

Article

East Asian Foundations for Constitutionalism: Three Models Reconstructed

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ABSTRACT

The majority of countries in East Asia have become liberal democracies with vibrant developments of constitutionalism and rule of law. Scant attention, however, has been paid to particular social and political foundations for East Asian constitutionalism. This paper utilizes the approach of constitutional ethnography to re-examine postwar constitution-making in Japan, South Korea and Taiwan. It re-examines social and political circumstances surrounding these constitution-making experiences and analyzes them from four perspectives: constitution-making and war situations, questionable constitutional authorship, constitution-making and decolonization, and finally constitution-making and nationalism. By reconstructing these postwar constitution-making stories, this paper finds that the three constitution-making experiences are reflective of three constitution-making models including: constitution-making as promoting democracy, constitution-making as national independence, and constitution-making as national inclusion. It concludes that East Asia constitution making is neither of any mere borrowing from nor of any resistance against “western constitutionalism.” Rather, postwar constitution-making experiences in East Asia have been developed

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and re-developed into distinctive, yet comparable, models of constitutionalism for global constitutional lawyers to learn.

Keywords: *Constitutionalism, East Asia, Constitution-Making, Colonialism, Constitutional Legitimacy*

2008]	East Asian Foundations for Constitutionalism: Three Models Reconstructed	113
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CONTENTS

I.	FORWARD	115
II.	THREE STORIES OF POSTWAR CONSTITUTION-MAKING	116
	A. <i>Japan</i>	116
	B. <i>South Korea</i>	119
	C. <i>Taiwan</i>	121
III.	ANALYZING THREE STORIES OF POSTWAR CONSTITUTION-MAKING .	124
	A. <i>Constitution-Making and War Situations</i>	124
	B. <i>Questionable (or Incomplete) Constitutional Authorship</i>	125
	C. <i>Constitution-Making and Decolonization (or Re-Colonization?)</i> .	127
	D. <i>Constitution-Making, Identity & Nationalism</i>	128
IV.	THREE MODELS OF CONSTITUTION-MAKING: EAST ASIA IN COMPARISON	129
	A. <i>Constitution-Making as Promoting Democracy</i>	129
	B. <i>Constitution-Making as National Independence</i>	130
	C. <i>Constitution-Making as National Inclusion</i>	131
	D. <i>East Asia Constitution-Making as Comparable Models</i>	133
V.	CONCLUSION	134
	REFERENCES	135

I. FORWARD

Japan, South Korea and Taiwan now stand firmly as pivotal constitutional democracies in East Asia. All three countries have written constitutions and exercise recognizable constitutional practices met with liberal constitutional criteria. Only a little more than half a century ago, however, the three countries were engaged in colonial struggles –South Korea and Taiwan being colonies of Japan– and fought with each other aided by western allies. Intriguingly, this war ended with three new constitutions for the three places –the 1947 Constitution for postwar Japan, the 1948 Constitution for Republic of Korea (South Korea), the 1947 Constitution of Republic of China (ROC) for Taiwan.

The 1947 Constitution was not the first constitution for modern Japan, but it was nevertheless commonly regarded as the first democratic one.¹ Till this day, it has lived with no formal amendment despite constant talks for revisions. The 1948 South Korea Constitution was, however, amended already in 1952 to buttress a presidential dictatorship in a war situation. South Korea has since had six republics with respective constitutions –some amended; others created anew.² The most recent one –the 1987 Constitution– facilitated a successful democratic transition and has remained unchanged. In Taiwan, the 1947 ROC Constitution had been frozen soon after its promulgation in 1948 by temporary provisions that sustained Chiang Kai-shek's constitutional dictatorship for combating Chinese communism.³ It was formally revised only in 1991 by additional articles –followed by further six times of significant revisions– to stipulate democratic transitions.⁴ The most recent constitutional revision occurred in 2005.⁵

In what ways and to what extent were the three experiences of establishing modern constitutions in Japan, South Korea and Taiwan similar

1. Katsutoshi Takami, *From Divine Legitimacy to the Myth of Consensus: The Emperor System and Popular Sovereignty*, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 9, 12-17 (Yoichi Higuchi ed., 2001). See also THEODORE MCNELLY, THE ORIGINS OF JAPAN'S DEMOCRATIC CONSTITUTION 98-100 (2000); KOSEKI SHOICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION (Ray A. Moore ed. & trans., 1997).

2. Dae Kyu Kim, *Constitutional Amendment in Korea*, 16 KOREAN J. COMP. L. 1-13 (1988).

3. Tom Ginsburg, *Confucian Constitutionalism? The Emergency of Constitutional Review in Korea and Taiwan*, 27 LAW & SOC. INQUIRY 763, 768-70 (2002); see also Tay-Sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531, 541-42 (2002).

4. Jiung-Rong Yeh, *Constitutional Reform and Democratization in Taiwan: 1945-2000*, in TAIWAN'S MODERNIZATION IN GLOBAL PERSPECTIVE 47, 55-59 (Peter Chow ed., 2002).

5. For the text of constitutional amendment in English, see http://www.president.gov.tw/en/prog/news_release/document_content.php?id=1105496084&pre_id=1105498701&g_category_number=409&category_number_2=373&layer=&sub_category= (last visited Sept. 8, 2008).

or distinctive? Would they share some common features due to similar postwar situations? To what extent would their colonial relationships affect their postwar constitution-making? In what ways would the three East Asian constitutional stories contribute to standard –if not merely western– understandings of modern constitutionalism? How would the three experiences of writing constitutions be evaluated? In what ways and to what extent these earlier experiences affect –or even contribute to– subsequent transformation to full democracies in the three places?

This article seeks to draw on postwar constitution-making experiences in Japan, South Korea and Taiwan and further develop them into models of constitution-making for comparative references. First, the three stories of writing postwar constitutions in Japan, South Korea and Taiwan would be retold and situated in their particular historical, political and social contingencies. The second part of the paper would then examine common or distinctive features that exist in the three constitution-writing experiences. Finally, three models of constitution-making would be attempted to draw upon these particular experiences. It is hoped that these models based upon East Asian experiences not only provide references for East Asia but also –perhaps more importantly– add pivotal accounts for understanding modern constitutionalism.

II. THREE STORIES OF POSTWAR CONSTITUTION-MAKING

On August 10, 1945, When Japan offered to surrender –conditioned solely on the continuance of the Emperor on the throne–, the war in the Pacific was about coming to an end.⁶ Five days later, on August 15, the recorded message of Emperor Hirohito was broadcast to the Japanese people and it was made clear to the allied powers that Japan was willing to surrender unconditionally. In about two weeks, the formal surrender ceremony took place on the deck of an American ship. The end of the war brought –perhaps not so surprisingly– constitutional moments to Japan, South Korea and Taiwan.

A. *Japan*

The first person to suggest Japan's constitutional revision after the war was General MacArthur. After his headquarters as the Supreme Commander

6. Howard S. Levie, *How It All Started –And How It Ended: A Legal Study of the Korean War*, 35 AKRON L. REV. 205, 206 (2002) (quoting *The United States and the Korean Problems*, S. Doc. No.83-74, 1953).

for the Allied Powers (hereinafter *SCAP*) were established in Tokyo, General MacArthur met with Prince Konoe, a seasoned cabinet member who had served as Prime Minister three times before the war. It was on this occasion that MacArthur revealed his demand for Japan's constitutional reform in order to introduce a new government with sufficient liberal elements.⁷ This demand was already in the Potsdam Declaration, one provision of which specifically required the Japanese government "remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people."⁸ Since the SCAP was to implement the Potsdam Declaration, the demand for constitutional reform by General MacArthur should have come as no surprise.⁹ Konoe began to work privately on a constitutional draft without formal mandate from the SCAP, but his work –despite later being presented to the Emperor on November 22– became futile with his own scandal¹⁰ and the change of government to new Prime Minister Shidehara.¹¹

The new government formed the "Committee to Study Constitutional Problems" –often referred as the "Matsumoto committee" on October 25, 1945. This committee despite being formed by the government remained unofficial and its activities were followed closely by the media. It was speculated that its rather conservative draft would be published sometime in January 1946.¹² Meanwhile, by the end of 1945, many constitutional drafts by political parties and civic organizations appeared one by one. Of most relevance were drafts by the socialist party, by the communist party, by conservative parties, by the constitutional research association, and by the constitutional discussion society.¹³ It should be noted that except drafts by conservative parties, all drafts asserted popular –instead of imperial– sovereignty and included a bill of liberal –at times social– rights.¹⁴

On February 1, the newspaper –*Mainichi Shinbun*– surprisingly published a so-called provisional draft by the Matsumoto committee and the

7. See SHOICHI, *supra* note 1, at 9. See also MCNELLY, *supra* note 1, at 2-4; DALE M. HELLEGERS, *WE THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION* 438-60 (2001).

8. Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 426 (1999) (quoting Article 10 of the Potsdam Declaration).

9. But in reality the initiative was seen as rather unexpected to the Japanese government. See SHOICHI, *supra* note 1, at 9; see also Hamano, *id.* at 430.

10. Later Konoe was charged with war crimes and committed suicide by the end of 1945.

11. See SHOICHI, *supra* note 1, at 70-71.

12. *Id.* at 54-67.

13. See SHOICHI, *supra* note 1, at 26-50. See also RICHARD B. FINN, *WINNER IN PEACE: MACARTHUR, YOSHIDA, AND POSTWAR JAPAN* 91 (1995).

14. See SHOICHI, *supra* note 1, at 26-48; see also Hamano, *supra* note 8, at 427-29.

conservative nature of that draft was reported and criticized.¹⁵ Two days later, on February 3, MacArthur formulated his famous three principles as essential requirements for Japanese constitutional reforms and his staffs began working secretly to prepare for a draft. Those essentials included principle of popular sovereignty, renunciation of war and abolition of feudal system.¹⁶ Having working on preparing a draft, MacArthur's team demanded the Japanese government for quick release of its draft.¹⁷ The Matsumoto draft was sent to it on February 8. Less than a week, on February 13, the SCAP met with the Japanese government with prepared critical responses against the Matsumoto draft and –as a huge surprise to the Japanese as well as the U.S. State Department¹⁸ and the international community– the MacArthur's draft for the Japanese Constitution.¹⁹

Reluctantly the Japanese government accepted the MacArthur draft on February 22²⁰ and began working on its own Japanese draft modeled upon the American one. On March 6, the draft on the Constitution was announced, whose complete text was not published to the ordinary people until April 17, a week after the first parliamentary election after the war was held. It was clear that the draft Constitution never became the center of the election, by which a parliament was to be formed to later enact the Constitution.²¹

A new government led by Prime Minister Yoshida was formed on May 22 as a result of the parliamentary election.²² The last parliamentary session of the Imperial Diet opened in June and debated on the draft Constitution for more than one hundred days.²³ As discussions proceeded, significant changes to the original draft were made.²⁴ The new postwar Japanese Constitution was approved on October 7 in the Diet, promulgated on November 3, and became effective on May 3, 1947, six months later. One last important note is that after the promulgation of the new Constitution, MacArthur sent the message to Yoshida government to offer another chance

15. See SCHOICHI, *supra* note 1, at 60.

16. *Id.* at 79. See also Hideo Otake, *Two Contrasting Constitutions in the Postwar World: The Making of Japanese and the West German Constitutions*, in FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 43, 46 (Yoichi Higuchi ed., 2001).

17. Otake, *id.* at 47.

18. In fact, the U.S. government in Washington had proposals for “reform of the Japanese government system” approved on Jan. 7, 1946 and sent it to MacArthur on Jan. 11. In this particular reform proposal, constitutional reforms came only as a third item. See *id.*

19. *Id.* at 98-102.

20. *Id.* at 109.

21. *Id.* at 129-33.

22. *Id.* at 165.

23. LAWRENCE W. BEER & JOHN M. MAKI, FROM IMPERIAL MYTH TO DEMOCRACY: JAPAN'S TWO CONSTITUTIONS, 1889-2002 82 (2002).

24. *Id.* at 187.

to freely amend the Constitution in January 1947. But it was only after a half and a year when a new cabinet took power that constitutional revisions emerged as a public issue. Despite some initial reviews, revisions to the new Constitution never received formal attentions,²⁵ and international situations at the time –particularly the rise of the Chinese Communist Party– shifted the focus and transformed –almost immediately– the postwar role of Japan from a supervised teenager to a helping young soldier.

B. *South Korea*

The Korean peninsula was formally made annexed to Japan in 1910.²⁶ Inspired by the international movement for national self-determination, a nationwide uprising for independence occurred on March 1, 1919 and a provisional government of Korea was subsequently established and took refuge in Shanghai, China.²⁷ A constitutional charter that was said to borrow many passages from the U.S. Constitution was created.²⁸

But the moment at establishing a modern constitution really came after Japan's surrender in August 1945. According to provisional arrangements during the war, the Japanese forces north of the 38th parallel would surrender to the Soviet army but those in south to the Americans.²⁹ Immediately after the Japanese surrender, a provisional government of Korea organized by local anti-Japanese political forces was set up. This Korean government welcomed the arrival of Soviet soldiers and sought collaborations with them. In the South, however, the U.S. soldiers arrived only on September 8, two days after the People's Republic of Korea was already proclaimed in Seoul.³⁰ On the next day, the U.S. Military Government in Korea (hereinafter *USAMGIK*) was established. The two separate occupying forces –one in the north and the other in the south– were formed.

This unfortunate division was sought to be resolved in December 1945. At the meeting held in Moscow, the Foreign Ministers of Great Britain and

25. *Id.* at 243-51.

26. Japan's gradual annexation of Korea began already in the 1870s and culminated with the Eulsa Treaty in 1905 and the Annexation Treaty in 1910. Both treaties were abolished by both Japan and South Korea formally in 1965.

27. Kyong Whan Ahn, *The Influence of American Constitutionalism on South Korea*, 22 S. ILL. U. L.J. 71, 72 (1997).

28. *Id.* at 72.

29. Howard S. Levie, *How It All Started-and How It Ended: A Legal Study of the Korean War*, 35 AKRON L. REV. 205, 206 (2002) (quoting the Cairo Declaration and the General Order by the U.S. Secretary of War, in the United States and Korean Problem, S. Doc. No. 83-74).

30. Eric Toussaint, *South Korea: the Miracle Unmasked*, http://www.cadtm.org/article.php3?id_article=1847 (last visited Apr. 11, 2006).

the Soviet Union and the U.S. Secretary of State reached the agreement, to which the government of China also concurred, that a provisional democratic Korean government should be established for Korea in its entirety, and that a joint commission of the two occupying forces would be formed.³¹ But neither military conferences nor meetings of the Joint Commissions during 1946-47 made any progress on this standoff.³² Meanwhile, political and economic developments continued in both the north and the south. The USAMGIK set up a civilian government led by Syngman Rhee who took exile to the United States during the Japanese occupation.³³ In the north, radical –if not revolutionary– economic and political measures were stipulated.³⁴

On November 14, 1947, the General Assembly of the United Nations –upon the request from the United States after having failed to find any solutions with the Soviet Union– adopted the resolution establishing the U.N. Temporary Commission on Korea and recommending a national election held no later than March 31, 1948.³⁵ The U.N. supervised election took place only in the southern part as the Soviet Union denied the U.N. authority over the Korean problem. After the election, with months, the National Assembly –in the south– adopted the Constitution for the Republic of Korea (hereinafter *ROK*) on July 12, 1948.³⁶ In the meantime, an unsupervised election was also held in the north, which resulted in the leadership of Kim Il Sung, and subsequently the Constitution for the Democratic Peoples Republic of Korea (hereinafter *DPRK*) was adopted in the north.³⁷ The *ROK* Constitution in the south was greatly influenced by the USAMGIK³⁸ while the *DPRK* Constitution was in the shadow of its Soviet advisors.³⁹

The problem of two Koreas exacerbated as the north attacked on the south in June 1950. The hostility dragged major countries such as the Soviet

31. See Levie, *supra* note 29, at 207.

32. See Levie, *supra* note 29, at 207-8.

33. Korea was under United States military rule until 1948, after which formal authority was turned over to a newly established political system dominated by United States protégée Syngman Rhee, who won the first presidential election. JOHN KIE-CHIANG OH, *KOREAN POLITICS : THE QUEST FOR DEMOCRATIZATION AND ECONOMIC DEVELOPMENT* 31-37 (1999).

34. See Toussaint, *supra* note 30.

35. See Levie, *supra* note 29, at 208-9. Oh, *supra* note 33, at 25-26.

36. See Levie, *supra* note 29, at 209.

37. *Id.*

38. In April, 1948 the U.S. military government just issued an ordinance providing the rights of the Korean People that modeled in many ways on American bill of rights. See Ahn, *supra* note 27, at 73.

39. Patricia Goedde, *Law “of Our Own Style”: The Evolution and Challenges of the North Korean Legal System*, 27 *FORDHAM INT’L L.J.* 1265, 1270 (2004).

Union, People Republic of China (hereinafter *PRC*), the United States and the international community into almost the third world war and lasted for three years.⁴⁰ The division of the two Koreas has since persisted. A dictatorship operated in the north, whose leadership was changed from Kim Il Sung to his son Kim Jong-Il in 1994 when the father died. Similar dictatorial regimes also operated in the south but the popular uprising of 1987 gave birth to –at long last– a new democratic regime that has lived through this day.

C. *Taiwan*

Taiwan was ceded to Japan in 1895, only less than ten years after it had been made into a province of the Ch'ing Dynasty.⁴¹ Despite the abandoned policy before the nineteenth century,⁴² the Chinese social structure and administrative system remained strong in Taiwan as residents were mainly immigrants from coastal mainland. The annexation to Japan was thus not without any resistance, and a number of democratic movements occurred throughout the colonial period.⁴³ Compared to Korea, however, the Japanization in Taiwan seemed was relatively intense as the Japanese colonial government invested heavily on all aspects –not just infrastructural or industrial– of developments.⁴⁴ The island's rather departure from earlier Chinese root during this period had sowed the seed of political –even cultural– clashes when the Chinese authority came to Taiwan after the war.⁴⁵

During the war, two war declarations –the Cairo and Potsdam declarations– dealt with the fate of Taiwan. It was stated that all the territories Japan had stolen from the Chinese should be restored to the ROC represented by the Chiang Kai-Shek government at the time.⁴⁶ Despite much debated legal status of the two declarations,⁴⁷ the Chiang Kai-Shek

40. The war was technically put into an end by the Armistice Agreement signed at Panmunjom on July 27, 1953. See Howard S. Levie, *The Nature and Scope of the Armistice Agreement*, 50 AM. J. INT'L L. 880, 884 (1956).

41. The Ch'ing Dynasty signed the Treaty of Shimonoseki with Japan, ceding both Taiwan and the Penghu Islands to Japan into perpetuity. See WEN-CHEN CHANG, *TRANSITION TO DEMOCRACY, CONSTITUTIONALISM, AND JUDICIAL ACTIVISM: TAIWAN IN COMPARATIVE CONSTITUTIONAL PERSPECTIVE* (JSD Dissertation, Yale Law School, 2001).

42. JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 68-69 (2d ed. 1999).

43. See CHANG, *supra* note 41, at 10-11.

44. Christopher J. Carolan, *The "Republic of Taiwan": A Legal-Historical Justification for A Taiwanese Declaration of Independence*, 75 N.Y.U. L. REV. 429, 432-33 (2000).

45. *Id.*

46. See CHANG, *supra* note 41, at 13-17 (quoting and discussing the two war declarations).

47. Lung-Chu Chen & W. M. Reisman, *Who Owns Taiwan: A Search for International Title*, 81 YALE L.J. 599, 610 (1972).

government was ready to take over Taiwan when Japan's surrender was announced in August 1945. Meanwhile, neither local pronouncement of independence nor self-formed government by local elite appeared on the island.⁴⁸ This stood in rather sharp contrast with the Korean situation. In September, Japan was directed by the Allies to surrender its forces in Taiwan to Chiang Kai-Shek.⁴⁹ The Chiang's troop swiftly seized the island and on October 25, Taiwan was renamed the "Taiwan Province" of the ROC.⁵⁰

Having named Taiwan as a province, however, the ROC government did not govern Taiwan the same way as it did in other provinces. Instead, it treated Taiwan as an occupied territory, not as a liberated Chinese province.⁵¹ A Governor-General, Chen-Yi, concentrated with executive, legislative and judicial powers was appointed and sent to govern Taiwan together with his troops.⁵² The high expectation of people toward the Chinese government vanished soon after the mainlander soldiers arrived. Meanwhile, economic situations worsened very quickly⁵³ because many mainlanders took refuge to Taiwan as the Nationalist Party (hereinafter *Kuomintang*, *KMT*) led by Chiang Kai-Shek and the Chinese Communist Party (hereinafter *CCP*) began serious armed conflicts.

Notwithstanding gradually intensified warfare with the CCP, the KMT government decided to continue the process of constitution-making that had been suspended during the war. It was decided that Taiwan, among the other newly "recovered" provinces, should be given additional seats in the Constituent National Assembly that would soon meet to enact the ROC Constitution. Delegates from the majority of provinces were already elected during 1936-37.⁵⁴ Despite Governor-General's reluctance,⁵⁵ the Taiwanese delegates were finally indirectly elected through a series of complicated procedures by the Provincial Council,⁵⁶ and as a result, seventeen delegates

48. See CHANG, *supra* note 41, at 17.

49. See Chen & Reisman, *supra* note 46, at 633-36.

50. *Id.*

51. DOUGLAS MENDEL, *THE POLITICS OF FORMOSAN NATIONALISM* 28 (1970).

52. *Id.*

53. By 1946, it was estimated that 80 percent of the native-born Taiwanese industrial workers lost their jobs. See CHANG, *supra* note 41, at 19-25. See also GEORGE H. KERR, *FORMOSA BETRAYED* 127-34 (1965).

54. Because Taiwan was under the control of Japanese colonial government, it was regarded as one of the overseas foreign nations with Chinese residents and give one overseas' delegate in the Assembly. Now as a province, a dozen more seats were given to Taiwan.

55. Governor-General Chen Yi was reluctant to hold any election and decided that delegates from Taiwan should be chosen by the KMT government on the mainland. As soon as his plan was released, the people in Taiwan were outraged and staged political protests such that the government had to make compromises.

56. Each city or county council as well as professional and indigenous groups could make a list

were elected.⁵⁷

In late 1946, the Taiwanese delegates joined fifteen hundred others in the mainland to the Constituent National Assembly.⁵⁸ But the CCP and its alliances boycotted the process, and a number of military clashes between the CCP and KMT took place during the period of the Constitutional Convention. Nevertheless, On December 25, the ROC Constitution was enacted by the Constituent Assembly, duly promulgated on January 1, 1947 and became effective on December 25, 1947.

After returning from the mainland, the Taiwanese delegates were surprised to find that the ROC Constitution was not going to be effective in Taiwan despite their participation.⁵⁹ The postponement of the ROC Constitution's application to Taiwan was made upon the request of Governor-General Chen Yi. He argued that the people in Taiwan were so absorbed into Japanese colonial culture that they were not ready for Chinese constitutional rule.⁶⁰ By the end of February, the most serious revolt occurred in Taipei and led to so-called the 1947 March Massacre.⁶¹ A martial law decree was imposed all over the island.

Across the Strait, the KMT was losing the battle to the CCP. Responding to such emergencies, in May, 1948, only a year after the ROC Constitution became effective, the first National Assembly convened to suspend the ROC Constitution and enact the Temporary Provisions, which would remain effective—even after the KMT government retreated to Taiwan—till May 1991, for more than forty years. On May 20, 1949, another martial decree was declared in Taiwan, which would last for thirty-eight years before it was finally lifted on July 15, 1987. In October 1949, the CCP announced itself a lawful government of the People Republic of China in the mainland. By the end of that year, the KMT government fled to Taiwan and declared Taipei as the temporary capital of the ROC.⁶²

After Chiang Kai-Shek died in 1974, his son assumed the political leadership in Taiwan. The political liberalization began in the 1980s and the progress of democratization accelerated after the death of Chiang Chin-Kuo in 1988. Since 1991, additional articles that substantially amended the ROC

of their recommended candidates that would ultimately be elected by majority votes of the Provincial Council. See CHANG, *supra* note 41, at 20.

57. CHANG, *id.*

58. WILLIAM L. TUNG, THE POLITICAL INSTITUTIONS OF MODERN CHINA 201-2 (1968).

59. See KERR, *supra* note 53, at 239-40.

60. *Id.*

61. *Id.* A detailed historical narrative is also available in electronic database, see <http://www.taiwanese.com/~bst/228/> (last visited Sept. 8, 2008). See also KERR, *supra* note 53, 254-311 (1965).

62. See CHANG, *supra* note 41, at 33-34.

Constitution have been revised for seven times in Taiwan to create a young, vibrant constitutional democracy.⁶³

III. ANALYZING THREE STORIES OF POSTWAR CONSTITUTION-MAKING

Having situated the three postwar constitution-making experiences in their particular historical-political contingencies, this part of paper would then examine in what ways and to what extent these three experiences in Japan, South Korea and Taiwan similar or distinctive? Would the three stories no more particular than other stories of constitution-making in various Continents? The following identifies four elements –war situations, constitutional authorship, decolonization, and nationalism– as critical in understanding and analyzing the three stories of constitution-making in East Asia.

A. *Constitution-Making and War Situations*

The three constitutions were all enacted immediately after the war came to an end, respectively in 1947 and 1948. This is not particularly exceptional. Many modern constitutions were made after wars, some of which were even triggered by wars or even as a product –part of peace agreement– of wars.⁶⁴ Some wars were international wars while others were internal conflicts. Still others involved colonial struggles –international or internal depending on perspectives–.

War is not particularly good or bad to modern constitution-making. On the one hand, as grounded in democratic legitimacy and popular sovereignty, modern constitution-making requires certain moments to invoke popular enthusiasm.⁶⁵ Citizens must be directed to involve in various process of constitution-making such as calls for constitutional convention, elections of constitutional delegates or referenda on constitutional ratification. Heightened popular energy during and after the war may provide such momentous conditions. On the other hand, however, what is crucial in constitution-making is not only popular enthusiasm but also –perhaps even more important– serious deliberations or discussions by delegates or even by the people.⁶⁶ Instability and rather poor social-economic conditions as a

63. See generally CHANG, *id.*

64. Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 663 (2006).

65. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

66. Jon Elster, *Deliberation and Constitution Making*, in *DELIBERATIVE DEMOCRACY* 97-122

result of war are not particularly good for providing such deliberative environments. Constitutions created in turbulent situations would not deliver better neither live for long. The first French Constitution came to our mind as a great example. Can any constitution be created to enjoy heightened public energy stipulated by wars while having any satisfying civic deliberation in rather stable conditions? The making of the U.S. Constitution perhaps is rather close to such a case. The independence was declared in 1776 after years of bloody fights while the making of the federal Constitution was stipulated in 1787 and ratified with elections and discussions for two years.

While the three constitutions of Japan, South Korea, and Taiwan were all made after the war, their conditions nevertheless varied. Comparably speaking, the condition for Japan –despite being defeated and suffered enormously– was a little better than Korea and Taiwan as both confronted emergent internal struggles –north and south; the KMT and the CCP– during the time of constitution-making. This is also evident in the extent to which civic and professional organizations participated in the discussion or drafting process. In about half a year after Japan’s surrender in August 1945, civic groups and organizations were able to gather and work on their own constitutional drafts with some media publicity.⁶⁷ This reflected to a certain extent both popular enthusiasm and public deliberation that would provide legitimacy for constitution-making. In cases of South Korea and Taiwan, however, the elections of constitutional delegates and conventions of constitutional assembly under the guardian of military forces were pretty nominal.

B. *Questionable (or Incomplete) Constitutional Authorship*

All three postwar constitutions in Japan, South Korea and Taiwan were criticized as lacking genuine constitutional authorship. The postwar Constitution of Japan is often referred as one imposed by the U.S. or even by MacArthur.⁶⁸ The proposal to revise the Constitution or to make a new one thus sometimes carries with it rather patriotic or even nationalistic sentiment and even wields certain power of popular –in particular conservative

(1998); Jürgen Habermas, *Popular Sovereignty as Procedure*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 35-65 (James Bohman & William Rehg eds., 1997).

67. See SHOICHI, *supra* note 1, at 212-26.

68. See SHOICHI, *supra* note 1, at 98-137. See also Yôichi Higuchi, *The Constitution and the Emperor System: Is Revisionism Alive?*, 53(1) LAW & CONTEMP. PROBS. 51, 53 (1990); Vicki C. Jackson, *What’s in a Name? Reflections on Timing, Naming and Constitutional Making*, 49 WM. & MARY L. REV. 1249, 1262 (2008).

crowds— mobilization. In South Korea, the first postwar Constitution was influenced strongly by the U.S. military government.⁶⁹ With the outbreak of the Korean War, the Constitution was quickly amended and replaced eventually by another one in a decade. In Taiwan, the ROC Constitution has sometimes been criticized as a Constitution made in China and for the Chinese but not a Constitution made in Taiwan and for the Taiwanese.⁷⁰ Even for the Chinese, the ROC Constitution is perhaps referred as one written by the KMT and for the KMT but not by the Chinese and for the Chinese—who have since 1949 been under the PRC—.

The lack of genuine constitutional authorship in the three postwar constitutions is thus pretty obvious. If we give it a second thought, however, it might not be so obvious. After all, how genuine is genuine constitutional authorship? How complete must complete constitutional authorship be? Was the 1789 U.S. Constitution without a question written by the Americans? Who were those Americans? Did they include delegates to the Philadelphia Convention, delegates to ratifying states conventions, those with the right to vote for delegates, those whose opinions exerted influences, or those who “consented” to such enactment? The question of authorship is as a matter of fact a very complex one, and together with the paradox of representation as two sides of a same coin. Thus, the fact that General MacArthur gave the Japanese government a draft constitution, that the USAMGIK influence upon the Constitution was direct and evident, and that Taiwan was not part of China when the ROC Constitution was prepared do not necessarily deny the respective constitutional authorship of Japan, South Korea (even Korea)⁷¹ and Taiwan. In the end, it is the last Imperial Diet that enacted the postwar Japanese Constitution, the newly elected National Assembly in Seoul passed the Korean Constitution, and seventeen elected delegates from Taiwan took part in the Constituent Assembly of the ROC Constitution.

One might still insist that constitutional authorship in the three places were put into question when their draft constitutions were clearly given—if not forced to receive—from outside. But ideas always travel and often change as they travel. Something from outside does not represent an absolute obstacle for us to establish any meaningful controlling relationship with it. More importantly, despite external influence (or imposition), all three

69. Hakjoon Kim, *The Influence of American Constitution on South Korean Constitutional Development since 1948*, 16(2) ASIAN PERSP. 25, 25-42 (1992).

70. See, e.g., Jiunn-Rong Yeh, *The Cult of Fatung: Representational Manipulation and Reconstruction in Taiwan*, in THE PEOPLE'S REPRESENTATIVES: ELECTORAL SYSTEMS IN THE ASIA-PACIFIC REGION 23-27 (Graham Hassall & Cheryl Saunders eds., 1997).

71. Both the South Korean Constitution and the North Korean Constitution assert de jure sovereignty over the other.

constitutions embody a certain –some very significant– degree of local, indigenous reflections. For example, it is agreed that the postwar Japanese Constitution –notwithstanding the MacArthur draft– reflected in the many significant ways the influence of its prewar Meiji Constitution and the Weimar Constitution of Germany.⁷² Similar contentions –particularly the influence from the German prewar Constitution– were made to the Korean Constitution.⁷³ The only exception was Taiwan as there was nearly no local reflection upon the ROC Constitution.

A last –but not the least– note on whether it is ever conceivable for constitutional authorship to be established –or supplemented– ex post. After the promulgation of the postwar Constitution, the Yoshida government labored enormous efforts to make the new document popularized.⁷⁴ Is it all right to assert the Japanese people’s constitutional authorship over the Japanese Constitution by ex post popularized efforts –in addition to the fact that the Constitution was never seriously called into formal revision–?

C. *Constitution-Making and Decolonization (or Re-Colonization?)*

In analyzing constitutionalism in Asia-Pacific states, Graham Hassall and Cheryl Saunders contend that almost all constitution-making experiences in Asia-Pacific were associated with decolonization and independence.⁷⁵ They distinguish two kinds of constitution writings in association with decolonization: negotiated independence constitution-making and declared independence constitution-making. In the former, constitutions are made via negotiations with previous colonizers, while in the latter, constitutions are enacted upon declaration of self-independence without consultations to former masters.⁷⁶

The three constitution-making experiences in East Asia, however, barely fit in the above models. Although Korea and Taiwan represented typical cases of decolonization, their respective constitution-making followed neither “declared” nor “negotiated” constitution-making paths. In fact, the

72. The influence of the Weimar Constitution is particularly seen in the inclusion of social rights and welfare policies and also the ways that these rights and their restrictions were prescribed. See SHOICHI, *supra* note, at 111-22. See also BEER & MAKI, *supra* note 23.

73. See Ahn, *supra* note 27, at 72.

74. See SHOICHI, *supra* note 1, at 212-27.

75. The only exception would be Thailand. But Hassell and Saunders argues that influenced by its neighboring states, Thai king –after a bloodless coup– presented a “first charter” that declared sovereignty belonged to the people. See GRAHAM HASSELL & CHERYL SAUNDERS, ASIA-PACIFIC CONSTITUTIONAL SYSTEMS 54-90 (2002).

76. *Id.* at 55.

Korean Constitution made by the left-minded government immediately after Japan's surrender in 1945 was closest to the "declared" model. After the U.S. military government moved in, however, that document was completely denied. In a way, the Korean Constitution might be regarded as "negotiated" –not with the former Japanese colonizer but with the new "colonizer" i.e. the U.S. military government–. Similarity may be drawn to Taiwan: upon the leaving of the Japanese colonizer came the new Chinese "colonizers," with no chance to declare or negotiate any constitution-making with its former master Japan.

Is it so because Japan was the loser of the war? Perhaps. But it is important to note that former European or American colonies –whose masters were either winner or loser in the war– were given (or recognized) the chance to declare or at least to negotiate their own constitution-making. In a way, as a loser in the battle, the experience of the Japan's postwar constitution-making was similar to the "re-colonization" share by its former Korean and Taiwanese colonies.

D. *Constitution-Making, Identity & Nationalism*

In articulating the concept of constitutional identity, Michel Rosenfeld distinguishes four models of constitution making in relation to constitutional identity: the French, the German, the American and the Spanish.⁷⁷ In the French model, constitutional identity rendered by way of constitution making was to recognize the already in-existence demos –though no yet fully adapted to the new constitutional order. The German model was ethnocentric in that constitution making was to realize the ideal of self-governance by an ethnic group –the Germans. The American model was closer to the French than to the German. But unlike the French model, at the time of founding, "We the People" of the United States was yet to be born and constitutional making was to provide for such a framework under which a new national identity would be constructed towards the future. The Spanish model differs from the earlier three in that constitution making was to provide for a multi-ethnic polity by recognizing the possibility of multiethnic nation-state.

In a way, the Japanese postwar constitution-making with regard to its constitutional identity is rather similar to the German model. To the extent

77. Michel Rosenfeld, *The Identity of the Constitutional Subject*, 16 CARDOZO L. REV. 1049 (1995); Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 CARDOZO L. REV. 1891 (1998).

that it symbolized the independence and liberation of “the Korean people,” the Korean Constitution would be characterized more like the French model. After all, before the Japanese colonization, the inhabitant of the peninsula was rather scattered and locally minded, and there was no need in constructing a “Korean” identity against any centralized ruler.⁷⁸ The Taiwanese situation was rather distinctive. It was more like the Catalonian situation in the Spanish model but in a reverse way. While the Spanish model provides a rather inclusive identity, the unified Chinese identity was imposed to the Taiwanese residents without much space for negotiation.

More importantly, both the German and French models –not to mention the “reverse” Spanish model– are nationalistic in nature as they rely much heavily on ethnic identity in the construction of constitutional identity. The three constitution-making in Japan, Korea and Taiwan were consistent with this assertion. In the course of independence and constitution-making, the Korean nationalism was constructed and became so strong to support two dictatorial regimes in the south for decades and in the north till even now. In a similar vein, the imposition of Chinese identity in Taiwan was intertwined with the dictatorial control of the Chinese Nationalist Party, KMT. But the Japanese case was a little different. The Japanese nationalism was only a continued –nevertheless strengthened due to postwar situation– development from the earlier Meiji period.

IV. THREE MODELS OF CONSTITUTION-MAKING: EAST ASIA IN COMPARISON

Reflected upon the three stories of constitution-making in East Asia and drawn upon their analytical particularities, three models of modern constitution-making emerge: first, constitution-making as promoting democracy, second, constitution-making as national independence, and finally, constitution-making as national inclusion.

A. *Constitution-Making as Promoting Democracy*

The first model of constitution-making as promoting democracy has been regarded as imperative in modern theorizing of constitutionalism. Constitutions are created to construct a democratic structure of governance and to ensure rights of the people who are governing at the same time being governed. But making constitutions to promote democracy has not been –at

78. The relationship of residents in the peninsula –represented by various nobilities– with Chinese imperial dynasties was rather of patronage.

least not always— occurred in every situation of constitution making. The earlier modern constitution-making such as the creation of the American and French constitutions was typical of such democratic struggles. In the above three stories, only the Japanese case was reflective of this model. The strong pursuit of democratic governance in postwar Japan was very pronounced in postwar constitution-making, both in the SCAP reforming plan and in many drafts written by civic and professional organizations.⁷⁹ The insistence upon the abolition of feudal system, the clear recognition of popular sovereignty in replacement of imperial sovereignty, and the addition of the peace clause have represented persistent efforts at postwar democratization.

The Japanese story contests, however, to the fact that even constitution-making of promoting democracy is neither self-evident nor without struggles. While making a constitution to promote democratic governance was beneficial to postwar Japan, its process was unfortunately entwined with external impositions and international politics. This rather unfortunate process precipitated —almost evidently— subsequent paradoxical, less enthusiastic attitudes towards the new Constitution. It thus came as no surprise that in the late 1950s and early 1960s several attempts at constitutional revisions particularly under the banner of anti-American sentiment were given by important political figures.⁸⁰ Nevertheless, as indicated above, the Japanese postwar constitution-making was —albeit external interventions— a national self-pursuit of new democracy. Any subsequent attempts at revising the Constitution were —almost without exceptions— unwelcome and labeled as conservative attacks on the rising new democracy. This well explains why contrary to constitutional politics elsewhere, revisionists in Japan are seen as conservative while preservationists liberal. It is due to this historical contingency that the postwar Japanese Constitution has persisted without any revision for more than six decades, and that this practice —while often mistaken by the West as indication of less vibrant constitutional regime— is far from conservative and indicative of national democratic persistence.

B. *Constitution-Making as National Independence*

The second model of constitution-making as national independence is very typical in modern practice of establishing constitutionalism. It has been identified as a common feature of constitution-making after World War II.⁸¹

79. See SHOICHI, *supra* note 1.

80. *Id.*

81. Jon Elster, *Forces and Mechanisms in the Constitution Making Process*, 45 DUKE L.J. 364,

The aforementioned story of the postwar Korean constitution-making was typical of this model. When constitution-making represents a clear declaration of national independence after colonial struggles, what the new Constitution carries is primarily a symbolic message about the newly emerged nation-state and its own people. Issues such as institutional designs or choices on lists of rights are on the sidelines. Often constitutional drafters rush themselves into making a new Constitution without pondering what institutions work best for the new nation-state. Thus it is very common for these new states to face post constitution-making situations as either –for the worse– falling into dictatorships or –perhaps for the better– facing another new round of constitution-making or amending. The Articles of Confederation, the first “constitution” made after the declaration of independence of the United States, were such a clear example that was soon to be replaced by a new federal Constitution.⁸² Many new states that declared their independence and made new constitutions fell into dictatorships and military regimes.⁸³

The Korean case was without exception. Even worse was the unfortunate division of North and South Korea, both of which wrote very nationalistic constitutions to commemorate past colonial struggles, national independence as well as quick national division. It came as no surprise that North Korea fell into dictatorship, and that South Korea was faced with vicious circles of replacing old constitutions and writing new ones. Any constitution made for symbolic declaration of national independence is inevitably read into instrumental passages, which leads to difficult subsequent constitutional developments. Since the first constitution-making, South Korea has had six constitutions, and not until the successful democratization of 1987 did serious issues of institutional choices emerge for public debates.⁸⁴

C. *Constitution-Making as National Inclusion*

The third model of constitution-making as national inclusion does not occur very often but can still be seen in some cases. The making of the 1978

368-70 (1995).

82. Wen-Chen Chang, *Constructing Federalism: The EU and US Models in Comparison*, 35(4) EURAMERICA 733, 745-46 (2005).

83. See Elster, *supra* note 81.

84. For instance, the debate about whether to institute a constitutional court or to have decentralized system of judicial review became most heated only in the 1987 constitution-making. See, e.g., Kun Yang, *The Constitutional Court in the Context of Democratization: The Case of Korea*, 31 VERFASSUNG UND RECHT IN UEBERSEE 160 (1998).

Spanish Constitution with regard to the relationship with Catalonia, and the 1982 enactment of the Canadian Charter that provides a “notwithstanding” clause for Quebec provide good examples.⁸⁵ Constitution-making that serves for the purpose of national integration or cohesion at a time of internal conflicts or serious fragmentation requires much more perplexing struggles in terms of substance and process. It is no easy task to design a workable constitutional framework and institutions for fragmented societies or even departing nations. The Spanish Constitution of 1978 tested the wisdom of constitutional drafters on how to envisage new ways of federal arrangements.⁸⁶ The Canadian case demonstrated that lengthy deliberation and consensus-building process was the key, if not the requisite, to successful constitution-making among divergent societies.⁸⁷ Both deliberative process and substantial considerations cannot take place at chaotic or even warring situations. Paradoxically however, divided national or ethnic groups often make constitutions often make constitutions for national cohesion after civil wars or bloody conflicts, and that is precisely why few constitutions made after peaceful accords signed can survive for too long.

In a way, the ROC Constitution promulgated in 1947 was such a constitution made for national inclusion against the backdrops of warlordism and localism after war. It was particularly so for Taiwan as it just departed from Japanese colonization. Unfortunately however, the constitution-making process in reality bore much more complexities. The ROC constitution-making took place in the middle of intensifying wars between the KMT and the CCP. In such warring situations, neither fair election of delegates in many provinces including Taiwan were held, nor could any serious deliberations and debates about the Constitution take place in the National Constituent Assembly.⁸⁸ Worse yet, the Taiwanese delegates were faced with the “February 28” massacres and the declaration of the martial law decree.⁸⁹ The making of the ROC Constitution for national inclusion was doomed to fail. Had the KMT government not taken refuge in Taiwan with the ROC Constitution, it would have been long buried after it was

85. For the Spanish case, *see, e.g.*, Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 CARDOZO L. REV. 1891 (1998). For the making of the Canadian Charter, *see, e.g.*, Thomas S. Axworthy, *Colliding Visions: The Debate Over the Charter of Rights and Freedoms 1980-81*, in THE JOURNAL OF COMMONWEALTH AND COMPARATIVE POLITICS 239-53 (1986).

86. Rosenfeld, *id.*; Juan J. Linz, *State Building and Nation Building*, 1(4) EUR. REV. 355 (1993).

87. *See* Axworthy, *supra* note 85.

88. *See* CHANG, *supra* note 41.

89. *Id.*

made. For the KMT government, the ROC Constitution represented its own national origin, sentiment as well as legitimacy.⁹⁰ For local Taiwanese people, however, the Constitution was a failed exercise of national inclusion and a symbol of a nationalistic, dictatorial rule over the entire island.⁹¹ Precisely due to this rather nationalistic nature that the ROC Constitution inherited, the subsequent constitutional developments in Taiwan became an inevitable process of constitutional indigenization and struggled between Chinese and Taiwanese nationalisms. Successful incremental constitutional reforms in tandem with democratization in the 1990s have rendered constitutional rule and democratic institutions in Taiwan. But national identity of Taiwan and its relationship with Chinese culture and ethnicity and with the rising PRC on the mainland remains unresolved to this day.

D. *East Asia Constitution-Making as Comparable Models*

Postwar constitution-making in Japan, South Korea and Taiwan was reflective of three models of constitution-making: constitution-making as promoting democracy, constitution-making as national independence, and constitution-making as national inclusion.⁹² These constitution-making stories represented their respective national struggles as well as political and social foundations surrounding their own constitution-making. At the same time, however, these stories were also reflective of typical constitution-making models that have been seen elsewhere. In other words, the stories of constitution-making in East Asia were in a sense “East-Asian” but in another sense “un East-Asian.” The stories were their own and at the same time not. The postwar constitution-making of Japan may be made into comparable relevance to other constitution-making as promoting democracy and tested necessary variables for successful constitution-making in such political and social contingency. This is also true to postwar constitution-making of South Korea or Taiwan. Contrary to the Asian value discourse,⁹³ postwar constitution making in East Asia was neither of any

90. See Yeh, *supra* note 70.

91. See CHANG, *supra* note 41.

92. It must be emphasized that these models that do not necessarily mirror the three stories of constitution-making in East Asia discussed above. Rather, they are the abstraction of these stories –perhaps with certain distortion in an attempt at create theoretical models that have further broader implications based upon East Asian experiences.

93. For the debate surrounding Asian value and constitutional developments in East Asia, see generally John Haley, *Political Culture and Constitutionalism in Japan*, in *POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH* 98-115 (Daniel P. Franklin & Michael J. Baun eds., 1995); and Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 *HARV. HUM. RTS J.* 109 (1998); and Karen Engle, *Culture and Human*

mere borrowing from nor of any resistance against “western constitutionalism.” Rather, like constitution-making elsewhere, they have particularities as well as common features, and have been developed and re-developed into distinctive, yet comparable, models of constitution-making. In the age of comparative constitutional laws,⁹⁴ East Asian constitutional developments should not be neglected but only added into diverse pools of comparative constitutional learning.

V. CONCLUSION

The majority of countries in East Asia have become liberal democracies with vibrant developments of constitutionalism and rule of law. Scant attention, however, has been paid to particular social, political and cultural foundations for East Asian constitutionalism. Worse yet, constitutionalism in East Asia has been attributed merely to the global expansion of constitutionalism from the West. Without a formal recognition of constitutionalism in East Asia, the discourse of constitutionalism loses the opportunity to understand diverse ways of constructing and reconstructing constitutionalism.

This paper utilizes the approach of constitutional ethnography to examine postwar constitution making in Japan, South Korea and Taiwan. It re-examines social and political circumstances surrounding these constitution-making experiences and analyzes them from four perspectives: constitution-making and war situations, questionable constitutional authorship, constitution-making and decolonization, and finally constitution-making and nationalism. By reconstructing these postwar constitution-making stories, this paper finds that the three constitution-making experiences are reflective of three constitution-making models including: constitution-making as promoting democracy, constitution-making as national independence, and constitution-making as national inclusion. It concludes that East Asia constitution making is neither of any mere borrowing from nor of any resistance against “western constitutionalism.” Rather, postwar constitution-making experiences in East Asia have been developed and re-developed into distinctive, yet comparable, models of constitutionalism for global constitutional lawyers to learn.

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94. See, e.g., VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999); Martha C. Nussbaum, *Comparative Constitutionalism: Introduction to Comparative Constitutionalism*, 3 CHI. J. INT’L L. 429 (2002).

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