Japan’s Constitutional Law, 1945–1990

1 JAPAN’S CONSTITUTIONALISM SINCE 1945

The barbarism of the Second World War ended with Emperor Hirohito’s announcement of surrender on August 15, 1945; Japan has fought in no war since, despite the Cold War environment and the wars of Asian geopolitics. That is part of the remarkable story of constitutional transformation which began under the United States-led Occupation (September 2, 1945–April 28, 1952) and continues on today. Peacefulness has replaced myopic nationalism and militarism at home and abroad; capricious authoritarianism in the name of the emperor is gone; and a revolution for human rights, more democratic choice of leaders, and a responsible government of limited and divided powers has been institutionalized.

The Constitution of Japan was drafted, debated, approved by parliament, and promulgated by the emperor between February and November, 1946, in the form of a revision of the 1889 Constitution of the Empire of Japan (the so-called “Meiji Constitution”); it came into effect on May 3, 1947. However, radical systemic changes began in the fall of 1945 when personnel working in the General Headquarters (GHQ) of “SCAP” (Supreme Commander for the Allied Powers), General Douglas MacArthur, disassembled the old order and served as the catalyst for the new democratic order required by Japan’s acceptance of the Potsdam Declaration. Unlike Germany and southern Korea, Japan was not ruled directly by the Allied Powers, but indirectly by means of directives called “SCAPIN” (“IN” referred to the index number of a directive) to Japan’s government. SCAPIN were converted by the government into laws, ordinances, or new policies, or led to the abolition of repressive laws and agencies. For example, freedom of expression swept through Japan with the issuance of SCAPIN 66 (September 27) and 93 (October 4). The government had attempted to censor publication of a photograph of the diminutive Emperor Hirohito alongside the imposing MacArthur, and met with a quick and decisive SCAPIN response overruling the censorship. Another example is the new House of Representatives Election Law of December 1945 which gave women the right to vote for the first time and lowered the voting age from twenty-five to twenty.
Although some still speak of the 1947 fundamental law as the “New Constitution,” by comparative standards the Constitution of Japan is one of the world’s venerable basic legal documents. Of roughly 180 single-document national constitutions in effect in 1994, Japan’s is one of about twenty whose ratification dates back before 1950. Its longevity is particularly striking when viewed against the kaleidoscopic backdrop of constitutional changes occurring around the world since 1945.

World patterns in constitutional development

For perspective, a few historic patterns. Most non-Western states of today became independent after 1945; their acquisition of independent nation-statehood represents the most fundamental constitutional revolution in the world’s collective political system in the past fifty years. Diverse forms of colonialism and United Nations trusteeship have ended, for Japan in eastern Asia, for the United States in the Philippines, Cuba, Panama, and South Pacific island territories, for the United Kingdom, France, Portugal and other European countries in Africa, Asia, the Middle East, and the Caribbean, and more recently for the Union of Soviet Socialist Republics (USSR) in its constituent Republics, Mongolia, and East Europe.

A second pattern in the second half of the twentieth century is unprecedented creative experimentation around the world in forms of government and law under written constitutions, as each nation-state has sought stability and appropriate definition of its constitutional identity, by writing, rewriting, amending, or re-interpreting its constitution, or by a combination of the above. As an example of the latter, the United States began revolutionary redefinition of its constitutionalism to fully legitimize racial equality for the first time during the 1950s and 1960s, by law, amendment, judicial interpretation, and a mass movement driven by African-American and liberal elites and religious conviction. France freed itself from its colonialism in “Indochina” (Vietnam, Cambodia, Laos) and in Algeria in the process of losing wars and regaining stability under the 1958 Constitution of the Fifth Republic. Most of the pieces of the broken Soviet bloc emerged as social democracies modeled on Western European constitutional practice. And in the 1990s South Africa remade itself from within, replacing in 1994 a minority apartheid regime with majoritarian democracy. More generally, over 125 countries trace the ratification of their constitutions back no farther than 1970. The frequency of revisions or amendments in some areas has been due to leadership changes after independence and to stages of adjustment in a process of developing stable government responsive to indigenous political realities, sociolegal culture, and economics as well as to transcultural principles of modern government such as human rights, political accountability, and predictability in legal practice.

A third phenomenon, the end of the Cold War, has given new elbow room since the late 1980s for national and subnational self-definition around the planet in countries long locked into the logic of bipolar nuclear deterrence. Although a welcome sign of long-desired collective freedom, the re-emergence of intense ethnonationalism sometimes resulted in violent conflict (for example, in the former USSR and Yugoslavia and in Africa). In the name of preserving group identity and self-determination as well as universalist principles of human rights and humane