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Chaihark Hahm and Sung Ho Kim
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Introduction

Controversy over Japan's postwar constitution entered a whole new phase on 1 July 2014 when Abe Shinzo's cabinet announced a decision to stretch the penumbra of Article 9's meaning via reinterpretation. Under the new interpretation, Japan may exercise the right to engage in collective self-defensive actions abroad even when its own territory is not under direct attack. The decision signals a drastic departure from the long-standing position of previous governments which had interpreted the "peace provision" to permit individual self-defensive measures only. Judging from the intensity of reactions, the decision may have touched a nerve in Japan's constitutional body politic. For nearly seven decades, constitutional pacifism has been embraced by Japan's general public as the cornerstone of their national civic identity. Abe's decision is being vehemently criticized as a dangerous move that will turn Japan into a country that can wage war again, in direct contravention of Article 9. According to a noted Japanese public intellectual, postwar Japan's pacifist spirit may finally be dying.¹ Japan's national identity formed around its "Peace Constitution" is being contested, to say the least, by this decision announced on the sixtieth anniversary of the establishment of the Self-Defense Forces.

On 5 November 2013, the Park Geun-Hye government of Korea took the unprecedented action of instituting legal proceedings at the Constitutional Court to seek the dissolution of a political party.² Claiming that the goals and activities of the far-left United Progressive Party (UPP) are unconstitutional, the Ministry of Justice decided to utilize, for the first time in Korea's constitutional history, the Article 8 procedure for disbanding a political party. The government's case was built on the claim that the party was clandestinely

¹ Norihiro Kato, "Japan's Break with Peace," *New York Times*, 16 July 2014, Opinion Pages.

² Sang-Hun Choe, "South Korea: Government Seeks to Ban Leftist Party," *New York Times*, 6 Nov. 2013, A11.

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following directives from the communist North Korea. In a rather contentious ruling of 19 December 2014, the Court agreed by holding that UPP's platform and activities were directed at destroying the "democratic basic order" of the constitution.³ It held that the idea of "progressive democracy" as understood and promoted by the party's leadership had no place in South Korea, whose constitutional identity was described by the Court as "liberal democracy." Reconfirming its previous pronouncements, it made clear that Korea's constitutional order was dedicated to the ideals of popular sovereignty, fundamental rights, multi-party system, and separation of powers. It further held that these principles have been at the core of Korea's civic identity ever since the "Founding Constitution" was written in 1948. In light of previous – and still ongoing – public debates, however, it seems quite likely that this decision, announced on the second anniversary of Park's election to the presidency, will not be the last word on the proper characterization of Korea's constitutional identity.

Almost seven decades after their founding, two of the most prosperous constitutional democracies outside the western world are, evidently, riddled with anxiety and self-doubt about their own civic identities. The decision by the Abe cabinet, and the reactions to it, are showing that there are deep cracks in Japan's pacifist identity under the postwar constitution. Apparently, no less grievous is the uncertainty surrounding Korea's constitutional identity. While everyone pays lip service to the constitutional ideal of "democratic basic order," its precise meaning and how to implement it remain deeply controversial. The people of both Japan and Korea are engaged in a search for their constitutional souls. Yet, it should be noted that such discontent is not merely a reflection of contemporary disagreements. It is actually a manifestation of a deeper restlessness or contention concerning the first democratic constitutions of the two countries adopted in the immediate postwar and postcolonial contexts.

In Japan, for instance, not too far below the surface of the recent controversy lies the persistent allegation that the constitution was somehow illegitimate from the very beginning. According to a popular view, the Peace Constitution was not really authored by "We, the Japanese People" but was rather imposed by overbearing American conquerors on a vanquished and helpless Japan. Abe's supporters applauded his cabinet's reinterpretation as a step toward returning Japan to a "normal state" able to defend itself proactively and shoulder its share of responsibilities on the international stage. In their view, the surprise was not that a new interpretation was adopted but that

³ Const. Ct. 2013 Hun-Da 1 (19 Dec. 2014) (S. Kor.).

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it took so long to take place. If constitutional pacifism was never a voluntary choice made by the sovereign people themselves, and if this imposed identity is inviting international criticism that Japan is shirking its responsibility for maintaining world peace, then perhaps it was high time that the constitution was amended, or at least interpreted differently. By contrast, defenders of Article 9 go to great lengths to argue that pacifism is a home-grown identity. For them, it has roots that go back, at least, to the Freedom and People's Rights Movement of the early Meiji era and the Christian and Socialist anti-war movements during Taishō democracy.⁴ On this view, Abe's decision is not a rectification of the wrongdoings of foreign imposition but a betrayal of the Japanese people's authentic will to unarmed peace. Article 9 is a symbol of native ideals of democracy and pacifism.

In Korea, too, there is a deeper contestation over the principal ideals of its Founding Constitution of 1948. Of the many arguments made in UPP's defense, for example, one that is worth noting is the claim that the party's platform is in fact no more radical or progressive than the spirit of the Founding Constitution which arguably pursued socioeconomic (read socialistic) as well as political (read liberal) democracy.⁵ This argument is interesting and provocative in that it seeks to turn the table on the government. The unmistakable charge is that it is Park's conservative government, rather than the UPP, which is distorting and even subverting the original constitutional identity of Korea. On this view, holding liberal democracy to be the fundamental principle of Korea's constitutional order, as is done by the conservative government, cannot be squared with the goals and principles that guided the making of the Founding Constitution. Of course, the Constitutional Court disagrees. For the conservatives, the Korean republic has always aspired to be a liberal democracy from its inception – even before it was formally established. It was mainly on this ground that the Court previously condemned those armed rebels who resisted the 1948 founding of the republic along liberal democratic lines by advocating a communist-inspired “people's democracy.”⁶ In the Court's view, Korea's constitutional identity has always been a liberal democracy.

In both countries, apparently, there are disagreements regarding the foundational principles of their postwar/postcolonial constitutions. Especially,

⁴ E.g., Yamamuro Shin'ichi, *Kenpō Kyūjō no Shisō Suimiyaku* [Philosophical Sources of Article 9 of the Constitution] (Tokyo: Asahi Shimbun Publications, 2007).

⁵ E.g., Han Hong-gu, *T'ŭkkang* [Special Lectures] (Seoul: Hangyoreh Ch'ulp'an, 2009), pp. 174–89.

⁶ Const. Ct. 2000 Hun-Ma 238 (27 Sept. 2001) (S. Kor.). The case involved a historical evaluation of the so-called 4.3 Incident, which had erupted in the Cheju Island on the eve of the May 10 General Election in opposition to the establishment of the Republic of Korea.

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with more scholarly attention given to their historical inspirations and original intentions, it is being revealed that neither Japan's "peace" nor Korea's "democracy" have such firm and unambiguous meanings as is often thought. Such historical discussions about their first democratic constitutions are in turn contributing to the intensity of current political debates regarding government decisions and policies. Contestations over the core constitutional identities of the two countries are obviously caused by different perspectives and partisan interests in the current political context. But, they are also being stoked by different understandings and assessments of the original constitutional orders of Japan and Korea which were established in the wake of defeat and liberation, respectively. The relentless contestation over the constitutional soul of each country is about history as much as it is about politics.

Deeply entrenched as those fault lines are, however, our reflections on the Japanese and Korean constitutional dramas are motivated less by what divides those constitutional interpretations than by what those opposing perspectives seem to have in common. Indeed, underlying such sharp differences in both the political and historical arenas is an interesting set of common assumptions regarding the legitimacy and identity of constitutions. Despite the contestations and disagreements, that is, similar outlooks can be detected across the political and ideological divide in both Japan and Korea. It may even be that the shared assumptions are responsible for the heightened tenor of the controversies about their constitutional souls.

First is the assumption that any external constraint on or interference with the process of constitution-making is illegitimate. A constitution must be the product of the autonomous will of the native people. It is largely for this reason that Korea's Founding Constitution, having been adopted in a democratically elected National Assembly for the first time in the nation's history, is still revered as the republic's historic and legal foundation. Both the proponents of the imposed view of the Peace Constitution and their pacifist detractors in Japan share the same belief in the right of people's self-determination unfettered by foreign interventions. A second common assumption is that the constitution must establish an entirely new civic order and identity. Its legitimacy is compromised to the extent that it fails to reject and obliterate the political order that preceded the founding. Even the ardent supporters of Abe's reinterpretation do not openly deny that the new democratic Japan had to be based on a firm repudiation of prewar militarism through the Peace Constitution. The Founding Constitution is an edifying symbol of Korea to this day because it signaled a radical departure from the colonial subjugation under Japanese imperialism. These two assumptions about the legitimacy of constitutional founding are in turn predicated on a third one about the identity of the

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collective self that adopts a new constitution. It is presupposed that there exists a constitutional subjectivity which can exercise such autonomy from others and enact such a radical break from the past. The agent which makes the constitution is simply assumed to be the entire nation of Japan or Korea, which in turn is understood as a self-contained, primordial entity that remains constant over time. There might be uncertainties at the fringe as to who belongs to the nation, but it is taken for granted that the identity and boundaries of the nation are firm, natural, and self-evident.

One might easily attribute the prevalence of these three assumptions, or attitudes, to the local peculiarities of the two countries. It is not hard, after all, to imagine that their respective historical experiences of the twentieth century, though in different ways, would have created extreme sensitivity to any external encroachments on their right and ability to chart their own political destinies. Similarly, both countries seem to share, again for different reasons, a desire to efface the past and to build a new future on a clean slate. Moreover, the colonial relationship that existed between Japan and Korea would have easily engendered a heightened and robust sense of ethnic peoplehood in both nations. Yet, from a more theoretical perspective, too, it is not at all surprising that such assumptions are widespread in these two successful constitutional democracies. For precisely the same assumptions undergird the conventional theories of constitutionalism grounded in the idea of popular sovereignty. The idea of a self-sufficient sovereign will unhampered by external forces and the call for the creation of a whole new political universe are almost axiomatic in most understandings of democratic constitutionalism. These two axioms are buttressed by a third. The subject of a modern constitutional order is commonly assumed to be “We the People” whose identity and membership are seldom, if ever, in question. The existence of a self-contained people with firm boundaries that is able to make autonomous and self-directed decisions for the purpose of abrogating the past and initiating a new order seems to be the common creed of the modern democratic constitutional faith.

According to this common creed, in sum, the legitimacy of constitutional founding hinges upon the unfettered agency of “We the People.” Virtually all modern constitutions claim some mandate of the people who gave birth to it at some discrete point in time. The constitution is also seen as always vulnerable to amendment, even abrogation, by the same people. As such, modern democratic constitutions are destined to have life only insofar as the people find it faithfully implementing their own will. Even for liberal theorists, who quite often cast the people’s collective will as a potential threat to individual rights, it is axiomatic that the people must be seen as the ultimate source of constitutional legitimacy. As regards the constitution, “We the People” is

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its author and fount of legitimacy as well as its master and chief beneficiary. Presupposing the people as the author of the constitution is not only natural (as a matter of logic) but also necessary (as a matter of normative reasoning).

This way of thinking, so intuitively commonsensical, is at work in a variety of contemporary contexts. It is detectable, for example, in the ongoing controversy over the desirability of creating a “constitution” for Europe. There, the debate is in large measure fueled by an anxiety that such a construct might threaten people’s agency and mastery over their respective nation’s own fate. It is often argued that, since there is no single European “people,” or *demos*, yet, there can be no common constitutional edifice for Europe.⁷ A similar apprehension seems to underlie the negative assessments of constitutions, such as that of Iraq, which have allegedly been “imposed” from the outside. The argument is that constitutional imposition is improper, impractical, and unsustainable because the local people were not given an active role in drafting the supreme law of their own land. In order to have a robust sense of ownership, the people, neither coerced nor obstructed, must prevail in the making of their constitution.⁸ Yet another context where this view plays a crucial role is the recent discourse in the United States on “popular constitutionalism” and the purported discontents of judicial supremacy. Here, the Supreme Court’s claim to be the final arbiter of constitutional meaning is challenged and criticized as a usurpation of power that rightfully belongs to the people. The argument is that, as the author of the constitution, “We the People” should be the ultimate authority in its interpretation as well.⁹ In addition to these examples, the recent flurry of post-Cold War constitution-making activities in other parts of the world have also been debated and critiqued on the basis of the same set of assumptions.¹⁰

⁷ For a discussion of this issue, see the various “Comments on the German Constitutional Court’s Decision on the Lisbon Treaty,” *European Constitutional Law Review*, vol. 5 (2009). For a critical analysis of the “no *demos* thesis,” see J. H. H. Weiler, “Does Europe Need a Constitution? *Demos*, Telos and the German Maastricht Decision,” *European Law Journal*, vol. 1 (1995).

⁸ See, e.g., Zachary Elkins, Tom Ginsburg, and James Melton, “Baghdad, Tokyo, Kabul...: Constitution Making in Occupied States,” *William and Mary Law Review*, vol. 49 (2008); Noah Feldman, “Imposed Constitutionalism,” *Connecticut Law Review*, vol. 37 (2005); Simon Chesterman, “Imposed Constitution, Imposed Constitutionalism, and Ownership,” *Connecticut Law Review*, vol. 37 (2005).

⁹ See, e.g., Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Mark V. Tushnet, *Taking the Constitution Away from the Court* (Princeton, NJ: Princeton University Press, 2000).

¹⁰ See, e.g., Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004); Ulrich Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress*, trans. Deborah Lucas Schneider (Atlantic Highlands, NJ: Humanities Press, 1995); Andrew Arato, “Dilemmas

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It is difficult, however, to erase the impression that these cases are raising difficult questions for the common creed of constitutional theory. Theoretically, one of the more fundamental issues they pose is a deep challenge to the conventional understanding that a democratic constitutional order is predicated on a “constituent moment” in which “We the People” lays down its fundamental decision about its political existence on a *tabula rasa*. It may no longer be warranted to assume an autonomous people with near-omnipotent agency vis-à-vis the political and constitutional universe it creates. “We the People” may not always be free, whenever it wants, to make a new world, a *novus ordo saeculorum*, by merely enacting another constitutional founding. It may be that the relationship between the people and the constitution is not so much that of creation and mastery. As a corollary, it may also be difficult to presuppose the existence of a constituent people whose identity remains constant over time despite the deeply transformative politics entailed in the historic act of constitution-making. We cannot simply assume a “timeless” agent with predetermined form and shape, which engages in constitutional founding with preordained goals and interests.

For political and constitutional theorists, then, the challenge posed by recent developments in the global constitutional landscape is profound. The actual making of real-life constitutions entails a process of negotiation and compromise that is far more complex and convoluted than is presupposed by this conventional dogma. A new constitution must declare and manage a clean break from the status quo ante, while somehow plugging itself back into a different “useable past” in order to reinforce its legitimacy and sustainability. In so doing, a constitution must also attempt to promote, or even create, unity and harmony in a context too often racked by conflict and dissension. Furthermore, these negotiations over the past and diversity are frequently made in the shadow of, or under the auspices of, an “external constituency” of sorts that ranges from foreign consultants to international organizations, and even direct foreign occupation. An act of constitution-making can no longer be understood as a pristine domestic affair in which “We the People” qua unitary and homogeneous constituent agent is “rebooting” their own history. According to this critical perspective, constitution-making might be more fruitfully understood as a process through which a different people comes into being as a consequence of protracted negotiations with previous power configurations, pre-constitutional identities, and even external forces. In other

Arising from the Power to Create Constitutions in Eastern Europe,” in Michel Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham, NC: Duke University Press, 1994).

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words, the so-called constituent people cannot be the axiomatic presupposition. It is rather the outcome of intense politics for constitutional founding. The emerging lesson seems to be that “We the People” are formed as they make a constitution, rather than pre-existing or presiding over any putative constituent moment. The challenge, in short, is no less than to rethink the identity of the “sovereign people” and the ideal of “popular sovereignty.”

This book represents our attempt at such rethinking, one that is done through an extended meditation on the historical experiences of constitution-making in Japan and Korea. Our purpose is to reexamine in a fresh light the increasingly questionable assumptions about the sovereign people and popular sovereignty. The book will take us back in time to the events leading up to and following the drafting of Japan’s Peace Constitution of 1946 and Korea’s Founding Constitution of 1948. It will seek to inquire as to whether, and to what extent, the conventional framework can account for the experiences of constitutional founding in postwar Japan and postcolonial Korea. Moreover, it will explore if and how the Japanese and Korean experiences may have universal ramifications by way of enriching our theoretical and conceptual discourse on the mutually constitutive relationship between constitution-making and the formation of “We the People.”

We believe that the constitution-making experiences of Japan and Korea are particularly well suited to our purposes for several reasons. First, both countries are examples of “older” states which had to go through a “rebirth” after World War II by adopting a democratic constitution in the name of “We the People.” Unlike, say, the United States where political union was largely the product of constitutional founding, both Japan and Korea had existed respectively as identifiable political units long before the advent of modern constitutionalism. Such contexts pose the issue of accounting for “We the People” in more acute terms. While the emergence of the people as a constitutional agent is undoubtedly a recent phenomenon, it is also undeniable that both countries have long traditions of relatively well-defined and established peoplehood. Yet it is equally evident that the people of postwar Japan and postcolonial Korea have begun to identify themselves in radically new ways. This calls into question the assumption that the identity of the people has remained unchanged from time immemorial. The two examples thus focus our attention on the changes brought about in the status and identity of the people by the adoption of democratic constitutions.

Second, Japan and Korea merit a comparative examination because the identity of the two peoples becomes clearer when we consider the extent to which one people figured in the other’s process of redefining itself constitutionally. “We the People” in both instances emerged through a process of

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extricating itself from the other because, as of August 1945, the two peoples had been legally incorporated into one and the same polity called the Japanese Empire since 1910. Postwar constitution-making in the name of the people meant that the people of one country had to be defined in contradistinction to that of the other. To be sure, there were other references and resources which informed the process of constructing the people as a constitutional agent. Yet, the significance of the constitution-making process for each people cannot be fully appreciated without considering the fact that both entailed undoing Japan's 1910 annexation of Korea and demarcating the two peoples again in political and legal terms.

Third, investigating these two instances of constitution-making side-by-side will be fruitful because both were done under the same foreign tutelage. It is common knowledge that the U.S. military occupation, led by General Douglas MacArthur as the Supreme Commander for the Allied Powers, played a pivotal role in the making of Japan's postwar constitution. The constitution of South Korea was also drafted while under the same U.S. occupation authority whose military chain of command went back ultimately to MacArthur in his capacity as the Commander-in-Chief of the United States Armed Forces in the Pacific. More interesting, perhaps, are the different approaches adopted by the U.S. military authorities in the two occupied territories. Defeated Japan was ruled indirectly via the Japanese government left intact after the surrender. By contrast, the United States Army Military Government in Korea took direct control of a nation that was liberated from Japan, decreeing itself to be the sole lawful authority in the territory and outlawing all local political groups claiming to represent the Korean people. Ironically, though, the Japanese constitution was largely a product of direct intervention by MacArthur, whereas the Korean constitution was written by Koreans themselves with less coercive involvement of the occupation authorities. The making of the two constitutions under the same foreign presence thus makes them a particularly suitable subject for comparison.

For these reasons, we believe that a comparative study of constitution-making in Japan and Korea will be meaningful not only in its own right, but also because it is an excellent opportunity and vehicle for rethinking the relationship between the people and the constitution. Our hope is to show, through critical reflections on both theories and historical events, that "We the People" is in a crucial sense "constituted" by the very constitution that is being drafted in its name. Thus, we will start by theoretically examining conventional perspectives on democratic constitution-making and the status of the people in that process. This will be followed by chapters each containing comparative

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analysis of the politics and history of the actual constitution-making in Japan and Korea.

Thematically, all four chapters of the book revolve around the three dimensions that make up the common creed of the democratic constitutional faith – external others, past legacies, and people’s boundaries. Chapter 1 will start with some critical reflections at the level of political theory and comparative constitutional law. Our primary concern in this chapter is to revisit those three assumptions that comprise the conventional model of constitution-making based on popular sovereignty. The goal will be to examine if they could be sustained under closer theoretical scrutiny and in light of historical and contemporary examples of constitution-making in various parts of the world. Although these reflections are by no means meant to be exhaustive, our hope is to suggest some theoretically persuasive, and historically grounded, reasons for questioning the soundness of those assumptions. To that end, we will also explore an alternative way of theorizing the relationship between the constituent people and constitution-making. It will be suggested that constitutional politics of founding is a deeply transformative process in the course of which the sovereign “We the People” emerges through interaction with external influences and negotiation with legacies of the past. In short, the processes of constitution-making and people-making will be postulated as mutually constitutive.

Turning to the Japanese and Korean experiences in constitutional founding, we begin by addressing the question of “overbearing outsiders” in Chapter 2. Our focus will be on what may be the most unique and striking feature of the respective constitutions – Article 9 in Japan’s Peace Constitution and the Economy Chapter of Korea’s Founding Constitution. It hardly needs to be mentioned that unarmed pacifism as outlined in Japan’s Article 9 was an entirely unprecedented constitutional principle in world history. Korea’s Economy Chapter was also extraordinary because it prescribed a “socialistic” economic regime for the new nation born under U.S. auspices during the nascent stage of the Cold War. Here, it will be shown that these idiosyncratic features of the two constitutions were shaped under external pressures at various levels. We will revisit not only the original making of these provisions which were crucial in forming the respective countries’ new constitutional identity, but also their subsequent adoption and adjustment in the immediate post-drafting stage which brought about significant reorientations in those identities. These processes will be analyzed in terms of intense and convoluted negotiations between the external