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BOOK REVIEW

Can Japanese Constitutional Law Scholars Recognize the Significance of this Book? The Universality and Originality of the Japanese Constitution in Quantitative Perspective

By Kenneth Mori McElwain. Tokyo: Chikura-Shobō, 2022, 221pp., ¥3,200+ tax (ISBN 978-4-8051-5)

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1. Introduction

'The Universality and Originality of the Japanese Constitution in Quantitative Perspective, written by Kenneth Mori McElwain, a professor at the Institute of Social Science, University of Tokyo, is a seminal work on comparative constitutional studies based on rich data and rigorous quantitative research methods. In this book review, I will clarify the significance, or values, of this book and briefly comment from the perspective of constitutional law scholar *in Japan*. First, in accordance with the style of book reviews, let us begin by introducing the book's outline.

2. Book overview

This book comprises seven chapters and a preface, postscript and fulfilling appendix. In Chapter 1, McElwain examines – based on comprehensive data – 'what' are the contents of constitutions and 'how' they are diachronically and synchronically stipulated. In Chapter 2, he clarifies that democratically enacted constitutions have a relatively long lifespan, and constitutions that have been amended on the part of the political institutions a moderate number of times are less likely to be reenacted or replaced by a new constitution. This general tendency reveals the peculiarity of the Japanese Constitution – in more than 75 years since its enactment, it has never been amended. What is the reason for this stability? In Chapter 3, McElwain explains that in 1946, the Japanese Constitution formulated human rights more than average, whereas its provisions on political institutions were far below average. Focused on this fact, McElwain demonstrates the hypothesis that more the provisions for human rights, the longer the life of the constitution itself tends to be, and more the detailed political institutions, the higher the probability that the constitution will be amended. Chapter 4 examines the similarities between the constitutions of Japan and other countries – both coterminous and historical – and highlights the interesting facts that the number of human rights provisions in the Japanese Constitution was ahead of the global trend and the paucity of provisions for political institutions ran counter to global trends. Regarding the latter, the Japanese Constitution not having a provision for emergency differs from global trends. As of 2020, 91% of constitutions in the world have emergency provisions. Chapter 5 focuses on the structure of emergency provisions and highlights the defects of emergency provisions prepared by the Liberal Democratic Party (LDP). In Chapter 6, the author discusses the problem of looseness of the provisions of the electoral system. McElwain discusses the malapportionment of seats in the House of Representatives and the excessive political campaign restrictions, and proposes solutions to these prolonged problems with minimal constitutional amendments. Finally, Chapter 7 looks ahead

towards the future of the Japanese Constitution. Based on original survey experiments, McElwain indicates three characteristics of voters' opinions about constitutional amendment. First, many voters prefer a constitution that prescribes human rights and institutions in detail rather than a concise constitution that emphasises tradition and history. Second, many voters do not necessarily want to amend the amendment rule to make it easier to amend the constitution. Third, there is support across party lines for adding rights to privacy and the environment into the Constitution. Based on these results, he advocates launching the constitutional amendment debate in areas where there is already bipartisan agreement.

The author's research has attracted not only professionals but also media, politicians and the general public who are interested in the Japanese Constitution. His earlier works that empirically highlighted the Japanese constitution do not provide sufficient topics, the expression of provision is not detailed and there is a substantial number of human rights provisions (see Chapters 3 and 4), are popular among those who participate in constitutional discussions. Additionally, his analysis of emergency provisions (see Chapter 5) has been discussed at the National Diet Commission and elsewhere. Thus, today it is impossible to participate in a constitutional debate without knowing his arguments. It is, therefore, not surprising that this book was awarded the 34th Asia-Pacific Award Special Prize by The Asian Affairs Research Council. I have been attracted to McElwain's brilliant previous research study, which forms the basis of this book, and I frequently used it in my arguments.[1] However, although his book is important for constitutional law scholars, his book will not be cited frequently by them. To explain the reason for this, I will sketch the situation of constitutional law academics in Japan.[2]

3. Comparative constitutional law as an academic field in Japan

Japan has approximately 700 constitutional law academics or researchers.[3] To become a constitutional law scholar in Japan, one must simultaneously research the constitutions of Japan as well as other countries – otherwise, the possibility of obtaining an academic post would dramatically decrease. In that sense, almost all constitutional scholars in Japan are comparativists. Then, how is 'comparative constitutional law' understood among constitutional law scholars?

Examining textbooks reveals such descriptions: constitutional law as an academic field is broadly divided into *constitutional interpretation* and *constitutional science* (or constitutional law as a *social science*). The interpretation of constitutions is practical, subjective and normative. In contrast, constitutional science is scientific, objective and descriptive. Comparative constitutional law is categorized as constitutional science. Yōichi Higuchi, a leading constitutional law scholar in Japan, has defined 'comparative constitutional law' in his pioneering book titled 'Comparative Constitutional Law' as follows: comparative constitutional law is the *science* that takes up constitutional phenomena in other

[1]*See, for example*, Satoshi Yokodaido, *Constitutional Stability in Japan not due to Popular Approval*, 20(2) German Law Journal 263 (2019); Satoshi Yokodaido and Toshihiro Yoshida, Constitutional Literacy: 15 Lessons Starting with a Question (Yuhikaku, 2022) (in Japanese).

[2]For the following part, *see also* Satoshi Yokodaido, *A Consideration of Comparative Constitutional Law in Japan*, in Global Constitutionalism and Constitutional Studies (Akiko Ejima, ed., Shinzan-sha, 2023) (forthcoming, in Japanese).

[3]This calculation is, among other things, mainly based on the number of members of the biggest academic society named the '*Japan Public Law Association*'. It has over 1,200 members comprising constitutional scholars, administrative law scholars and practitioners; however, the majority of the members are constitutional academics. There are a few other academic societies related to the Constitution based on political preferences: the '*Association for Studies of Constitutional Law*' and '*Association for Studies of Constitutional Theory*' are left-wing, liberal academic societies. The '*Constitutional Law Association*' is a right-wing, conservative academic society – hardly anyone simultaneously becomes a member of left- and right-wing academic associations. We also have the '*Japanese Association of Comparative Constitutional Law*', which mainly focuses on other countries' constitutions. Other academic societies also study other countries' constitutions.

countries from a comparative perspective.[4] It is safe to say that there is little objection to that understanding among constitutional law scholars *in Japan*.[5]

So, what is science or social science? Higuchi explains his understanding of science as follows: 'the basic purpose and procedure of science are to organize and describe various facts on the basis of observation, to formulate hypotheses about causal relationships among facts, to test these hypotheses by experience and derive rules…and, in so doing, to eventually be able to explain as broad a range of facts as possible in a comprehensive manner'.[6] Additionally, he said that constitutional research as a science necessarily becomes like *political science*.[7] This implies that comparative constitutional law is, necessarily, close to (comparative) political science.[8]

Then, what kind of *comparative methodology* is used in Higuchi's book based on his understanding of science? Plainly speaking, his book represents a comparative history of constitutional thought of the UK, France, Germany and the USA. He employs *comparative historical analysis* – as he explicitly admitted – under the heavy influence of the study of western economic history. He said that 'the type of each modern state or modern constitutionalism is fundamentally guided according to the type of modern civil revolution'. The 'revolution from below' in England and France realized liberal constitutionalism, and 'reform from above' in Germany resulted in constitutionalism in appearance. Based on this basic understanding, he attempted to clarify the particularities of the Japanese constitutional phenomenon. In other words, the 'science' of Higuchi's comparative constitutional works was ensured mainly by relying on the findings of western economic history.

4. The reality of comparative constitutional law in Japan

If the comparative constitutional law should be scientific, and the scientific method is not limited to the historical one that Higuchi relied on,[9] then comparative constitutional scholars might utilize many research methods used in the academic field of social sciences, especially political science. There are many studies about methods and methodologies in social sciences. For example, books about comparative political science introduce many techniques of comparison – not only qualitative but also quantitative research using causal inference, statistics, experiments, etc. McElwain's book is a scientific comparative constitutional law study using various social sciences methods, and constitutional law scholars should appreciate the publication of this book. Then, why did I say that McElwain's book will not appear to be referenced as much by constitutional law scholars in Japan? – because, although the understanding of comparative constitutional law as a social science has been broadly accepted among Japanese academics, in reality, they have not only been disinterested in using these multiple research methods, but also sometimes even hostile towards these methods, especially the quantitative approach to research for comparison. Then, what research has been performed in the name of comparative constitutional law, and why are they hostile towards the research using quantitative methods?

[4]Yōichi Higuchi, Comparative Constitutional Law 3 (3rd ed., Sōbun-sha, 1992) (in Japanese) (emphasis added).

[5]I disagree with this definition in that it only recognizes 'science'; I sympathize with the statement by Vicki C. Jackson: '[G]ood work in comparative constitutional law does not necessarily require social science methods, but does require knowledge of law and legal institutions and capacities for insight and imagination'. Vicki C. Jackson, *Comparative Constitutional Law, Legal Realism, and Empirical Legal Science*, 96 B.U. L. Rev. 1359, 1360 (2016). *See also* Jaakko Husa, *Comparison*, in *Research Methods in Constitutional Law: A Handbook* 12–13, 25 (David S. Law and Malcolm Langford, eds., 2018).

[6]Yōichi Higuchi, Modern Constitutionalism and Contemporary States, 4–5 (Keisō-Shobō, 1973) (in Japanese).

[7]*Id.* at 115.

[8]Although presently inconceivable, there was a time when the term social science was used almost synonymously with Marxism. Many constitutional law scholars who espoused Marxism deployed comparative constitutional studies based on historical materialism. For them, comparative constitutional law was to clarify the laws of universal history by verifying the relationship between the mode of production as a base and the legal order as parts of the superstructure in a few countries. However, hardly anyone in constitutional academics is explicitly devoted to Marxism now in Japan.

[9]On the relationship between the study of history and social science, *see* Hiroyuki Hoshiro, The Method How to Create Theories from History: Integrating Social Science and Study of History (Keisō-shobō, 2015) (in Japanese).

One prominent feature of comparison by constitutional law scholars in Japan is the paucity of compared countries; approximately 90% of them select the UK, France, Germany or the USA as an object of comparison.[10] Although the population of researchers studying Canada has recently grown, these four countries have been dominating the comparative work by Japanese constitutional academics. They tend to believe that many significant constitutional concepts are *universal*, and because these concepts have developed in these countries, it is enough to focus on these countries for comparative study. Additionally, because of the advanced constitutional practices in those countries, their interpretations are helpful for *justifying* or *inventing* our interpretation of the Japanese Constitution. In other words, 'main' countries' constitutions are studied to obtain insights or implications for a better understanding of the Japanese Constitution. They seem to think that the interpretation and understanding of the Japanese Constitution does not require *any* knowledge of other constitutions, such as those of Thailand, Hungary, Mexico, Chili, Cameroon, Spain, Ireland, etc. Thus, the broadness of comparison by McElwain, using data from over 900 written constitutions enacted after the eighteenth century, becomes not an advantage but a deficit, because that information relativizes the 'main' countries. Although this attitude, purpose and method of comparative constitutional law seem *not* to fit the definition of science, this type of research has dominated the academic field in the name of comparative constitutional law in Japan.[11]

In relation to that, there is *indifference* towards the current global trends in the English-language study of comparative constitutional law, which is characterized as 'a newly energized field in the early 21st century'.[12] As McElwain explicitly acknowledged, his research owes a lot to it (p. 189), and he has cited many articles in his book. In this academic field, scholars have been using numerous research techniques based on their research questions, because 'what we compare and how we do so depend importantly on the purposes of comparison, which in turn differ according to who is doing it'.[13] In contrast to the Japanese almost *monistic* research method of comparative constitutional law, 'the renaissance of comparative constitutionalism has been characterized by blissful *methodological pluralism*.'[14]

Furthermore, there seems to be some *hostility* towards the quantitative method among constitutional lawyers in Japan. Interestingly, despite his claim that constitutional research as a science necessarily becomes like political science, Higuchi has criticized the statistical or quantitative methodology in comparative constitutional studies. His criticism of these research methods seems to be historical and political; soon after the restoration of Japan's sovereignty in 1952, certain academic groups eager to amend the current Constitution used the statistical data to suggest its revision.[15] There is little inevitable connection between quantitative analysis and advocating constitutional amendments;

[10]A principal reason for this situation is historical in nature. When Japan attempted modernisation in the late-nineteenth century, these countries, except the USA, became models to emulate. Many basic laws – not only the constitution, but also the civil code, criminal code, commercial code, etc. – were replicated from these countries' laws. Law education was conducted in German, French and English at universities. After World War II, the USA became a model to be compared, which explains its heavy influence on the enactment of the current Japanese Constitution and other laws.

[11]*See* Hajime Yamamoto, *Constitutional Interpretation and Comparative Law*, 66 Public Law Review 105, 106–107 (2004) (in Japanese). As I mentioned in *supra* note 5, as I disagree with the idea that comparative constitutional law must be a science, I think these types of studies also deserve to be treated as comparative constitutional law. The problem is not whether it falls under the definition of comparative constitutional law, but that only similar studies can be found.

[12]Rosalind Dixon and Tom Ginsburg, *Introduction*, in Comparative Constitutional Law 1 (Tom Ginsburg and Rosalind Dixon, eds., 2011).

[13]Stephen Gardbaum, *How Do and Should We Compare Constitutional Law*? in Comparing Comparative Law 2 (Samantha Besson, Lukas Heckendorn and Samuel Jube, eds., 2016), UCLA School of Law, Public Law Research Paper No. 16-15, available at SSRN: https://ssrn.com/abstract=2758885.

[14]Ran Hirschl, *Comparative Methodologies*, in Comparative Constitutional Law 11, 11 (Roger Masterman and Robert Schütze, eds., 2019) (emphasis added). On the meaning of the renaissance in this context, *see* Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law, Chapter 1 (2015).

[15]For example, they presented the data that among 33 countries that enacted new constitutions from 1945 to 1949, 26 countries experienced constitutional amendments and 18 entirely replaced their constitution.

however, several constitutional scholars, including Higuchi, seem to regard the quantitative approach as a danger, and therefore, remain vigilant.[16] For them, the detailed information that the majority of current constitutions have emergency provisions (see Chapter 5) would be an inconvenient truth for Japan. Similarly, the suggestion of minimum constitutional amendment for solving the problems of the electoral system based on profound comparative constitutional knowledge (see Chapter 6), and the recommendation for launching constitutional debate on topics that people could agree with based on the original survey experiments (see Chapter 7) would be regarded as using comparative constitutional research for the purpose of constitutional amendments by them.

5. Must constitutional amendment be a last resort?

Most of the book is *descriptive*. Unfortunately, I – and the vast majority of constitutional law scholars – possess little competence to judge or evaluate the correctness and novelty of his claims as research of comparative political science. However, as McElwain also makes several *normative* claims based on his research, I will make a few, minor comments on them here.

Based on my impression as a constitutional law scholar, his modest but insightful assertions of constitutional amendments would not receive adequate support from constitutional law scholars *in Japan*, who believe that constitutional amendments must be a last resort – that which can be handled by amending the law, should not be addressed by amending the constitution.[17] They claim that '*from the objective of Constitutionalism*, the topics that can be addressed by ordinary statutes should be managed with ordinary statutes, not with the Constitution. The Constitution should only be involved when the topics cannot be addressed by general statutes'. 'Using a Constitutional amendment on a matter that can be solved by ordinary statutes is a waste of time and effort,'[18] and contrary to constitutionalism.

From this perspective, McElwain's contention of constitutional amendments must be treated as a waste of time and money, as correcting the disparity between vote values and excessive political campaign regulations can be accomplished via ordinary laws. Similarly, McElwain's suggestion to launch constitutional amendment debates regarding environmental rights, right to privacy, increased public spending on education and establishment of the Constitutional Court may receive the same reaction. In fact, Yasuo Hasebe – an influential constitutional law scholars of this generation – once wrote as follows:

> [M]erely writing these things [right to privacy or environmental rights] into the text of the constitution without solidifying implementation through statutes in the National Diet or precedents set by the courts would be meaningless. The right to privacy has already been solidified by the court's interpretation of Article 13 of the Constitution. As it is, if this right is infringed upon, a person can seek damages or an injunction against the violator. It seems like nothing would be gained by making a new constitutional amendment to what citizens already have. Environmental rights are meaningless without laws that make them concrete, and if there is a law that makes them concrete, then a constitutional amendment has only a symbolic meaning.[19]

[16]Once, in a private conversation, I heard a famous professor criticize: 'Such kind of research is only counting numbers'.

[17]I sincerely disagree with this claim. *See*, *for example*, Yokodaido and Yoshida, *supra* note 1 at 68–70. Simply put, especially under the concise and simplified Constitution of Japan, this idea would effectively allow for *de facto* constitutional amendment by political actors, and this, in turn, would foster a public awareness that the text of the Constitution can be interpreted in a flexible manner, which would undermine the normative force of the Constitution itself. On this point, we should refer to other prominent research on the Japanese Constitution by a political scientist. *See* Shirō Sakaiya, Constitution and Public Opinion: How Japanese People Confront the Constitution after War (Chikuma-shobō, 2017) (in Japanese). For other reasons for my disagreement, *see infra* note 19.

[18]Atsushi Sugita, *Proper Conditions for Arguments about Constitutional Amendments*, in Say No to Abe's Style of Constitutional Reform! 207 (Yōichi Higuchi and Jirō Yamaguchi, eds., Iwanami-Shoten, 2015) (in Japanese).

[19]Yasuo Hasebe, What is a Constitution? 18–19 (Iwanami-Shoten, 2006) (in Japanese). Based on that criterion, many significant implementations of constitutional amendments in other matured democracies are also evaluated as useless – a waste of time and money, and even anti-constitutionalism. For example, in Ireland, the twenty-first Amendment of the Constitution

McElwain wrote that 'even if the guarantee of minority rights are required by law, they could be stripped away in the future, as they can be easily changed by a majority in parliament. Therefore, the stability of rights is much greater if they are enshrined in the Constitution' (p. 76). However, this explanation would be rejected by constitutional law scholars in relation to his suggestion, because the right to privacy and environmental rights are not for minorities, but universal.

6. On emergency provisions

If McElwain desires support for his suggestions, he should confront this type of argument. Despite that, oddly enough, McElwain himself shows a similar understanding regarding the necessity of emergency provisions. He wrote, 'the purpose of constitutional reform is to solve difficult problems *that cannot be dealt with by ordinary legislation*' (p. 115, emphasis added), and because the Japanese Constitution's conciseness enables coping with emergency situations using ordinary laws, and there are minor obstacles to implementing governmental policies because the Japanese Constitution has adopted the parliamentary government system and majoritarian democracy, '*there is little need to establish the emergency provisions*' (p. ix, emphasis in original).[20] However, is this a persuasive reason for not having emergency provisions in the Japanese Constitution? McElwain acknowledges that 'the aim of emergency provisions is to create a situation of exception to the constitutional regime' (p. 101). If so, why can ordinary laws make exceptions to the *constitutional* regime? Additionally, McElwain stated that 'the fact that there is little need for amendment is not synonymous with the fact that amendment is undesirable' (pp. iv, 75), and that 'my main concern is that the Constitution does not regulate in detail political institutions, because of which political actors are able to manipulate them arbitrarily' (p. 191). Does his claim, that there is little need to establish emergency provisions, contradict his own statements? I will cite the Report of the European Commission for Democracy through Law (known as the Venice Commission), which is the Council of Europe's advisory body on constitutional matters, to indicate the reason for the *desirability* of stipulating emergency provisions into constitutions[21]:

> Within the system of written emergency powers, the basic provisions on the state of emergency and on emergency powers *should be included in the Constitution*, including a clear indication of which rights can be suspended and which rights do not permit derogation and should be respected in all circumstances. The Venice Commission has previously indicated that '[t]he emergency situations capable of giving rise to the declaration of states of emergency *should clearly be*

Act of 2001 inserted the new provision that 'the Oireachtas [Congress] shall not enact any law providing for the imposition of the death penalty' in Article 15.5.2 of the Irish Constitution. This and other related amendments to abolish the institution of the death penalty is '[t]o some extent, this was a largely symbolic gesture. The latest execution took place in 1954; the death penalty was abolished for all but a very limited class of crimes by the Criminal Justice Act 1964 and the death penalty was finally abolished even for these crimes by the Criminal Justice Act 1990, s 1'. Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, Kelly, The Irish Constitution 346 (5th ed., 2018). Therefore, the Irish achievement of prohibiting the death penalty by amending their Constitution would be criticized by the criterion used by Japanese constitutional scholars. However, I think, this is crucial for constitutions to have a symbolic meaning.

[20]The Japanese have witnessed such arguments during the COVID-19 pandemic; Japan did not introduce harsh measures, such as lockdowns, which were implemented in other countries to prevent the contagion. The Japanese government and the LDP explained that introducing lockdowns would be difficult because of constitutional hurdles, and thus, constitutional amendment would be required. Against this stance of the government and the LDP, not only the biggest opposition party but also many constitutional scholars, have asserted that a restriction as extensive and harsh as a lockdown is justifiable under 'public welfare' as the current Constitution's general provisions for basic rights restriction. Thus, for them, there is no need to change the Constitution at all. *See* Keigo Komamura, Satoshi Yokodaido, Mai Sugaya, Masayoshi Kokubo, *Japan*, in The 2021 International Review of Constitutional Reform 132 (Roberto Barroso and Richard Albert, eds., 2022). I have criticised these attitudes from the standpoint of human rights protection. *See* Satoshi Yokodaido, *Human rights, Lockdown, and Emergency Situation*, 2505 Hanrei-Jihō 119 (2022) (in Japanese).

[21]I have written that putting the emergency provisions in a constitution is meaningful for protecting human rights. *See* Yokodaido and Yoshida, *supra* note 1, Chapter 10, and Yokodaido, *supra* note 18.

> *defined and delimited by the constitution*'. *This is necessary because emergency powers usually restrict basic constitutional principles, such as fundamental rights, democracy and the rule of law*. It is up to each State to decide whether one or several emergency regimes will be recognized. If several emergency regimes exist, the differences between them (causes, levels of parliamentary oversight, levels of powers to the government, available emergency measures) should be clearly set in the legal rule. The State should always opt for the least radical regime available in the given circumstances.[22]

7. Conclusion

I believe if constitutional law scholars are to take seriously what Higuchi calls 'science', Japan's comparative constitutional studies should incorporate the results of today's social sciences. Conversely, it must be said that the 'scientific' nature of comparative constitutional studies, which is asserted without incorporating the results of today's social science, is doubtful. McElwain's masterpiece could be a starting point for this step. My criticism of McElwain's book in this review is trivial because the main theme of his book was not *normative* but *descriptive*. Put differently, the collaboration between constitutional scholars who have received legal education and political scientists who take advantage of using 'scientific' methods could produce new insights and achievements. Thankfully, McElwain suggested the need to continue deepening the dialogue between constitutional law scholars and political scientists (pp. 191–192). If this is achieved, comparative constitutional studies in Japan will be a step ahead.

[22]European Commission for Democracy Through Law (Venice Commission) Report: Respect for Democracy, Human Rights and the Rule of Law During States of Emergency: Reflections, taken note of by the Venice Commission on 19 June 2020 by a written procedure replacing the 123rd plenary session, 6–7 (CDL-AD(2020)014-e) (internal citation is omitted and adding emphasis).