IMPOSED BUT DEMOCRATIZED CONSTITUTION: A POSTERIORI DEVELOPMENT OF THE LEGITIMACY OF THE JAPANESE CONSTITUTION

Masahiko Kinoshita
CONSTITUTION-MAKING IN POST-AUTHORITARIAN STATES

- The contexts of constitution making

(1) Authoritarian States to Democratic State
(2) There is potentially significant involvement of international community

Ex. Japan, Germany, Cambodia, Kenya, Iraq, Afghanistan・・・
PARTICIPATORY CONSTITUTION-MAKING

- Guiding Principles

(1) Public Participation

(2) Inclusiveness (including gender equity) and Representation

(3) Transparency

(4) National Ownership

J Cottrel and others, Constitution-Making and Reform: Options for the Process
PARADOXES OF PARTICIPATORY CONSTITUTION-MAKING

- Participatory constitution-making has been held to have more legitimacy than elite-dominated constitution-making.
- However, participatory constitution making
  (1) more time,
  (2) difficulties in protecting minorities,
  (3) people unfamiliar with democracy.
## BENEFITS AND RISKS

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<th>Benefits</th>
<th>Internationally Imposed Constitution Making</th>
<th>Participatory Constitution Making</th>
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<td>Short time</td>
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- **Benefits**
  - Short time
  - Universal Democratic Principles
  - Protection of minority rights

- **Risks**
  - Lack of Legitimacy
  - Discrepancies with local culture
  - Lack of Local Knowledge
THE CASE STUDY OF JAPANESE CONSTITUTION

- 1946 Constitution
  (1) Internationally imposed constitution-making
  (2) Elite dominated constitution-making

However,
(1) 1946 Constitution has not been amended in 75 years.
(2) Japan has developed as a liberal democratic country.

Ex. Global Freedom Score 96/100
TWO TYPES OF CONSTITUTION

▪ “Large-c” constitutions
A legal document, or set of legal documents, that
(1) proclaims its own status as supreme or fundamental law,
(2) purports to dictate the structure, contours, and powers of the state, and
(3) may also be formally entrenched, in the sense of being harder to amend or repeal than other laws.

▪ “Small-c” constitutions
the body of rules, practices, and understandings, written or unwritten, that actually determines who holds what kind of power, under what conditions, and subject to what limits.

David S. Law, Constitutions, The Oxford Handbook of Empirical Legal Research
JAPANESE CONSTITUTIONAL ORDER

- **1946 Constitution** ("large-c" constitution)
  1. Compact Constitution
  2. Delegation to Legislation
     Except: Democratic Political process, Separation of Power, Rights of Criminal Defendants

- **Constitutional Management** ("small-c" constitution)
  1. Judicial Passivism
  2. Constitutional Doctrines made by the Political Branches
     Ex. Article 9 (Pacifism Clause)
## THE RELATIVITY OF NORMATIVE DIFFERENCES

### Participatory Constitution Making

<table>
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### Japan Model (A Posteriori Participatory Constitution Making)

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FUNCTIONAL BENEFITS OF JAPANESE MODEL

- Benefits of Internationally Imposed “Large-c” Constitution
  (1) Saving time
  (2) Establishing neutral governmental structure
  (3) Protecting the rights of minorities against majorities

- Benefits of Democratic “Small-c” constitution making
  (1) It can take enough time to reconcile the ideals of constitutionalism with local culture and consciousness.
  (2) It can be based on the consciousness of the people after democratization.
PREMISES OF THE JAPANESE MODEL

- Political Freedom, Criminal Due Process
- Imposed Statutes
- International Supervision for several years