



Societies Without Borders

Volume 4 | Issue 2


Article 2

2009

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Recommended Citation

Kimijima. 2010. "Japan's Contribution to Global Constitutionalism." *Societies Without Borders* 4 (2): 105-116.

Available at: <https://scholarlycommons.law.case.edu/swb/vol4/iss2/2>

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Japan's Contribution to Global Constitutionalism

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Abstract

In this paper I want to approach the theme of “globalization and Japan” from the standpoint of constitutional studies. Constitutions and constitutionalism are important means of reining in political power, and in the modern sovereign state system, constitutions and constitutionalism have been conceived on the level of single states. However, as many scholars have observed, one can see the global spread of power in, for example, the worldwide deployment of the US military using overseas bases throughout the world,¹ and the worldwide activities of transnational corporations based in the US, Europe, and Japan. In sum, this is the global spread of military and social power. It is urgent that we rein in this global power. Although controlling power through single-state-level constitutions and constitutionalism is perhaps still the most important priority, we must also consider the possibilities of global constitutionalism or regional constitutionalism now when power is spreading globally. This paper will explore global constitutionalism, which is now the subject of vigorous discussion for those concerned with global governance. Finally, the paper will link global constitutionalism with the pacifism in Japan's constitution.

Keywords

global constitutionalism, globalism, globalization, military power, Japan

1. Constitutions and the World Order

1.1. *The History of Global Constitutional Theory*

When examining global constitutionalism, the first thing one recalls is the research done in the US soon after the Second World War. One item was the Preliminary Draft of a World Constitution, usually known as the Chicago Draft of a World Constitution, which was drawn up in 1948 by the Committee to Frame a World Constitution, a group organized chiefly

¹⁾ Calder 2008; Gerson and Birchard 1991.

around researchers at the University of Chicago,² and another was a 1958 book titled *World Peace Through World Law* by Grenville Clark and Louis Sohn.³ The Chicago Draft was the response of US social sciences to the shock of Hiroshima and Nagasaki. The recognition that nuclear weapons can no longer be controlled by the sovereign state system is the fundamental idea underlying the Chicago Draft, which represents an experiment that then quickly developed into world constitutional theory. Another response to Hiroshima and Nagasaki is the world federalist movement.⁴ Although this movement gained a considerable number of supporters, the idea was marginalized during the Cold War. But as the spread of global power became pronounced after the Cold War, discussion on global constitutionalism was reignited.

1.2. *Thinking Based on the Domestic Analogy and Domestic Model*

Constitutional theory and world order theory were originally very closely linked. When examining the world order, people have often consciously or unconsciously worked from an analogy of the domestic order or used the domestic order as a model. Hidemi Suganami has explored in detail how the world order concepts proposed in Europe and North America from the start of the 19th century through the second half of the 20th century were based on thinking which used a domestic analogy.⁵ According to Suganami, many of the 19th-century world order concepts used their own countries' constitutions as models. The previously mentioned Chicago Draft, and the Clark and Sohn *World Peace Through World Law*, were discourses on the world order which used the US constitution as a model.

The discipline of international law also built its theory on the foundation of the domestic law model and domestic legal theory. Prof. Yasuaki Onuma of The University of Tokyo has traced historically how, since the time international law came to be distinguished from domestic law, the discipline of international law has consistently built its theory on the foundation of the domestic law model and domestic legal theory.⁶ In a sense it

² The University of Chicago Library keeps the records of activities of the Committee to Frame a World Constitution (1945–1951).

³ Clark and Sohn 1966 [1958].

⁴ See Boyer 1994 on the relationship between the atomic bombings in Hiroshima and Nagasaki and the world federalist movement.

⁵ Suganami 1989.

⁶ Onuma 1991, pp. 57–82.

is natural and reasonable that the discipline of international law has based itself on the domestic law model and domestic legal theory. Conceiving the norms of international society using as a foundation the normative consciousness of domestic law, which is an integral part of our everyday lives, has a theoretical and substantive basis. According to Onuma, the problem arises when the international law scholars of major powers and hegemonies unconsciously and unknowingly inject the thinking and theories of their own countries' domestic laws into the discipline of international law.⁷ What is needed is “a method which objectifies one's own position by having an awareness that the domestic model thinking incorporated into international law is both unavoidable and problematic, and with that in mind use the domestic model while identifying its conditions, deviation, and limitations.”

2. Theories of Global Constitutionalism

2.1. *Hideaki Shinoda's "New International Constitutionalism"*

In international political science, the tendency toward idealism in the 1920s and 1930s gave way to a tendency toward realism after the Second World War. In this period normative thought waned, but starting in the 1980s there was growing criticism of realism, and normative thought made a comeback. Prof. Hideaki Shinoda of Hiroshima University says that since the 1980s there has been a push toward what might be called “a new international constitutionalism.”⁸ This “new international constitutionalism” as described by Shinoda has two elements or characteristics. One is conceived as taking the values linked with human survival, such as peace and human rights, and forming them into the basic norms of international society. The activities of states and governments are regulated by means of those basic norms. The spheres of states and of societies are distinguished from one another internationally, and it is important to prevent unjust incursions by states into society, that is, infringements on human rights. The other element is not making an issue of the degree to which states are integrated. Rather, a civil society that is relatively independent of the state,

⁷ Mattei 2003 analyzes the phenomenon in which the domestic legal theories of a hegemon become globalized.

⁸ Shinoda 2000, pp. 130–50.

and the existence of a global civil society are important. This is how Shinoda conceives the “new international constitutionalism.”

2.2. *Toshiki Mogami’s “International Constitutionalism”*

Prof. Toshiki Mogami of International Christian University has also advocated the establishment of “international constitutionalism” for some time.⁹ Mogami says that constitutionalism encompasses a series of linked issues such as surmounting the natural condition between states, instituting the rule of law, establishing and regulating public power, and the protection of rights. He also says, “Constitutionalism – insofar as it concerns international society – is the building of a system that rejects arbitrary violence.” He goes on to say, “If such a system has yet to be created, then international society for its part can only carry on with persistent attempts to create it.” The reason it has not been created, as discerned from Mogami’s writings, is the difficulty of legally controlling the actions of the permanent members of the UN Security Council, in other words major powers and hegemons. Establishing international constitutionalism means putting the actions of major powers and hegemons under the rule of law.

2.3. *World Order Models Project’s “Global Constitutionalism”*

Activities of the World Order Models Project (WOMP) have yielded a concept of “global constitutionalism” that is both important and attractive.¹⁰ WOMP was launched in the second half of the 1960s as joint international research which, while critically carrying on the “World Peace Through World Law” project, obtained the participation of researchers from the Global South in order to consciously overcome the US-centered way of thinking. The core people were Saul Mendlovitz of the Rutgers University Law School and Richard Falk of Princeton University. People participating from the outset included Johan Galtung and Yoshikazu Sakamoto. Toshiki Mogami also participated. WOMP made an effort to consciously overcome a research style that tended to be US-centered and use thinking based on the US model.

According to Falk and others, global constitutionalism signifies the totality of transnational norms, rules, procedures, and institutions for realizing peace, economic welfare, social justice, ecological balance, and other world

⁹ Mogami 1999, pp. 44–50; 2004, pp. 37–41.

¹⁰ Falk, Johansen, and Kim 1993.

order values for global society as a whole. The world now comprises three systems. The first is the states system, which is made up of territorial states and the corporations, banks, military forces, and media that support them. The second is international governmental institutions including the United Nations system. The third system is composed of the nonstate actors and individuals who act through NGOs, various kinds of citizen groups, social movements, and other vehicles. Presently the world can be conceived as a three-tiered structure comprising the states system, the UN system, and global civil society. The totality of transnational norms, rules, procedures, and institutions for realizing world order values should permeate all three tiers. While we must work to achieve democracy in the states system and the UN system, it is also important to have initiatives that vertically pass through all three tiers, such as NGOs democratizing and constitutionalizing states and the UN, or NGOs bringing about reform by collaborating with the reformist camps within states and within the UN.

A major characteristic of WOMP's global constitutionalism is that it does not adopt the state integration approach of world federalist theory. It is contradictory and paradoxical to try and surmount the sovereign state system by eliciting a world government, that is, a still greater power. WOMP's global constitutionalism sees importance in the autonomous role of global civil society as seen in NGO activities, and is conceived as a process that aims to constitutionalize global society, not as something that seeks to establish a world government.

2.4. Towards a New Global Constitutionalism

Here I would like to briefly present a fresh approach to global constitutionalism.¹¹ There is something to gain from WOMP's global constitutionalism, Shinoda's new international constitutionalism, and Mogami's international constitutionalism. Emerging from the theories of WOMP and Shinoda are the aspects (1) that global civil society plays an autonomous role, and (2) that peace, human rights, and other values are basic norms that are superior to and restrict the states system and the UN system. From WOMP's global constitutionalism comes a way to restrict power by means of collaboration among NGOs, governments, and the UN. From Mogami's theory emerges the question of how to control the permanent members of the Security Council, a group characterized by the insufficient implementation

¹¹⁾ Kimijima 2006a, pp. 17–28.

of constitutionalism. As this shows, all three of the theories on global constitutionalism discussed above have something to offer, but I personally think that WOMP's global constitutionalism offers the most.¹²

3. The Practice of Global Constitutionalism

3.1. *Framing International Disarmament Laws Under NGO Initiatives*

In the world of the 1990s, the elements of WOMP's global constitutionalism came to pass. These included the World Court Project, which elicited from the International Court of Justice an advisory opinion on the illegality of the threat or use of nuclear weapons, and the International Campaign to Ban Landmines, which achieved the Convention on the Prohibition of Landmines. These are both instances in which NGOs took the initiative, created NGO networks, and worked in league with governments that sympathized with the NGO position – many of them middle powers or small countries – to form international disarmament laws.¹³ These represent none other than the practice of global constitutionalism as conceived by WOMP.

3.2. *The Exceptional Becomes the Norm: The Suspension of Constitutionalism*

One could say we have been living in the era of the war-on-terror. The war on terror is not a war between states, in which there is a winner, a loser, and a peace treaty. It is a war that continues indefinitely as long as there is the possibility of terror. Since 9/11, the world situation is one of never-ending war, which means that an emergency situation, that is, an exceptional situ-

¹² Discussions on global constitutionalism have become very active in recent years. Caution is required because various authors use the term and concept differently. Peters 2006 provides an excellent overview of global constitutionalism from the perspective of international law. Gill 2000 uses the concept “new constitutionalism.” “New constitutionalism” as described by Gill is a legal framework to impose the demands of the neoliberal world economy while bypassing national democracies. Gill has been criticizing “new constitutionalism,” and we are faced with the challenge of overcoming it. Slaughter and Burke-White 2003 have introduced the concept of “international constitutional moment” and explained the transformation of international law in the post-9/11 world. Their theory has the effect of “deregulating” the current prohibition on the use of force under Article 2 (4) of the UN Charter. As these cases indicate, the concept of global constitutionalism has been used to mean different things.

¹³ Kimijima 2005a, pp. 451–471; Dewes 1998; Cameron, Lawson and Tomlin 1998.

ation, has become the norm. In an emergency situation or exceptional circumstances, constitutionalism, that is, the rule of law, is suspended.

But actually, prioritizing security, or in other words, turning the exceptional into normality, is a trend seen worldwide since the First World War. There is an awareness that since the First World War the world has been on total war footing prepared for war at any moment. One might say that since the First World War the world has been in a perpetual state of war.¹⁴ The wars from the First World War to the Second World War, the Cold War, the War on Terror, and the wars in between have been episodic events stemming from a common program.

3.3. *Replacing Military Solutions with Civil Solutions*

At the same time, however, there is now a distinct trend in the world toward diminishing the domain and role of the military sphere, while expanding the domain and role of the civil sphere. This is an initiative toward replacing military solutions with civil solutions when dealing with conflicts and humanitarian crises, and it is seen in the spheres of government, international organizations, and civil society. Such initiatives are also the practice of global constitutionalism.

Evidence of this in the government sector includes the civil peace service or civilian peace service seen in European countries.¹⁵ One such project trains civil peace activists in nonviolent means to manage conflicts and then deploys them to conflict areas in other countries at government expense. They stay around to assist with post-conflict settlements and rebuilding. This project was proposed in Germany in the early 1990s and became a reality by the end of the 1990s. It is a government-NGO partnership for which Germany's Federal Ministry for Economic Cooperation and Development provides funding, and which is implemented by German peace NGOs and development NGOs. Currently in Germany, each year about 100 activists undergo four months of training in nonviolent dispute resolution, building civil societies, and other skills, and are then sent to Balkan countries, Latin America, Africa, and other places for two years.

¹⁴ Agamben 2005; Paye 2007. See also Yamanouchi, Koschmann, and Narita 1998.

¹⁵ For an overview of civil peace service in Europe, see Wallis and Junge 2002; For information on the civil peace service in Germany see <http://www.ziviler-friedensdienst.org>. The NGOs participating in civil peace services in European countries have formed the European Network for Civil Peace Services and have been very active. See <http://www.en-cps.org> for more information.

The project is an important part of Germany's development assistance policy. Although Germany's civil peace service is the most advanced, Austria, France, the Netherlands, Switzerland, Sweden, and Italy have civil peace service projects. Civil peace service cannot be used by conscientious objectors in lieu of the military service obligation in Germany, but it can in some other countries.

An important instance of practice by an international organization is the Kosovo Verification Mission which the Organization for Security and Cooperation in Europe (OSCE) sent to Kosovo during the conflict there.¹⁶ When the Kosovo conflict erupted, the OSCE sent about 1,000 civilian observers in an attempt to deter the conflict from becoming violent. Researchers and NGO activists often claim that sending about 1,000 foreign civilians/citizens into conflict areas can prevent conflicts from becoming violent, and the Kosovo Verification Mission was exactly that kind of effort. Because the mission was withdrawn before its activities were fully implemented, one cannot properly assess its effectiveness, but peace researchers have applauded the possibilities that the mission had, and the possibilities of civilian/citizen intervention on such a large scale.

I would like to emphasize that, as practice by civil society and NGOs, efforts at peacekeeping operations or nonviolent intervention by citizens and NGOs instead of military forces have been made since the 1980s.¹⁷ Especially pioneering were the activities of Peace Brigades International, which was created in 1981 and launched its activities in Guatemala in 1983. Building upon these achievements, the Nonviolent Peaceforce was proposed as a foundation from which to advance the project further. The Nonviolent Peaceforce was eventually created in 2002.¹⁸

Finally this section shall briefly discuss a UN reform proposal that advocates that the UN have a unit, primarily civilian, which can respond promptly to humanitarian crises. When humanitarian crises arise, the UN Security Council asks member states to send troops, but in fact in many cases civilian forces are better suited than military forces in dealing with humanitarian crises. Proposals that push the UN to have a mostly civilian rapid

¹⁶ Information on the Kosovo Verification Mission can be found at <http://www.osce.org/item/22063.html>. One of the assessments of the Kosovo Verification Mission is the Nonviolent Peaceforce Feasibility Study, located at <http://www.nonviolentpeaceforce.org/en/feasibilitystudy>.

¹⁷ Moser-Puangsuwan and Weber 2000; Mahony and Eguren 1997; Griffin-Nolan 1991.

¹⁸ On the establishment of the Nonviolent Peaceforce, see Kimijima 2004, pp. 57–87; and the website of the Nonviolent Peaceforce, <http://www.nonviolentpeaceforce.org>.

deployment force are sensible, and this is yet another area in which the civil sector is overcoming the military one. A promising proposal in this vein is the “United Nations Emergency Peace Service” drafted by Prof. Robert Johansen at the University of Notre Dame in the US.¹⁹

4. Japan’s Contribution to Global Constitutionalism

Previously I touched on the criticism by Yasuaki Onuma of the fact that “international law scholars of major powers and hegemony unconsciously and unknowingly inject the thinking and theories of their own countries’ domestic laws into the discipline of international law.” In the case of Japanese researchers, it is perhaps necessary for them to do the opposite and inject the thinking, theory, and practice of Japan’s constitution into world order theory or global constitutionalism theory consciously and knowingly.²⁰ That would balance the current theories on world order and security, which are biased toward military thinking.

The global constitutionalism I have in mind and the pacifism of Japan’s constitution complement one another. My understanding of the Japanese constitution’s pacifism, which is manifested in the Preamble and Article 9, is as follows.²¹ (1) People have the right to live in peace as an inherent right (Preamble). This is expressed in Article 9 as the prohibition of the use of force by Japan’s government. This is similar to, for example, the provision of the US constitution’s First Amendment, which states that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” which guarantees people’s inherent right of freedom of expression. (2) The Constitution of Japan forbids the use of force by Japan’s government, and emphasizes “international public” measures and world order formation by international organizations (Article 9 and Preamble). (3) Japan’s constitution aims to create an international society that banishes “tyranny and slavery, oppression and intolerance . . . fear and want” (Preamble). Japan’s government and citizens are expected to deal with conflicts and humanitarian crises throughout the world. To just watch world conflicts and

¹⁹ Johansen 2005. The proposal to establish UNEPS has been supported by many NGOs in the world. In Japan, Sadako Ogata and Tadashi Inuzuka, a member of the House of Councilors (Democratic Party of Japan) have supported the proposal.

²⁰ To borrow from Higuchi 1998, p. 460, it is to redefine world order studies from the perspective of Japanese constitutional scholarship.

²¹ See also Kimijima 2006b, 2007a, 2007b.

humanitarian crises while doing nothing is not the intent of Japan's constitution (Preamble). On such occasions Japan does not adopt the use of force (Article 9). Under Japan's constitution there are expectations for actions such as nonmilitary emergency aid activities by the Japanese government, conflict mediation by the government, and various NGO activities by Japanese citizens. This means dealing with problems through civil solutions instead of military solutions. (4) Japan's constitution does not provide for emergency situations. In spirit, Japan's constitution promotes the thorough implementation of constitutionalism rather than shutting down constitutionalism under the pretext of emergency situations or security.

Such is my understanding of the pacifism of Japan's constitution. It resonates with global constitutionalism, and the two are mutually reinforcing. This is arguably Japan's contribution to global constitutionalism. One entity that practices global constitutionalism is the world's NGOs, and since the Hague Appeal for Peace Civil Society Conference in 1999, whenever the world's NGO conferences prepare documents such as declarations and action plans, references to Article 9 of Japan's constitution are virtually assured.²² Article 9 is quoted because it resonates with the efforts of NGOs to replace military solutions with civil solutions.

In today's world, exceptional circumstances have become the paradigm for government, and we need to find what direction to take in surmounting violence in the world. I think we can find that direction in the activities of global civil society, such as efforts to replace military solutions with civil solutions. The pacifism of Japan's constitution resonates with such activities. And that is Japan's contribution to the world.

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²² See Kimijima 2001, pp. 90–95; Kimijima 2005b, pp. 78–81.

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