 1812 Spanish Constitution of Cádiz, which though it survived barely two years, set out such lasting liberal provisions as separation of powers, popular sovereignty, and a parliamentary system within a constitutional monarchy. The short-lived Cádiz Constitution formed the basis of the constitutions of the newly independent nations in Latin America and also influenced Portugal, Italy, Greece, and Norway, whose 1814 constitution remains in force today.¹¹ The next constitutional wave arrived in Europe after the revolutions of 1848, so that by the Meiji period constitutions had become the norm for new states or regimes, including Prussia in 1850 and the new German empire in 1871. To be or to become a nation in a nineteenth-century world of nations required a constitution, so that constitutional fervor in Japan followed what Meiji Japanese so often called the “trend of the times” (*jisei*).

As in other nations, the origins of the Meiji Constitution were hybrid and cosmopolitan, as both the government oligarchs and the liberal opposition searched the world for models. The American constitution was known early. It was used as a text to learn English in Nagasaki in late Tokugawa times, as intellectually ambitious samurai gathered to chant, “we the people...to form a more perfect Union.” Fukuzawa Yukichi translated both the Declaration of Independence and the U.S. Constitution in his best-selling *Seiyō jijō* [Conditions in the West] of 1866, conveying to readers the perplexities of meaning of such words as “rights,” “liberty,” and “equality.”¹² But when the first shogunal mission visited the United States in 1860 they had not been enamored. One visitor dismissed the electoral system by saying, “At the time of the expiration of a president’s term, the Prime Minister and a

Preambles,” *Chicago Unbound, Public Law and Legal Theory Working Papers* (2013) p. 127.

¹⁰ Daniel N. Rockmore, Chen Fang, Nicholas J. Foti, Tom Ginsburg, and David C. Krakauer, “The Cultural Evolution of National Constitutions,” *Journal of the Association for Information Science and Technology* (March 2018), p. 484.

¹¹ Natalia Sobrevilla Perea, “The Cádiz Constitution in the Atlantic World,” *Oxford Research Encyclopedia of Latin American History* (2016), <https://oxfordre.com/latinamericanhistory/view/10.1093/acrefore/9780199366439.001.0001/acrefore-9780199366439-e-35?rskey=kPK21t&result=1>.

¹² Fukuzawa’s Meiji bestseller sold more than a quarter of a million copies. See Tadashi Aruga, “The Declaration of Independence in Japan: Translation and Transplantation, 1854-1997,” in “Interpreting the Declaration of Independence by Translation,” *Journal of American History Roundtable* (1999), expanded version available at <http://chnm.gmu.edu/declaration/japanese/aruga2.html#pgfid=1005818>.

few other high officials (who have distinguished themselves with their own talents) are considered. If the Prime Minister and these nobles all decline the offer, then they – together with the retired presidents – hold an auction (*nyūsatsu*) and choose the highest bid.” The head of the mission concluded, “I don’t believe that the fundamental laws of this country will last much longer.”¹³ The Meiji government leaders who traveled the world on the Iwakura Mission from 1871-73 came home convinced that a constitution was essential for the new Japan. Kido Kōin, who along with Ōkubo Toshimichi and Saigō Takamori played a key part in the Meiji Restoration, studied the translation of the U.S. Constitution every day for a month and a half during his stay in Washington, and then continued his constitutional education in England and Europe. But he, like his colleagues, preferred monarchy to democracy as the “gradualist” path to a representative polity. Ōkubo Toshimichi wrote that democracy was appropriate for new nations or nations of immigrants, for the United States, Switzerland, or in South America, but Japan, like England, was an island country, with its own characteristics like “geography, the customs and temperament of the people and the movement of history,” for which constitutional monarchy was better suited.¹⁴ The leaders examined French, Belgian, Bavarian, and other constitutions, searching widely for congenial precedents and possibilities. On his constitutional study mission to Europe in 1882-83, Itō Hirobumi, the “father of the Meiji Constitution,” was famously taken with Prussian, German, and Austrian versions. This quest for models had become standard during the nineteenth-century contagion of constitutions. It was the age of cosmopolitan or constitutional plagiarism, which produced a “pick and mix” approach to constitutional drafting.¹⁵

Meiji leaders “picked” from the common conventions of that time, particularly constitutional monarchy (*rikken kunsei*) in its European forms, which combined a ruler with a parliament and included the rights and duties of the people. Japanese drafters frequently called

¹³ From the *Man'en gannen* mission of 1860, the first remark by Yanagawa, the second by Muragaki, the head of the mission. Quoted in Masao Miyoshi, *As We Saw Them: The First Japanese Embassy to the United States* (Philadelphia: Paul Dry Books, 2005), pp. 85-86.

¹⁴ For Kido, Marlene Mayo, “The Western Education of Kume Kunitake, 1871-6,” *Monumenta Nipponica* 28, no. 1 (Spring 1973), p. 26; Ōkubo Toshimichi, “Rikken seitai ni kansuru ikensho” [1873], https://www.ndl.go.jp/modern/e/cha1/description_08.html; see Masakazu Iwata, *Ōkubo Toshimichi* (Berkeley: University of California Press, 1964), pp. 176-8.

¹⁵ Colley, “Writing Constitutions and Writing World History,” pp. 165, 175.

such “shared rule of ruler and people” (*kunmin dōchi*, as Ōkubo termed it) a “universal” trend, when it was in fact just the historically available constitutional forms of the age. Meiji leaders then “mixed” these so-called universals with the “conditions” and “customs” of Japan, especially the imperial sovereignty described in the emperor’s 1876 order to draft a constitution as “the system established at the time of the founding of the nation.” Hence, not only the monarch, the emperor, but also his ancestors were enshrined in Article I of the Meiji Constitution as the line “unbroken for ages eternal.” Itō presented the Constitution as “the ultimate accomplishment of the objective originally entertained by the said imperial ancestors.”¹⁶ The legitimacy of mythic antiquity, now evoked by Itō to provide the unity he thought was supplied by Christianity and the legacies of absolute monarchy in Europe, was the crucial Japanese ingredient in the Meiji constitutional “pick and mix.” Thus, although it is (too) often said that Japanese were civilizational copy-cats whose constitution “imitated” Western models, in fact all modern constitutions were hybrids, all plagiarized, and all adjusted to fit local conditions. There is perhaps no better example than Simon Bolívar’s 1826 constitution for Gran Colombia, which combined separation of powers, a parliament – and a lifetime presidency.

The picking and mixing of constitutional elements was taken in hand by a handful of Meiji leaders, with Itō Hirobumi and Inoue Kowashi playing central roles in the drafting. This, too, was common practice: many constitutions were drafted in secret, without consultation, by a few, self-appointed elites, who were either in power or wanted to be. The process was often quite rushed, and not surprisingly, most of the drafters had had little or no experience in creating constitutional law. In this respect, Itō and his colleagues had more time to prepare than many of their nineteenth-century counterparts. Constitutional debate had been vigorous both in and out of government circles for two decades: leaders conducted study tours in the West and sought the help of foreign advisors like German Hermann Roesler, while the liberal opposition made the constitution a continuing focus of public politics. In some countries ratification processes brought more people into the constitutional circle, but not in Japan, where the constitution was bestowed on the people as a gift from the emperor (*kintei kenpō*). Still, the number of nineteenth-century constitutions that were what is now termed “inclusive” or participatory in their drafting

¹⁶ Itō Hirobumi, *Commentaries on the Constitution of the Empire of Japan* (Tokyo: Chūō daigaku, 1931), p. 1.

were fewer than might be imagined.¹⁷ Top-down drafting was the norm, not only by dictatorial but also by would-be democratic leaders of the day.

That said, constitutions require broader commitment than that of the drafters: the “trust which men repose in the power of words engrossed in parchment.” A process of popularization had to garner what we now call buy-in, not only by political actors, but also by the people, whether citizens of a republic or subjects of a constitutional monarchy. In Japan politically active local elites had contracted constitution fever already in the 1870s and 80s, such that a wife announced a “constitution” for the birds against her husband’s gluttony for her hens, and an educated young man drew up a domestic “constitution” for himself and his new bride.¹⁸ But at the time of the promulgation of the constitution in 1889, few Japanese knew the word *kenpō*, even though many joined the celebration in the streets of Tokyo on February 11, the announcement date chosen for maximum imperial value to coincide with the legendary founding of the empire in 660 B.C. Woodblock artists imagined the scene of the emperor bestowing the constitution as a “gift from the throne,” with an audience of Japanese and foreigners resplendent in military uniforms and Western dress.

¹⁷ On inclusion, Elkins, Ginsburg and Melton, *The Endurance of National Constitutions*, pp. 78-81.

¹⁸ Tokutomi Rōka (Kenjirō), *Omoide no ki* (1897), a semi-fictionalized account of his brother, the famous Meiji journalist and public figure Tokutomi Sohō. Quoted here from the translation by Kenneth Strong, *Footprints in the Snow: A Novel of Meiji Japan* (New York: Pegasus, 1970), pp. 101 and 354.



*Illustration of the Ceremony Promulgating the Constitution, artist unknown (1890)*¹⁹

Few understood the meaning of the festivities: one man expected that the celebration of the promulgation would, like other holidays, be repeated annually; others copied the text on scrolls and hung them high on the walls of their houses. Yet some two decades later, when the Meiji era ended in 1912, nearly everyone knew the word and many gave credence to the importance of the constitution. The now established political parties each had the word “constitutional” (*rikken*) in their names and were quick to hurl the epithet “unconstitutional” at the actions of the government. Students labeled their teachers “unconstitutional” when they overrode school rules, and geisha used the same insult about customers who did not pay what they owed.²⁰ The first of two political movements “to protect constitutional government” (*kensei yōgo*) occurred in 1912, and by the 1920s, its foreign models no longer relevant, it was simply the Constitution of the Empire of Japan. Although it remained a gift from the emperor, by then many more claimed its authority and felt empowered to speak in its name.

A constitution may be, as de Tocqueville argued, “a thing apart,” but it is never “a machine that would go of itself,” as nineteenth-century Americans’ naïve faith in their foundational law was once described.²¹ Constitutions live only in practice: in theoretical and legal

¹⁹ John Dower and Shigeru Miyagawa, *MIT Visualizing Cultures*, from Sharf Collection, Museum of Fine Arts, Boston, https://visualizingcultures.mit.edu/throwing_off_asia_01/gallery/pages/2000_226.htm.

²⁰ Carol Gluck, *Japan's Modern Myths: Ideology in the Late Meiji Period* (Princeton: Princeton University Press, 1985) pp. 228, 243.

²¹ James Russell Lowell in 1888; see Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Knopf, 1986).

interpretation, like that of Minobe Tatsukichi's famous "organ theory of the emperor," first articulated in 1912, and most important, in political interpretation and application.²² The contention between party and bureaucratic politics had long characterized Meiji constitutional debates, from the time of the contest between the Freedom and Popular Rights Movement and the government in the 1870s and 1880s.

During the first decade of parliamentary politics in the 1890s, the parties and oligarchs contended for power, with the parties gaining ground. By 1900 an oligarch, in this case Itō Hirobumi, formed his own party, the Seiyūkai, and over the next decades, the struggle continued as before. The Meiji constitution permitted party cabinets in the 1920s and national unity bureaucratic cabinets in the 1930s: same constitution, different systems. Yet the Meiji constitution was never amended. Amendment would have required submission by the emperor and two-thirds majority of both houses, a provision common in constitutions of the time, and one that made amendment easier than it became in the 1947 Constitution, which requires parliamentary approval plus a referendum. Unamended, the same constitution supported both party and bureaucratic governments, but because of the emperor, rendered "sacred and inviolable" in Article III, it also enabled the government to act in his name and suspend parties altogether in 1940. Although by the time of the defeat in 1945, Japan had experienced over a half century of constitutional government, the Meiji constitution proved in practice to be a flawed hybrid of imperial and parliamentary government.

CONSTITUTIONALISM IN POSTWAR JAPAN

Around the world and across two centuries, war spread constitutional ideas and impelled constitutional revision and replacement, whether after victory, defeat, or independence. The twentieth century saw three global waves of constitution-making. The first wave, after World War I, framed the modern constitutional universe of bicamerality, less monarchy, more democracy, greater civil and social rights. The second wave, following the Second World War, after totalitarianism, war, and decolonization, widened the constitutional circle. The third came after the end of the Cold War in the 1990s, though in truth this seems less a wave than a steady surge – 103 new or revised constitutions came into force between 1990 and 2019.²³ The

²² Frank O. Miller, *Minobe Tatsukichi: Interpreter of Constitutionalism in Japan* (Berkeley: University of California Press, 1965).

²³ <https://www.constituteproject.org/search?lang=en>.

constitutions in each period reflected their time, not only in the specific historical reasons for amending, revising, replacing in one country or another, but also in the available provisions circulating in global discourse at those moments. Japan's draft constitutions of 1945-46 were products of the mid-twentieth-century constitutional universe, just as the Meiji drafts and final document had been products of their own global day.

After the Second World War under Allied Occupation, Japanese and American constitutional traditions intersected. Those who concurred on the general need for constitutional change did not agree about its specifics, but both sides were responding to war and creating conditions for peace. Like Germany's Basic Law [*Grundgesetz*] of 1949, the Japanese counterpart was in this sense a "reactive constitution."²⁴

As in Meiji, multiple drafters worked in and outside the government, some proposing minimal changes to the 1890 Constitution, others beginning from scratch. The liberal constitutional theorist Minobe Tatsukichi had been denounced and driven out of the Diet in 1935 for his "organ theory of the emperor" as a part of -- not above -- the state. But after the war, as an advisor to the government's Constitutional Problems Investigation Committee (the Matsumoto Committee), Minobe initially argued for democratization under an unchanged Meiji constitution, which he believed could accommodate a liberal system were it differently interpreted.²⁵ In contrast, the progressives in the Constitution Research Association (*Kenpō kenkyūkai*) worked on the basis of rupture. They delivered their private draft to occupation officials in December, 1945, before the Matsumoto draft was completed. This group of leftists, scholars, and constitutional lawyers began with popular sovereignty and relegated the emperor's role to "rituals." That parts of it were deemed "democratic and acceptable" by the Occupation drafters suggests the range of Japanese constitutional opinion in play at the time.²⁶ This was the first of twelve

²⁴ Peter Graf Kielmansegg, "The Basic Law: Response to the Past or Design for the Future," *Forty Years of the Grundgesetz (Basic Law)* (Washington, D.C.: German Historical Institute, 1990), p. 6, https://www.ghi-dc.org/fileadmin/user_upload/GHI_Washington/Publications/Bulletin28-1/bu06.pdf.

²⁵ In the same month as the Committee was formed, Minobe published three articles outlining his position in the *Asahi shinbun* (Oct. 20-22, 1945). See Miller, *Minobe Tatsukichi*.

²⁶ Chaihark Hahm, Sung Ho Kim, *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea* (Cambridge: Cambridge University Press, 2015), pp. 142-43.

Japanese drafts submitted to the occupation. The ultimate draft of course was produced by Americans, who took the start-from-scratch approach to what became a wholesale amendment of – in fact, replacement for – the Meiji constitution. Although they counted no constitutional scholar among them, the twenty-eight members of the Government Section drafting committee exhibited a diversity of thinking. Milton Esman, for example, the only Occupation drafter with an academic background in political science, proposed that the prime minister be appointed by the emperor. On both Japanese and American sides, the constitutional debates were intense and vigorous.

And again as in Meiji, the origins of the 1947 Constitution were multiple, the result of a quest for models that might best suit postwar Japan. The tables in the drafting room were laid with exemplars from which to borrow what seemed to the committee members the best practices of the day. For in fact no constitutional drafters ever really start from scratch. Tom Paine had urged Americans to “frame a CONTINENTAL CHARTER, or Charter of the United Colonies (answering to what is called the Magna Carta of England.” And after 1776 the British carried American constitutional discourse back across the Atlantic.²⁷ Constitutions are not exercises of the imagination; they are woven from and into the fabric of their global time and national space.

To facilitate this particular episode of “constitutional plagiarism,” Beate Sirota Gordon, a 22-year-old civilian and the only woman on the committee, famously requisitioned a jeep and driver to visit the libraries still standing in bombed-out Tokyo. Careful to take only one or two from each in order to conceal the “top-secret” nature of the constitutional drafting, she returned with texts of the constitutions of Weimar Germany, France, Scandinavian countries, the Soviet Union, and the United States. Her fellow committee members leapt on the books, she recalled, like “students cramming for a particularly important exam.”²⁸ Their quest for models was reminiscent of Itō Hirobumi’s on his extended constitutional study mission to Europe in 1882-83.

²⁷ Linda Colley, “Empires of Writing: Britain, America and Constitutions, 1776-1848,” *Law and History Review* 32, no. 2 (May 2014), p. 245.

²⁸ Beate Sirota Gordon, *The Only Woman in the Room: A Memoir of Japan, Human Rights, and the Arts* [1997] (Chicago: University of Chicago Press, 2014), p. 106. Milton Esman took another jeep, visited other libraries, including the Tokyo Institute of Municipal Research established by Gotō Shinpei and the private library of the scholar Rōyama Masamichi. Panel discussion, “We the People: A Commemoration of the 40th Anniversary of Japan’s Constitution,” University of Maryland, April 25, 1987.

And once again, the drafting approach was a version of updated pick-and-mix. By 1946 the “global script” of nineteenth-century constitutionalism had shifted and broadened in ways that reflected both the immediate wartime experience and earlier twentieth-century political thinking. Among the three principles of the 1947 Constitution identified in the 1964 report of the Commission on the Constitution – popular sovereignty, pacifism, and human rights – the commitment to popular sovereignty came from by then widely established constitutional precepts subscribed to by American drafters and Japanese progressives alike. The substantial catalogue of human rights, both negative and positive, came from the increasingly extensive rights provisions in the Weimar and other existing constitutions. And pacifism as expressed in the language of Article 9 probably came from General MacArthur with input from Charles Kades and General Whitney. But whatever its source, it was surely innovative rather than imitative of provisions found elsewhere. Yet it too had such earlier referents as the Kellogg-Briand pact and other initiatives during the post-World-War-I years.²⁹

Once translated into Japanese, the language of the 1947 Constitution was condemned as *batakusai* (reeking of butter, meaning Western), and parts of the text did indeed directly echo the U.S. constitution, the Declaration of Independence, and the Atlantic Charter. It also reflected the U.S. wartime planning document on “Reform of the Japanese Government System” (SWNCC 228). Yet the document was not as totally American as some critics liked to allege. Recent comparative studies have shown that nearly all constitutions employ the “global idiom” of their time. “We the people,” for example, is a “meme” that appears in nearly 15% of 476 constitutional preambles since 1789; “rule of law” in 11%; and “rights of man” in 10%. All three phrases became much more common after World War II and again after the end of the Cold War in the 1990s, marking the most recent global wave of innovative imitation.³⁰

When Beate Gordon was assigned to draft the women’s rights section -- because “You’re a woman,” her superiors were said to have told her -- she combined her childhood memories of the unequal status of Japanese women with progressive provisions from the Scandinavian,

²⁹ Theodore McNelly, *The Origins of Japan’s Democratic Constitution* (Lanham, MD: University Press of America, 2000), pp. 105-128.

³⁰ Tom Ginsburg, Nick Foti, and Daniel Rockmore, “‘We the Peoples’: The Global Origins of Constitutional Preambles,” (University of Chicago Public Law and Legal Theory Working Paper No. 447, 2013), pp. 119-21, 129.

Weimar, and Soviet constitutions. Her lengthy, detailed list of positive rights shocked some of her fellow drafters whose point of reference was the comparatively laconic U.S. Bill of Rights, not to mention members of the Japanese government for whom women's rights did not appear on the political agenda. Yet, a surprising number of her provisions survived in the final text, including my favorite, Article 24: "Marriage shall be based on the mutual consent of both sexes and maintained through mutual cooperation with the equal rights of husband and wife as a basis." While such a list of rights might have seemed outlandish to the Japanese and Americans involved in constitution-making in 1946, in fact it aligned with the "rights creep" that characterized constitutions written in the decades after the war. Some of the proliferating constitutional rights were "generic rights" like freedom of religion, found in 97% of all constitutions in force in 2006. Others, such as women's rights, became generic over time, appearing in 35% of constitutions in 1946 and 91% by 2006.³¹ In this respect the provisions in the 1947 Constitution written by a 22-year-old Austrian-born woman were both abreast, and ahead, of their time.

If popular sovereignty, women's rights, an independent judiciary and other items exemplified the "pick," the American drafters devoted considerable attention to the "mix" as well. They were acutely conscious that they were engaged in an unusual and likely dubious enterprise of writing another country's constitution. Esman predicted the law would not outlast the occupation and later said he had been appalled by the all-American process and viewed its outcome a mere "patching up of the Meiji constitution."³² I confess that my own image of the drafters was transformed after I appeared with five of them – Charles Kades, Beate Gordon, Osborne Hauge, Richard Poole, and Milton Esman – on the occasion of the fortieth anniversary of the constitution in 1987.³³ I had assumed that the "mother and fathers of the Japanese constitution," as someone called them, would be at least self-

³¹ David S. Law and Mila Versteeg, "The Evolution and Ideology of Global Constitutionalism," *California Law Review* 99, no. 5 (Oct. 2011), pp. 1194-1200.

³² "Would not outlast": quoted in Theodore McNelly, *The Origins of Japan's Democratic Constitution* (Lanham, MD: University Press of America, 2000), p. 173; "Patching up": quoted in R. W. Kostal, *Laying Down the Law: The American Legal Revolutions in Occupied Germany and Japan* (Cambridge, Harvard University Press, 2019), p. 131. Richard Poole was "astonished" at a task he considered "presumptuous" and bet the constitution would not survive long after a peace treaty. ("We the People," 1987).

³³ "We the People," 1987. A similar group reconvened in Tokyo in November 1997 on the 50th anniversary, expressing similarly varied views. See McNelly, *The Origins of Japan's Democratic Constitution*, pp. 171-74.

sure and probably self-congratulatory about their collective achievement. So I thought to cut them to size by emphasizing the long Japanese constitutional tradition that preceded their intervention. What a shallow and callow thought that turned out to be. In fact, much the opposite was true. They worked to understand and respect Japanese legal, constitutional, political, and cultural practices even as they not unpredictably produced a largely “un-Japanese” document. They followed the organizational structure of the Meiji Constitution, and were attentive to the more liberal private Japanese drafts such as that of the Constitutional Research Association.

The mix therefore included earlier constitutional referents and the liberal Japanese views that had evolved, especially during the interwar period. And partly because of MacArthur's three directives to the drafters – keep the emperor, renounce war, remove all vestiges of feudalism – they were kinder to the emperor than they might otherwise have been and infinitely kinder than the other Allies at the time preferred. Considering that among Japanese government officials the provisions regarding the emperor aroused more controversy than Article 9, it is telling that of the seven drafting sections, the section on the emperor was assigned to “leftover personnel.” Hence naval Ensign Poole, age 26, drafted the clause on the emperor as symbol of the state, later recalling that the British-style monarchy was the model but that the word “symbol” as applied to a person proved to be a new coinage in Japanese.³⁴ And according to Beate Gordon, they vowed not to talk publicly about their role in writing the constitution for some thirty years.³⁵ Vow or no, it was true that most of the drafters' appearances, interviews, and writings appeared in great number after the late 1980s, with Beate Gordon and Charles Kades, the lawyer and colonel who headed the committee, the most prominent in the U.S. and especially in Japan, where their stories became part of constitutional folklore.³⁶

The now famous drafting process featured a small group of Americans, most with no expertise, experience, or expectation of suddenly constituting a constitutional convention. On Saturday,

³⁴ Poole quoted in “Vague Constitution Needs Clarification,” *Mainichi shinbun* (May 3, 2000).

³⁵ E.g., Takeshi Itō, “A Long Interview with Beate Gordon,” Part 2 (April 26, 2007), <http://www.shinyawatanabe.net/atomicssunshine/BeateSirotaGordon/en/interview#part2>.

³⁶ Kades, like Gordon, was a natural raconteur whose stories were sometimes embellished as he repeated them. For a scholarly version, Charles Kades, “The American Role in Revising Japan's Imperial Constitution,” *Political Science Quarterly* 104, no. 2 (Summer 1989), pp. 215-247.

February 1, 1946, the leaked plan of the government's Constitutional Problem Investigation Committee (the Matsumoto draft) was deemed too conservative, especially on the matter of sovereignty and the status of the emperor. On Sunday, General Whitney informed the Government Section of MacArthur's directive for them to create a *model* for a constitution, to show the Japanese government the magnitude of the changes the occupation had in mind. On Monday, February 3, the committee was convened, and on the following Tuesday, February 12, the draft was delivered to and approved by MacArthur. Hence, the perceived image of the constitution-in-one-week, a rush that was more common to constitution drafters around the world than the deliberateness of the Meiji leaders, also a small group but one with enough time to make constitutional study tours of Europe. As in many other national settings, the drafting was both top-down and secret. And without consulting the Japanese, the "model" was – in the second perceived image -- rammed down the throats of the government. It felt "like swallowing boiling water" to members of the Shidehara cabinet who had no choice but to endorse the draft on February 22.³⁷ The heated tug-of-war between the Japanese translation and its retranslation into English was provisionally concluded during the famous all-night meeting of March 4-5, 1946 and the constitution was made public by the Japanese government the following day.

Press coverage and Diet debates followed from June to October, with some revisions, including the so-called Ashida amendment, which added a phrase to the prohibition of war potential in the second paragraph of Article 9.³⁸ On November 3, 1946, the birthday of the Meiji Emperor, the government promulgated the constitution, not in the name of the emperor, but approved by him. His approval confirmed the new constitution as a formal amendment to the Meiji constitution -- ironically, since the new constitution granted him no such authority. So then: in 1947 whose constitution was it actually? MacArthur's, as it was frequently known, or the Japanese people's, as stated in the preamble and represented by the Diet? International response was often skeptical at best. The British diplomat George Sansom, who later called the constitution "idiotic," had been instructed by the Foreign Office at the

³⁷ Quoted in Dale M. Hellegers, *We the People: World War II and the Origins of the Japanese Constitution*, vol. 2 (Stanford: Stanford University Press, 2001), p. 534.

³⁸ "In order to achieve the aim of the preceding paragraph" is the phrase, which occasioned commentary on Ashida's possibly thinking about moving toward rearmament.

time that there was no recourse but to accept MacArthur's "outstanding un-Japanese constitution."³⁹

The clamor for revision began almost immediately, on the grounds that the constitution was indeed imposed by the occupation. Despite support for Article 9 and other provisions, its alien provenance was hard to miss and just as hard to bear. The first Commission on the Constitution, established by those who favored revision, began deliberations in 1957 and issued its voluminous final report in 1964. Although the majority of commissioners favored revising the law, the report in the end made no recommendation for revision. One view as to whose constitution it was appeared in a masterly double-negative: "It cannot necessarily be said that the present Constitution was not enacted on the basis of the free will of the people."⁴⁰ Other views emphasized not the alien origins but the effective functioning of the constitution in the present. In the event, nothing came of the massive study, which initiated decades of debate over revision that have not ended yet.

The occupation and the government immediately set out to popularize the new law. Among its activities, the Constitutional Popularization Society [*kenpō fukyūkai*] chaired by Ashida Hitoshi, promoted the "Constitution Song" and produced a series of magic lantern slides [*gentō*] showing the abuses under the prewar system and the blessings (almost literally) of human rights granted by the new constitution.⁴¹

³⁹ Roger Buckley, "Britain and the Emperor: The Foreign Office and Constitutional Reform in Japan, 1945-46," *Modern Asian Studies* 12, no. 4 (1978), p. 569, 566.

⁴⁰ John M. Maki, *Japan's Commission on the Constitution: The Final Report* (Seattle: University of Washington Press, 2017), p. 223.

⁴¹ Constitution Song, <https://www.ndl.go.jp/constitution/e/outline/05outline.html>
Jinken sengen gentō [Proclamation of human rights slides] Alfred Hussey Collection: Japan's Constitution Slides, University of Michigan Collections, <https://quod.lib.umich.edu/h/hussey/lic>.



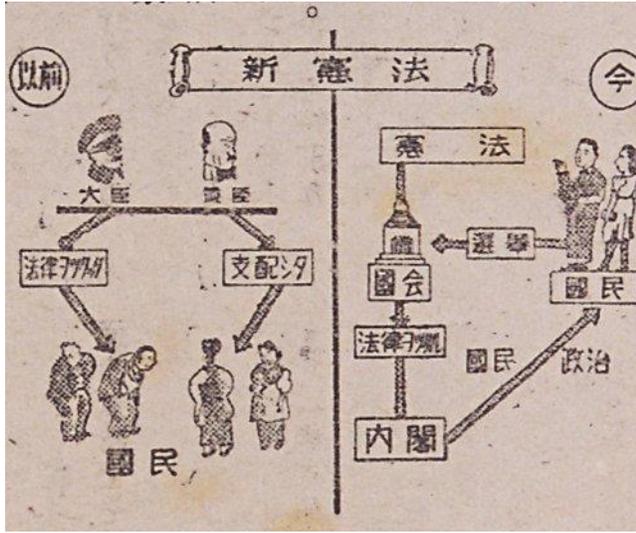
New human rights take wing under the “new constitution”



Granted something precious: the “constitution” holds “basic human rights”

The Association distributed twenty million copies of its 1947 book, *Atarashii kenpō akarui seikatsu* [New constitution, bright life], which included “then” and “now” diagrams of the change in the political system, with the people ruled from above (then) and the people electing the Diet (now).⁴²

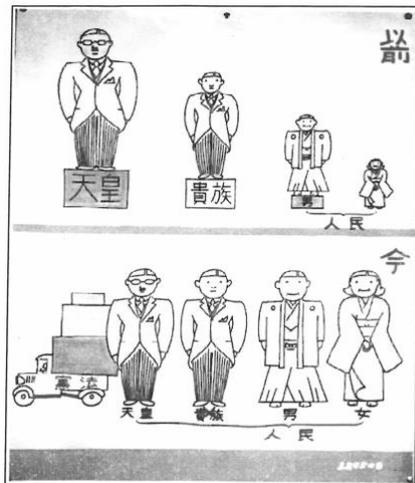
⁴² <https://www.ndl.go.jp/constitution/e/shiryō/05/141shoshi.html>.



The New Constitution

The Occupation produced its own educational graphic on the subject, with the notable difference of the emperor, who was cut down to a size equal to that of the people in the American drawing but who did not figure in the Japanese schema.⁴³

⁴³ In John Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W.W. Norton, 1999), p.368. A further difference is that the word for people in the Japanese drawing is *kokumin* [national people]; the American word is *jinmin*, the word used by progressives.



Emperor, aristocracy, men, women: then and now

However dubious the impact of these early propaganda efforts, over time the Peace Constitution [*heiwa kenpō*], as it was often called, became embedded in the popular mind, even if vaguely and without “a burning desire to revise it.”⁴⁴ By 1967, twenty years after it went into effect, 64% knew something about the content of the constitution (popular sovereignty, pacifism, human rights). Forty-three percent said the constitution had not been imposed on Japan (compared to 31% in 1956). Of the two-thirds with some knowledge of the constitution, 49% said it did not much matter if it was based on the occupation draft and 75% thought its objective was peace. Only 40% of those polled had read the document, but 56% thought that it was in sum a good constitution.⁴⁵

For years the anti-American Left defended the constitution, primarily on behalf of Article 9 while the pro-American Right, in particular the LDP, pushed for revision. The contest over revision changed with the shift in contemporary issues: rearmament, the constitutionality of the Self Defense Forces, collective self-defense, civic rights, the environment, and so on. Repeated polls on revision

⁴⁴ Shiro Sakaiya, “Decoding Public Opinion Polls to Understand the Japanese People’s Fickle Attitude towards the Constitution: A Look Back at the Constitutional Revision Debate and the ‘Neo 1955 System’” [original Japanese in *Chūō kōron* (March 2018), pp. 76-87], *Discuss Japan* no. 49 (Oct, 11, 2018), p. 11, <https://www.japanpolicyforum.jp/politics/pt20181011123227.html>. For the argument against the common view of the Japanese public’s strong support of the constitution, see his book, *Kenpō to yoron: sengo Nihonjin wa kenpō to dō mukiatte kita no ka* (Chikuma shobō, 2017).

⁴⁵ Government poll, February 1967: *Asahi shinbun* (May 3, 1967). Comparisons between 1956 and 1965: *Nikkei shinbun* (May 3, 1967).

fluctuated over the years, depending on current issues and the questions asked, so although it is noteworthy that support for revision declined after 2005, these numbers had changed before and would likely change again.⁴⁶ Public commitment to Article 9 remained strong, while the constitutionality of the Self Defense Forces gained support.⁴⁷ In sum, Japanese made peace with their butter-reeking constitution, whether eventually amended or not.

Commitment is one thing, practice another. Postwar political practice saw considerable change in the electoral system, the cabinet, the judiciary, and other areas without the need for constitutional amendment. LDP dominance for most of the time since 1955 was one reason for this; another was the rare use of judicial review of constitutional issues. Yet another lay in the structural stability and the reluctance to upend a system that supported it. One scholar adds that what some define as Japan's "compact" (i.e., short) or "framework-style" constitution, like its Meiji predecessor, stated its provisions in relatively general terms, leaving details to be worked out in laws and interpretation. And like its predecessor the constitutional generalities could contain politics of different stripes, liberal or conservative.⁴⁸

Direct constitutional issues did arise, such as the separation of religion and the state, heavier penalties for patricide (declared unconstitutional in 1973), and others. But the main axis of constitutional interpretation without constitutional amendment lay in the ways in which advocates for constitutional revision (*kaikenha*) and supporters of the existing constitution (*gokenha*) each managed to rationalize -- or paper over -- the gap between the letter of Article 9 and the realities of Japanese defense policy and capacity, most clearly in relation to the Self Defense Forces. In the 1950s the LDP called for constitutional revision and at the same time expanded military forces; in the 2010s, the Abe administration did much the same thing in connection with the doctrine of collective self-defense. This recurring opposition between revisers

⁴⁶ For polls over time, see Sheila Smith, Ayumi Teraoka, Masatoshi Asaoka, "Japanese Public Opinion on Constitutional Revision" (July 27, 2016); "Will the Japanese Change Their Constitution" (July 28, 2016); "Japanese Public Opinion on Constitutional Revision in 2016" (Aug. 1, 2016), *Asia Unbound*, Council on Foreign Relations, <https://www.cfr.org/blog/japanese-public-opinion-constitutional-revision>, <https://www.cfr.org/project/will-japanese-change-their-constitution>, <https://www.cfr.org/blog/japanese-public-opinion-constitutional-revision-2016>.

⁴⁷ Sakaiya, "Decoding Public Opinion Polls," pp. 8-9.

⁴⁸ Satoshi Yokodaido, "Constitutional Stability in Japan Not Due to Popular Approval," *German Law Journal* 20 (2019), pp. 263-83; on containing politics of different stripes, he uses the terms "democratic or populist," p. 278.

and protectors led one political scientist to speak of a “neo 1955 system,” in which Article 9 again divided the parties as it had sixty years earlier.⁴⁹ In the decades between these two LDP-driven “systems,” but particularly in the 1990s, changes in defense policy, budgets, and deployments meant that Article 9 was reinterpreted in fact while remaining the same in law. Constitutions live by practice, not by paper.

PERSPECTIVES ON THE PRESENT

To revise or protect the constitution is – and has always been – a political issue. This, too, is true of constitutions everywhere: they are engrossed in parchment but enacted in politics. And the nature of that politics depends on the government of the country. After he took power in 2010, Viktor Orbán rewrote the Hungarian constitution to favor himself and his party in every sector, including the judiciary and the media. By 2018 he was planning further constitutional revision to lock down his version of “illiberal democracy,” which made a mockery of democracy for the sake of political power. Constitutions are in this way inert; they live and die politically.

Thinking about constitutional revision in Japan means locating the politics that drives it. The argument over un-Japanese origins is at base a political ploy. The contrast with Germany is suggestive. In the 1980s the historian Wolfgang Mommsen marveled at Japanese arguments for revision based on the law’s alien origin. One could well argue, he said, that West Germans “have to some degree lived since 1948 [sic] under a system which was dictated to us. Nonetheless, the present situation is such that no German would ever raise this kind of question. They would all say that Germans have come to acknowledge the system, that it has acquired a quality in itself.” This “tradition-based legitimacy” persisted, even as the law was revised more than sixty times.⁵⁰ Because West German drafters during the occupation were greatly concerned that the document be provisional -- until the divided country was re-unified -- it was called not a constitution but a Basic Law. After unification in 1990, the opportunity arose to write a new law for a united Germany, based on Article 146 of the original Basic Law, which called for a constitution “freely adopted by the German people.” Yet the parliament voted not to do so but instead to retain and amend the 1949

⁴⁹ Sakaiya, “Decoding Public Opinion Polls,” p.2.

⁵⁰ Wolfgang Mommsen in Hagihara Nobutoshi, *Experiencing the Twentieth Century* (Tokyo: University of Tokyo Press, 1985), p. 59. The West German Basic Law went into effect in 1949.

Basic Law. The amended law required approval by the four Allied powers, which occupied and directly governed the country after the war. It was not therefore until the Two Plus Four Treaty of 1990 that full sovereignty was finally restored to Germany.

In contrast, Japan regained legal sovereignty when the occupation ended in 1952. Despite the US-Japan Security Treaty, US dominance in postwar Japanese foreign relations, and the belated return of Okinawa, Japan controlled its own constitutional destiny. One might argue that the “tradition-based legitimacy” accorded Germany’s Basic Law came to attach to Japan’s postwar constitution as well. Perhaps that is the reason why wholesale revision of the constitution did not occur: it was legitimated by more than seventy years of practice. It is this stability, or status quo, that likely accounted for the lack of powerful popular political support for constitutional change.

Meanwhile, the positions of the political parties remained divided, as evidenced in the various constitutional proposals produced since 2005, which varied in details, with the LDP advocating the most forceful changes in Article 9. In his speech on Constitution Day, May 3, 2019, Prime Minister Abe repeated his pledge to have a new constitution in effect by 2020, writing the Self-Defense Forces into Article 9 to “put an end to the debate over its constitutionality.”⁵¹ Abe was scarcely the first -- and likely not the last -- LDP prime minister to uphold the position held by the party since 1956. In 2017, at early 100 years of age, former prime minister Nakasone summed up a political lifetime of advocacy for constitutional revision with the same arguments and the much the same proposals for Article 9 as those espoused by Abe.⁵² As the evocation of a “neo 1955 system” suggests, the politics of party alignment were predictable, even if the names of the parties had changed. Clearly the recently formed Constitutional Democratic Party did not have the electoral clout to overwhelm the LDP, but it is equally clear that the politics of constitutional revision did not rest with the parties or the government alone.

The constitutional drafts and proposals produced by newspapers like the *Yomiuri* and business organizations like Keidanren sometimes overlapped, expanded, or contested those of the Diet commissions. Taken all together they included a broad range of provisions, ranging

⁵¹ “Abe Stands By 2020 Target for Amending Japan’s Constitution,” *Nikkei Asian Review* (May 4, 2019), <https://asia.nikkei.com/Politics/Abe-stands-by-2020-target-for-amending-Japan-s-constitution>.

⁵² Yasuhiro Nakasone, “Upon the 70th Anniversary of the Constitution: Summary of Debate on the Constitution of Japan,” *Asia-Pacific Review* 24, no. 2 (2017), pp. 1-36.

from environmental and privacy rights, free public education, emergency powers, to strengthening the family and articulating the uniqueness of Japanese culture and history. As before, the span of suggested provisions reflected contemporary global practices – environment, expanded human rights, and the like – and local concerns such as the emperor and Japanese cultural distinctiveness: a pick-and-mix of twenty-first-century constitutional discourse.

Two aspects of the politics of popular opinion seemed potentially important in the endless constitutional debates. The first was the grass-roots interest in the question: not only the movements to preserve Article 9 but others interested in gender rights, the environment, and diverse social issues, with some ad hoc groups meeting to talk together in constitutional cafes (*kenpō kafue*).⁵³ Such interest constituted no cohesive political force but it did signify a renewed awareness of constitutional issues. The second was the confusing polls conducted over decades to measure public views on revision. Inconsistent and often ambiguous questions elicited shifting responses, though without demonstrating overwhelming support one way or the other. The numbers favoring revision peaked at 42% in 2004, declining since then, with particular drops after the LDP presented new draft proposals in 2005 and 2012.⁵⁴ Of the 56% who opposed revision in one July 2019 poll, some did so out of distaste for Abe, others because they equated revision with the alteration or abolition of Article 9.⁵⁵ In general, popular support for the “Peace Constitution” held over the years, not yet reaching a political tipping point in favor of revision, at least of the sort proposed by the LDP.

If the politics of constitutional revision is one abiding factor, recurrent patterns of historical change are another. According to my modestly titled “Grand Unified Theory of Japanese History,” a disinclination toward social disorder led to much of Japanese history occurring in long periods of incremental change. The theory can explain abrupt change, too, such as the Meiji Restoration or the postwar reforms,

⁵³ Tessa Morris-Suzuki, “The Constitution, Human Rights, and Pluralism in Japan: Alternative Visions of Constitutions Past and Future,” *The Asia-Pacific Journal: Japan Focus* 16, no. 5 (March 1, 2018), <https://apjff.org/2018/5/Morris-Suzuki.html>.

⁵⁴ See Kenneth Mori McElwain, “What Do Japanese People Want from Their Constitution?” paper prepared for the Conference on Constitutional Reform in Japan, Columbia Law School, March 13, 2019.

⁵⁵ “56% Oppose Amending Constitution Under Abe Gov’t: Kyodo Poll,” *Kyodo News* (July 23, 2019). A Jiji Press poll in August showed 41% opposed, underlining the slipperiness of these polling results, <https://www.nippon.com/en/news/yjj2019081600728/41-pct-oppose-constitutional-revision-under-abe-cabinet.html>.

but in regard to the constitution, it is gradual incremental change that matters. The theorem says that the constitution may well be revised, not this year or next, but if and when revision occurs, the most hotly debated changes will *already have happened* in accumulated increments.

Consider the possible alterations to Article 9 in light of developments in military and security policy: among others, the founding of the Self Defense Force in 1954; sending troops abroad in PKO in the 1990s, then without the UN to Iraq in 2004; renaming the Defense Agency the Defense Ministry in 2007; articulating the principle of collective self-defense in 2015; record defense spending in 2019. In a sense, the changes in Article 9, paragraph 2 had *pre-occurred* in incremental fashion over the postwar decades. Opinion polls, however slippery, suggested that ever greater numbers of Japanese had come to regard the Self Defense Forces as constitutional (62% in 2017), accepted as part of the contemporary status quo.⁵⁶ And this also held for those who responded that they opposed revision. If the politics of constitutional revision, both governmental and popular, does result in making the SDF constitutional, that change alone will seem to many -- though certainly not to all and not to Japan's Asian neighbors -- as much a description of present realities as a departure from them.

Although my theory stresses the importance of long periods of incremental change in Japan, change by reinterpretation is common to long-lived constitutions around the world. Constitutions change by amendment but they also change by politics, by power, by "informal modes" of reinterpretation, often as in Japan within a framework of structural stability.⁵⁷ Constitutional reform is a matter of historical time and transnational space. Japanese are now more than six decades into the debate calling for revision of the 1947 Constitution. Who is willing to wager if or when it might happen?

⁵⁶ Sakaiya, "Decoding Public Opinion Polls," p. 9.

⁵⁷ See Rosalind Dixon and Guy Baldwin, "Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate," *American Journal of Comparative Law* 67, no.1 (March 2019), pp. 145-76.