From Imperial Myth to Democracy: Japan's Two Constitutions, 1889-2002 (review)

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emerge from its postwar era. Symbolic were a new Anglo-Japanese commercial treaty in 1962—the first since before the war—Emperor Showa's visit to Britain in 1971, and the queen's coming to Japan in 1975. The emperor's remarks in London avoided reference to the war, but the press and POW groups did not allow the public to forget it. As in the 1930s, Japan was increasing its exports, and charges of dumping increased tensions in the mid-1970s. Japan imposed restraints on its exporters in an effort to curb trade surpluses.

All the essays are well researched and written, and fit comfortably into the style of conventional diplomatic history. The organizational structure gives some variant perspectives on the treated eras. While it is hoped that the volume on cultural relations will address the role of the arts, popular culture, and values in Anglo-Japanese relations, there is no evidence in the present volume of cross-fertilization with cultural history. The work would benefit from a concluding, comprehensive essay and fuller information about the contributors.

Overarching themes include trade friction, British anxiety over Japanese relations with China, and the hegemonic shadow of the United States. Frequently, spokespersons on both sides have appealed to a presumed legacy of affinity between the two countries; but as Braddick writes, the emotional bond is felt mostly on the Japanese side. The two nations have seen their vital political and economic interests alternately mesh and clash over the past 70 years. The Nish/Kibata volume goes a long way to clarify the vicissitudes of that interaction.

From Imperial Myth to Democracy: Japan's Two Constitutions, 1889–2002. By Lawrence W. Beer and John M. Maki. University Press of Colorado, Boulder, 2002. xiv, 234 pages. $45.00, cloth; $17.95, paper.

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With the help of American "collaboration," Japan adopted a new constitution immediately after World War II[1] and subsequently transformed itself from an expansionist empire into an affluent, peace-loving democracy. Ja-

1. Beer and Maki use the term "collaboration" to characterize the American role in the drafting and adoption of the Constitution of Japan, but it can be argued that the American role extended beyond that implied by this polite term. See, for example, my essay "The August Revolution Thesis and the Making of the Constitution of Japan," in Werner Krawietz, Enrico Pattaro, and Alice Erh-Soon Tay, eds., *Rule of Law: Political and Legal Systems in Transition,* eds. *Rechtstheorie,* Beiheft 17 (Berlin: Duncker & Humblot, 1997), pp. 335–42.

pan's astonishing postwar trajectory sounds like a success story for both Japan and the United States, suggesting that the Japanese constitutional experience *vis-à-vis* the United States might serve as a model in endeavors to transform other militaristic states. Yet having borrowed almost all of our constitutional devices from foreign countries, the Japanese people can solemnly declare that we are nonetheless a little nervous about whether our constitutional system really measures up to the standards of Western constitutional democracies.

With a sober, scholarly touch, Lawrence W. Beer and John M. Maki expose (if unintentionally) several glaring tensions in the structure of the Constitution of Japan, affording insight into the dramatic modern history of Japan's constitutional system. More generally, Beer and Maki's *From Imperial Myth to Democracy* comprises an important inquiry into the development of Japan's constitutional system. Both scholarly and general readers will find the volume valuable due to its impartial viewpoint, highly readable style, and diverse appended materials.

One such constitutional tension, to which Beer and Maki refer in their discussion of the social advancement of Japanese women after World War II, relates to the Imperial Household Law (Kōshitsu Tenpan), which restricts the imperial throne to male offspring of the imperial family (p. 162). As the authors indicate, numerous constitutional scholars have argued that this law violates the equal protection clause (Article 14) of the Constitution of Japan. (Interestingly, numerous conservative politicians, in their eagerness to preserve the imperial house, share this view today.) Yet there is an air of contradiction, or even hypocrisy, surrounding the argument that the institution of the imperial house, a symbol of feudalistic prewar Japan, must conform to an ideal of equality among human beings.

As Jean-Jacques Rousseau and later Karl Marx observed,[2] the modern state destroys the feudal systems it succeeds by concentrating political power in a central government; through this process, legal distinctions between social classes are abolished and the modern citizenship constitutionally endowed with equal rights emerges. The Constitution of Japan

2. Karl Marx writes, "The *constitution of the political state* and the dissolution of civil society into independent individuals—whose relationship is Right, just as men's relationship within the estate and guild was privilege—is completed in *one and the same act*" ("On the Jewish Question," in Karl Marx, *Early Political Writings,* ed. Joseph O'Malley [Cambridge: Cambridge University Press, 1994], p. 49; emphasis in original). Jean-Jacques Rousseau writes that "we do not properly begin to become men until after having been citizens" ("Geneva Manuscript," Book I, Chapter 2, in Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings,* ed. Victor Gourevitch [Cambridge: Cambridge University Press, 1997], p. 158). The notion of the concurrent emergence of the modern state and equality among citizens has become widely known in Japan through the writings of Yōichi Higuchi. See, for example, his "L'Etat-nation et les droits de l'homme," in Yōichi Higuchi, *Le Constitutionalisme entre l'Occident et le Japon* (Geneve: Helbing & Lichtenhahn, 2001), pp. 43–56.

adopted after World War II almost fully reflected this process of modern state-building with its endowment of equal rights for citizens. Yet the constitution also provides for the maintenance of a small enclave from Japan's preceding feudal society, namely, the imperial house: the constitution both endows members of the imperial family with special privileges and deprives them of basic liberties it guarantees to ordinary citizens.

Opinions may vary on the merits of this constitutional framework, but insofar as the constitution itself provides for the maintenance of this feudal enclave, and moreover dictates that the principle of equal rights stops at the gates of the Imperial Palace, it makes little sense to argue that the Imperial Household Law, with its male-only restriction on the right of imperial succession, is unconstitutional because it violates the equal protection clause. Yet given the successive births of female offspring to the imperial family in recent years, it is no mystery—as Beer and Maki suggest—that disappointed conservative politicians have embraced this far-fetched application of the equal protection clause.

An even more glaring constitutional tension is evident in Beer and Maki's discussion of Japan's constitutional pacifism (pp. 113–21). Article 9 of the Constitution of Japan provides for a pacifist state as follows:

> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.
>
> In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

The Japanese government "recognizes a national right of self-defense and the legitimacy of using police violence against some crimes, but . . . also denies the legitimacy of taking violent initiatives to settle international disputes (for example, to contest territorial claims)" (p. 114). Beer and Maki aptly characterize this position as "quasi-pacifist" (p. 114). Given the detrimental effects of militarism on both international relations and civil society in prewar and wartime Japan, the government's position can be understood as a prudent, constitutionally based precommitment to minimizing the state's potential for militarism; as such, this position constitutes a prerequisite for the development of a healthy liberal democracy and peaceful, positive relationships with neighboring countries.

However, most constitutional scholars in Japan take a contrasting pure-pacifist view of Article 9. According to this dominant view, the article prohibits the government from maintaining any military forces whatsoever; the text of the article must be taken literally.[3] Yet most people view the protec-

3. See, for example, Tadakazu Fukase and Yōichi Higuchi, *Le Constitutionalisme et ses problèmes au Japon* (Paris: Presses Universitaires de France, 1984), chapter two; and Toshihiro

tion of their lives and property against the possibility of foreign aggression as an essential function of government, and it is highly doubtful that a national territory can be defended effectively without the presence of an armed force. Thus, the only reasonable understanding of this pure-pacifist view is that its adherents see Article 9 as a kind of moral imperative, specifically, an assertion that renouncing military force is the only good and virtuous way to live. From this perspective, this moral imperative of pure pacifism—however perilous it may be—comprises moreover a necessary demonstration of penitence for crimes committed by the Japanese against other Asian peoples during World War II.[4]

The question is whether this dominant pure-pacifist view of Article 9 is compatible with constitutionalism at all, which postwar Japan is supposed to have embraced. In the New Testament, Jesus Christ teaches a similar sort of pure pacifism, saying that if an evil man strikes you on the right cheek, you should turn the other cheek to him as well (Matthew 5:39). Christ does not mean to suggest that if you turn the other cheek, the evil man will stop hitting you; rather, you should turn the other cheek whether he stops hitting you or not, because to do so is virtuous. Although this teaching may be a praiseworthy guide for personal behavior, to impose such a comprehensive conception of goodness upon an entire society is contrary to constitutionalism in a fundamental sense.

That is, constitutionalism presupposes that individuals within a society hold diverse, even mutually incommensurable conceptions of the good; different religious doctrines each purporting to teach the "truth" exemplify such comprehensive conceptions. Yet although the members of a society may embrace a plurality of values, they are supposed nonetheless to want to participate in the wider life of society, sharing in its benefits and burdens on fair terms.[5]

To fulfill the potential of constitutionalism to provide for such participation, a clear division must be drawn between people's lives in the private and public spheres. In the private sphere, an individual is free to lead her life

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Yamauchi, "Constitutional Pacifism: Principle, Reality, and Perspective," in Yōichi Higuchi, ed., *Five Decades of Constitutionalism in Japanese Society* (Tokyo: University of Tokyo Press, 2001), pp. 27, 30–33.

4. Another possible literal interpretation of Article 9 is that it forbids only the government from maintaining military forces. In this view, individuals would have the right to conduct, for example, guerrilla warfare in the event of a foreign invasion. One of the leading commentaries on the Constitution of Japan (Hōgaku Kyōkai, *Chūkai Nihonkoku kenpō* [Tokyo: Yūhikaku, 1953], pp. 243–45) makes this argument. However, if a foreign invasion were really to transpire, this interpretation seems likely to have even worse consequences than pure pacifism would produce.

5. See, for example, John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

in accordance with her own comprehensive conception of the good. On the other hand, she must wear the mantle of equal citizenship in the public sphere, particularly in her participation in public deliberation concerning the interests of the society as a whole. In such public deliberation, the individual must reason independently of her private conception of goodness, for collisions between incommensurable values have the potential to destroy the fragile, artificial public sphere. The imposition of pure pacifism on an entire society would constitute an exercise in a failure of such public reasoning.

Thus, the pure-pacifist view that predominates among constitutional scholars in Japan is disturbing, not least because it reveals that most Japanese constitutional scholars fail to recognize the serious tension between constitutionalism and pure pacifism. And as Beer and Maki observe, Japan's national security has benefited largely from "quasi-pacifism" implemented by the government and approved by most Japanese people (p. 120), not from pure-pacifism advocated by Japanese scholars.

Beer and Maki also report on the establishment of two Committees to Investigate the Constitution—one committee for each house of the Diet—in 1999, on the initiative of four political parties, including the dominant Liberal Democratic Party (p. 182). The task of these committees, according to the legislation that established them, is simply to conduct broad and comprehensive research on the constitution.[6] Everyone knows, however, that their real agenda is to recommend revisions to the constitution. Beer and Maki observe that most of the controversy surrounding these committees centers on whether, and if so how, to modify the peace provision of Article 9 (p. 183).

I personally maintain, as do "many of Japan's most respected constitutional lawyers," that there is little need for this legislative exercise (p. 183). Considering the substantial contributions that the constitution in its present form—and in particular Article 9—has made to promoting Japan's liberal internal democracy and peaceful international relations, this view seems more prudent than that of the legislators who established these committees, who have apparently forgotten that an important purpose of a rigid constitution is to force mediocre politicians such as themselves to concentrate their energies on addressing the sort of day-to-day political issues to which their abilities are equal.[7] And as Beer and Maki observe, "any movement to modify Article 9 . . . might awaken fears abroad, at least among Japan's Asian war victims" (p. 115).

In conclusion, however, I suspect that these "respected constitutional

6. The Diet Law, article 102–6.

7. My argument here is indebted to Russell Hardin. See especially chapter seven of his *Liberalism, Constitutionalism, and Democracy* (Oxford: Oxford University Press, 1999).

lawyers"—though rightly resistant to the efforts of legislators to amend the constitution—will nonetheless need to rethink the literal reading of Article 9 to which the majority of them adhere, as well as the basic understanding of the relationship between constitutionalism and pacifism upon which this reading is predicated.

Antitrust in Germany and Japan: The First Fifty Years, 1947–1998. By John O. Haley. University of Washington Press, Seattle, 2001. xiii, 249 pages. $65.00.

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Japanese antitrust has been of interest to many because weak antitrust has been associated with barriers to trade, investment, and economic transformation. During the Structural Impediments Initiative (SII) talks of 1989–91, the United States pressed Japan to beef up its antitrust policy in order to reduce barriers to foreign trade and investment. In the last several years, Prime Minister Koizumi Jun'ichirō and officials at the Ministry of Economy, Trade, and Industry (METI) have also advocated stronger antitrust policies in order to boost economic growth and facilitate a shift to a more advanced economy.

John Haley's *Antitrust in Germany and Japan* makes an important contribution to understanding contemporary Japanese antitrust by comparing it with that of Germany. Germany is a particularly apt choice for comparison, not only because of its intrinsic economic importance, but because it served as the model for the pro-cartel policies Japan developed in the 1930s which formed a key part of Japan's industrial policy system. Haley argues that many are mistaken in their understanding of the relationship between Japanese and German antitrust policy. People think Germany and Japan were very similar before the war; in fact, Germany was much more effectively cartelized than Japan. And while many think Germany developed much more rigorous antitrust policy than Japan after World War II, Haley argues that Japan's policy is now roughly equivalent to Germany's.

Haley notes that Japan and Germany were both late-developing economies and that Japan modeled its legal system on Germany's. German court decisions from 1888 to 1897 recognized the right of firms to set up cartels, and by the 1920s Germany was dominated by cartels. Haley argues that, unlike Germany, the Japanese economy was not dominated by private cartels at this time. The effective push for cartels in Japan only came with the es-