International Human Rights Law in Japan: the Cultural Factor Revisited

Joëlle Sambuc Bloise

Addressing the implementation of international human rights law in a specific country can be done in different ways. Analyzing the courts' case-law, periodic reports submitted by the authorities to international monitoring bodies, counter-reports drafted by human rights activists and concluding observations of these international bodies offers a general view of the legal situation which is informative and revealing.

This general view leads inevitably to conclusions regarding the quality of the record of the said country and then to questions about the reasons behind shortcomings or even failures in implementation of international law. Confronted to conflicts of norms or even violations of international obligations that may endure over the years, scholars focusing on a non-Western country are found to look for answers in historical or political traditions, specific cultural values or indigenous social and moral rules that are said to create hurdles to proper enforcement of treaties.

This is especially the case in studies dedicated to Asian countries and to Japan in particular. The persistence of the debate opposing universality of human rights and cultural relativism explains partially at least that many problems met when implementing human rights are given a "cultural" reason. In addition, Japan has been described for decades as being "unique" by sources both outside and within the country. This has contributed to a viewpoint where human rights standards, if not the rule of law itself, are seen as being largely alien to the Japanese system, society and individuals. Therefore, human rights violations are seen as defensible, or at least understandable, or even downright inevitable and enduring.

Most studies made by foreign legal scholars on Japan have been conducted by researchers using mostly the United States political and legal culture as a comparison. This contributes to an analysis that usually oversees the influence of the European origins of the modern Japanese legal system and that brands as "typically Japanese" mechanisms that can be also found in civil law countries.

This article tries to propose another approach to culture and human rights in Japan moving from an academic debate regarding the existence of an "unique Japan" mindset distrustful of the international human rights discourse, to an analysis of the political and social use of this discourse by authorities and social movements in the context of power plays regarding legal and social change. The cultural issue is in fact connected to the

---

1 J.D., Master in Law, PhD in law (University of Geneva), holder of the Swiss bar certification. This article is based on research done at the Faculty of Law of the University of Tokyo from October 2009 to November 2010, as a Japanese Society for the Promotion of Science Fellow and thanks the generous support of both JSPS and the Swiss National Fund. I express my deepest gratitude to my supervisor, Professor Iwasawa Yuji, for his continuous support and advices. I am also grateful to the numerous scholars, graduate students and individuals, members of Non-profit Organizations or working at the Ministry of Foreign Affairs, for taking time to meet and discuss specific issues with me.
broader issue of the role of legal norms in a society in general, as well as to the way norms reflecting different sets of values are accepted and are able to change social practices².

Part I sums up the enduring debate opposing the promoters of cultural relativism and the proponents of the universality of human rights. Special focus will be put on the case of "Asian values" at a time where the principal advocates of this theory, Southeast Asian countries, have decided to set up the first regional human rights mechanism in that region. The practice of international bodies on the role of culture and implementation of international human rights will be discussed.

Part II will analyze the case of Japan. After a short overview of the history of human rights constitutionalism and commitments of Japan regarding international human rights law, we will analyze the meaning of the "cultural factor" for explaining Japan's human rights record. The nihonjiron literature will be opposed to the actions of social movements using human rights arguments to promote social and legal change. Relevance of culture and traditions will be discussed in relation to human rights litigation and the role of the judiciary body. Our analysis will close with a presentation of a specific social movement - women's groups - and how they have worked during decades to promote social and legal change, notably by referring to international human rights law.

Part I. Cultural Relativism, the Cultural Factor and Implementation of International Human Rights

1. The Debate Regarding Cultural Relativism Today

Ever since the rise and development of international human rights law at the end of World War II, governments but also legal and social scientists, political and anthropological scholars have engaged in a seemingly endless debate on the universalism of human rights and the importance of culture³, making it a central theme of the modern human rights narrative⁴.

Historically, in the 1970s, the debate surrounding universality of human rights focused on the relation between civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand, reflecting the Cold War ideological struggle between Western and socialist states. Later and up to this day, this partisan dispute has moved to the relations between individual rights and group rights, that is between cultural values that posit the prevalence of individuals and those that promote community rights over individual freedoms⁵. From a East-West stand-off, the debate has shifted to a North-South

---


axis⁶, reflecting at the same time the diffusion of the "clash of civilizations" discourse in industrialized states, and a growing opposition against "Western cultural imperialism" in developing countries⁷.

In this dispute, the social science approach is dominant and influences domestic and international actors that wrangle about the role of culture and diversity in an increasingly globalized and mutually dependent world. This has also influenced the work of legal authors, driving many away from the fact that human rights, as part of international law, are to be addressed as rights possessing a true legal character⁸.

Burke asserts that decolonization has impacted the United Nations' human rights agenda in such a way that the trend in favor of cultural relativism promoted by so-called Third World Countries has in fact overcome universalist theories. Every country being now entitled to its own norms of civilization, which are deemed equally valuable and worth protecting, human rights are therefore declining⁹. This conclusion follows the view of radical universalists that see cultural diversity as a threat to an effective enforcement of human rights law and standards¹⁰.

Opponents of universalism see the modern conception of human rights as the creation of post-war Europe and its political philosophy, its interpretation of what defines human beings and their dignity as well as the importance of individuality and liberalism. International human rights law therefore becomes a way of imposing Western culture to other nations and does not enjoy universal legitimacy¹¹.

Culture is seen as the supreme ethical value and the unique source of the validity and legitimacy of a moral right or rule, including human rights. In this perspective, universal values such as those enshrined in international human rights law should not be allowed to supplant local cultural values since they come from a specific origin (the West) and are not transferable and do not hold the same significance for all peoples¹².

Radical promoters of both currents share actually one common ground: they adopt a static, unified and unifying, deterministic, essentialized and homogenous approach to culture

---

⁶ Addo, 604.
⁷ Nader Chokr, Qui (n)'a (pas) peur du relativisme (culturel) ? transl. by Paul Costey, Yann Fuchs, Marc Lenormand, Victor Moisand and Eric Monnet, Tracés, n° 12, 2007, 32.
¹⁰ Addo, 603-604.
¹¹ Wilson, 4-6.
¹² Wilson, 2; Adamantia Pollis and Peter Schwab, "Human Rights: A Western Construct with Limited Applicability", in: Adamantia Pollis and Peter Schwab (eds.), Human Rights: Cultural and Ideological Perspectives 1, Praeger, New York, 1979, 1-18; Addo 604-605; See in general the literature quoted by Addo, in footnote n°5, 603-604.
which is conceived as a strict synonym of tradition and national identity. This is an inappropriate view of culture since it is changing through time and space, is negotiated, heterogenous, subjective, and creates much controversy and disagreement within societies themselves.

The issue of "Asian values" is a good example of the cultural relativism theory, of how it has been used at both international and domestic levels, the kind of external pressure it has faced. Since this is also a discourse found under a particular form in Japan, it is worth exposing briefly.

2. Asian values in the era of the New ASEAN Intergovernmental Commission on Human Rights

2.1. Cultural Relativism and Asian values

After the end of the Cold War, cultural relativism has been promoted in several Asian countries, especially since the collective position of East Asian states taken in 1993, at the official Asian Regional Meeting of the World Conference on Human Rights in Bangkok, in favor of cultural exception and regional particularities, broadly called "Asian values". Indeed, point 8 of the so-called Bangkok Declaration stated that although human rights are universal, regional and national particularities as well as historical, cultural and religious perspectives needed to be considered.

Like other cultural relativists, proponents of Asian values, and in particular of Confucian values, have argued that democracy and individual freedoms stem from Western historical and cultural backgrounds. Therefore, they are said to be incompatible with the authoritarian form of government issued from Confucian tradition. Through stereotyped views that conceal the diversity of Asian societies and cultures, Asian countries are said to be incompatible with civil and political rights, to defend common values such as prevalence of community over individuals, social harmony, individual duties and respect of hierarchy, which make them not (or less) receptive to international human rights law and values.

---

13 Pollis, 9; Sally Engle Merry, *Human Rights and Gender Violence*, quoted in: Steiner/Alston/Goodman, 526; Chokr, 35.


In turn, proponents of Asian values and relativist theories in general tend to apply stereotyped views also on Western states and cultures since they see "Western values" as another monolithic, homogenous bloc of cultural traditions that are supposed to have given birth to uniformed definitions and enforcement of human rights standards. This opinion easily overlooks that the cultural issue is indeed debated on every continent\textsuperscript{18}.

Interestingly, these arguments were developed not only in Asia but also in Western countries where "orientalism" is defended by scholars and policy-makers that try to prove that people in Asia are the "others" who cannot enjoy and understand human rights\textsuperscript{19}. Among Western international policy-makers, this simplistic theory is the backbone of discourses presupposing that Southeast Asian states are reluctant to address human rights issues\textsuperscript{20}.

In this context, the adoption of the new Association of Southeast Asian Nations (ASEAN\textsuperscript{21}) Charter and the subsequent creation the ASEAN Intergovernmental Commission on Human Rights (AICHR) raises interesting questions regarding the theoretical and political future of the Asian values discourse. This is especially true since ASEAN members were among the most vocal on this question and given that the Bangkok Declaration structured how the human rights issues later unfolded within ASEAN\textsuperscript{22}. Typically, before the passing of the new Charter, ASEAN had refrained from codifying civil and political rights and had rather focused on recognition and enforcement of economic and social rights throughout the Southeast Asian region\textsuperscript{23}.

2.2. The ASEAN Charter and Intergovernmental Commission on Human Rights

On November 2007, after 40 years of existence\textsuperscript{24}, ASEAN Member States adopted the Charter of the Association of Southeast Asian Nations\textsuperscript{25}. Set out in 55 articles, the Charter

\begin{flushleft}


\textsuperscript{20} Katsumata Hiro, \textit{ASEAN and Human Rights: Resisting Western Pressure or Emulating the West ?} The Pacific Review, vol. 22, n° 5, 2009, 620.

\textsuperscript{21} ASEAN member States are Singapore, Vietnam, the Philippines, Thailand, Indonesia, Myanmar, Laos, Cambodge and Brunei.

\textsuperscript{22} Helen E. S. Nesadurai, \textit{ASEAN and Regional Governance after the Cold War: From Regional Order to Regional Community ?} The Pacific Review, vol. 22, n° 1, 2009, 107; see also Hao Duy Phan, \textit{A Blueprint For a Southeast Asian Court Of Human Rights}, Asian & Pacific L. & Pol'y Journal, vol. 10, n° 2, 2009, 386 (quoted Hao Duy Phan 2009a); Desierto 2009a, 77-111.

\textsuperscript{23} Desierto 2009a, 93-94, 102.

\textsuperscript{24} For a short overview of the history and structure of ASEAN since its establishment in 1967, see Helen E. S. Nesadurai, \textit{The Association of Southeast Asian Nations (ASEAN)}, New Political Economy, vol. 13, n° 2, 2008, 225-239.

\textsuperscript{25} See http://www.aseansec.org/21069.pdf, last checked on November 24, 2010.
\end{flushleft}
confers to ASEAN legal personality as a rule-based intergovernmental organization and grant it a more consolidated and cohesive base to enhance its role in the region. Along with other elements that have been hailed as "novel and progressive" regarding democracy, human rights, good governance and the rule of law, the Charter proclaims its intent to establish a Human Rights Body in its article 14.

Katsumata posits that this decision was made mostly to increase ASEAN member states' reputation and international image and the history and evolution of AICHR gives credence to this conclusion. Before 2009, the Asian continent lacked any regional structure that could be compared to the human rights mechanisms set up on the European, American and African continents that are supervised by a Court or a Commission, since the state was seen as being central in any human rights framework. Moreover, before the adoption of the Charter, the ASEAN organization was not as politically and economically integrated as the Council of Europe (nor the European Union), the African Union or the Organization of American States from which stem these Courts or Commissions.

Katsumata argues that ASEAN nations have recently started to pursue "overly ambitious liberal agendas" by promoting human rights and democracy, not because of external pressure from Western countries, but through "mimetic" adoption of human rights and democracy, in order to be identified as advanced and legitimate in a world where such standards are prerequisites to belong to the global community.

In his view, external concern to be part of the global community should be seen as the ASEAN member states' main drive behind the creation of AICHR. Moreover, all Member States have recently acceded to the United Nations' core human rights treaties, a fact that has contributed to recognizing and enshrining international human rights standards regarding civil and political rights in the new Charter.

However, at the domestic level, ASEAN States have shown various level of success in implementing human rights standards, depending on the degree of democratization of each country and the strength of local civil society organizations. International law principles such as sovereign equality and the rule of non-interference in the internal affairs of the state have always been the deeper basis of consensus and consultation in the decision-making process of the organization. Article 20 (1) of the Charter still overtly endorses it as being cardinal to ASEAN, to the disappointment of observers. Desierto argues that the consensus requirement for decision-making has been diluted, since failure to achieve it will vest the ASEAN Summit, the supreme policy-making body according to

---

26 Nesadurai 2009, 94. See also article 3 of the Charter.
29 Katsumata, 628.
31 Katsumata, 624-627.
32 Desierto 2009a, 107-108.
33 See the United Nations' General Assembly Resolution 2625.
34 Seah, 199 and 202; Nesadurai 2009, 94; Nesadurai 2008, 226; see also article 5 of the ASEAN Charter as well as article 20 (1) regarding decision-making.
Article 7 (2a) of the Charter, with the final authority to decide how a decision can be made.\footnote{See Article 20 (2) of the Charter; Desierto 2009a, 91.}

Nevertheless, the new international practice, mostly developed within the European regional system, that softens the rule of non-interference and internal sovereignty in human rights issues, is not yet endorsed by ASEAN member states.\footnote{Seah, 200.} This is unsurprising however since tight links exist between cultural relativism arguments and claims of sovereign autonomy.\footnote{Henry J. Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context - Law, Politics, Morals*, 3rd ed., Oxford, Oxford University Press, 2007, 517.} According to the Charter, member States undertake to respect individual freedoms, to protect and promote human rights, but with due regard to their rights and responsibilities, which include both internal and external sovereignty that are privileged over other sociopolitical norms, such as human rights and social justice.\footnote{Seah, 207; Nesadurai 2008, 227.}

Even though authors point out that sovereignty must be exercised consistently with international obligations, which comprise not only the new Charter but also other international treaties,\footnote{Seah, 207.} the non-interference principle, decision-making by consensus and political conservatism remain dominant parts of ASEAN regional governance.\footnote{Nesadurai 2009, 94.} Therefore, it is not surprising that both the declaration of intent to set up AICHR and the adoption of its Terms of Reference in July 2009 raised careful expectations and caution from Asian National Human Rights Commissions and regional NGOs;\footnote{FORUM-ASIA, "The ASEAN Charter: Some windows of opportunity for human rights", 23 Nov. 2007, http://www.forum-asia.org; ASEAN NHRI Forum, "Position Paper Concerning the Political Declaration on the ASEAN intergovernmental Commission on Human Rights (AICHR)," 28 Aug. 2009); Solidarity for Asian Peoples Advocacy Task Force on ASEAN and Human Rights, "Civil Society message to AICHR: Congratulations! Now it is time for action!" in: Asian Human Rights Defender vol. 5, n° 3, December 2009, 18-19.} the result is consistent with their concerns.

In a 2008 statement, Singapore's foreign minister acknowledged that the AICHR would be "lacking in teeth,"\footnote{Statement by Foreign Minister George Yeo in Singapore Parliamentary Reports, vol. 84, 28 February 2008, at http://www.parliament.gov.sg/Publications/sprs.htm, last checked on November 24, 2010.} suggesting that it would have more of a promotional and declaratory activity than anything else. It would not be a review mechanism that would be on par with e.g. the European Court of Human Rights.\footnote{Seah, 208.} Moreover, during the drafting stage, ASEAN member States have shown various degrees of commitment and support to AICHR, some such as Indonesia and Thailand fighting for more power to the Commission and calling for norm change, other holding fast to the non-interference principle.\footnote{Hao Duy Phan 2009a, 387; NTS-ASIA Secretariat, *NTS-Alert - Bulletin of the Consortium of Non-traditional Security Studies*, September 2009, 3, available at: http://www.rsis.edu.sg/nts/resources/nts-alert, last checked on November 24, 2010.} As a result, AICHR reflects the inner tensions and political diversity among ASEAN members and represents a compromise.
AICHR has received only a limited mandate and will convene only twice a year. Each State will appoint one representative, serving a three-years term. More importantly, as an intergovernmental agency, it lacks independence from authorities; its functions depend on political will of ASEAN members. Except for Indonesia and Thailand, all member States have appointed governmental officials as their representative in AICHR. Consensus will also be the leading decision-making principle for AICHR.\textsuperscript{45}

AICHR does not enjoy any sanctioning nor investigating power but is rather seen as a consultative inter-governmental body whose primary mission will be to raise awareness on human rights issues, develop strategies, draft documents and studies as well as provide advisory services\textsuperscript{46}. No individual petition or claim and no periodic report will be submitted to the Commission. Its very small funding (USD 200’000) can also be cause for regret. These weak competences stand in sharp contrast to what the region needs for an effective protection of human rights\textsuperscript{47}.

It is not possible at this stage to evaluate AICHR’s work. Its rules of procedure have not yet been adopted and its five-years working plan were supposed to be completed in July 2010, which has not been the case\textsuperscript{48}. Among its first working priorities are the drafting of an ASEAN Declaration on Human Rights and the undertaking of two studies, one on corporate social responsibility and another on migration\textsuperscript{49}.

In view of its limited powers and means, much of AICHR's credibility and sincerity will therefore depend on its first actions and commitments, as well as on how it will use its resources and expertise of its Secretariat. Moreover, in view of the enduring strength of the principles of sovereignty and non-interference, it remains to be seen if what the AICHR will be able to achieve will have any effects or not. At first, it will be more of a regional platform for discussing human rights among ASEAN member states than a true protection mechanism\textsuperscript{50}.

Nonetheless, its very existence has been hailed as being an important first step in that region. NGOs have for example called upon another regional organization, the South Asia Association for Regional Cooperation\textsuperscript{51}, to follow ASEAN’s lead and establish its own human rights mechanism\textsuperscript{52}. ASEAN member States that had called for a more powerful Commission have also argued that the present functions of AICHR should be seen as a


\textsuperscript{46} Hao Duy Phan, \textit{The ASEAN Inter-Governmental Commission on Human Rights and Beyond}, Asia Pacific Bulletin of the East West Center, n° 40, July 20, 2009, 1-2 (quoted Hao Duy Phan 2009b).

\textsuperscript{47} Hao Duy Phan 2009a, 387-388.

\textsuperscript{48} SAPA Task Force on ASEAN & Human Rights organization, Press release, September 19, 2010, "It is AICHR’s turn to move forward to promote and protect human rights in Southeast Asia".

\textsuperscript{49} Asia Pacific Forum, "ASEAN rights body sets out priority areas", http://www.asiapacificforum.net, last checked on November 24, 2010.


\textsuperscript{51} SAARC, regrouping Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

beginning and not as an end\textsuperscript{53}.

2.3. Comments

The continuing endorsement of the principle of non-interference in internal matters, including on human rights issues, is one of the enduring aspects of the Asian values doctrine among ASEAN member States since it has allowed them to stall full implementation of international standards\textsuperscript{54}. While it still remains rigidly applied under the ASEAN Charter, the establishment of AICHR is an important first step for promoting universal human rights in a context which is no longer purely domestic\textsuperscript{55}. For Desierto, the ASEAN Charter marks in fact a "convergence of ASEAN toward "universalizing" core human rights norms" and represents the "litmus test for the capacity of ASEAN Member States to adapt to their new roles under an international organization subject to international human rights law"\textsuperscript{56}.

Indeed, both article 14 of the ASEAN Charter and AICHR itself testify of the significant developments made on the human rights front in the ASEAN region during the last twenty years. A few weeks after the Bangkok Declaration, ASEAN foreign ministers declared for the first time that a regional human rights mechanism could be considered\textsuperscript{57}, a step that has been seen as a way to resist the global human rights agenda set forth by the international community after the end of the Cold War, by proposing regional alternatives that would be receptive to cultural and historical specificities\textsuperscript{58}. Despite this intent, this Ministerial statement allowed human rights activists to collaborate across states and establish officially in 1996 an informal Working Group for an ASEAN Human Rights Mechanism, in the Philippines.

By that time, human rights had become a legitimate political topic both at domestic and regional levels. In parallel, National Human Rights Commissions were established in several ASEAN member states. Despite limitations, NHRC have contributed to domestic change at their respective levels and have effectively led to a "slow embedding of a universal human rights discourse (as opposed to Asian values) in ASEAN"\textsuperscript{59}.

Nesadurai also underscores the role of the Working Group and civil society movements, next to NHRC, for creating both a regional discourse defending international human rights standards based on universality and objecting to views leaning on Asian values, and a


\textsuperscript{54} Nesadurai 2008, 228; Hao Duy, 385.

\textsuperscript{55} Hao Duy Phan 2009b, 1.

\textsuperscript{56} Desierto 2009a, 80 and 84.


\textsuperscript{58} Nesadurai 2009, 109.

\textsuperscript{59} Nesadurai 2009, 107-108.
political space allowing bottom-up push of human rights agenda\textsuperscript{60}. Therefore, in effect, the initial intent of ASEAN member states to resist the human rights agenda might have been deflected, at least slightly.

3. The Functional and Legal Universality of International Human Rights Law

To go beyond the universality versus relativism dispute is not an easy exercise given the ideological, partisan and political currents that frame it. While being a strong defender of cultural relativism, Donnelly has argued recently in favor of the "relative universality of human rights", defending legal, functional and consensus universality but rejecting substantive universality grounded in anthropological and ontological roots.

Donnelly notes that human rights ideas are not as much a "Western" tradition as rather the result of modernity and its impact on social, economical and political structures \textsuperscript{61}. Where modernity has spread, similar political, economical and social struggles have followed. Human rights have become relevant and efficient to protect human dignity from modern threats created by market economies and state actors that are now found around the globe.

This analysis is in fact supported by socio-political studies that show that as the level of modernity of any society increases, individuals pursue empowerment, react against social injustice and commit to political activism and political participation, contributing to establishment and improvement of democracy while at the same time aspiring to enforcement of human rights\textsuperscript{62}. These studies demonstrate that indeed, it also applies to societies that are historically rooted in non-Western values, such as Confucian societies, and that this value shift tends to take place in any society reaching a certain level of development\textsuperscript{63}.

Furthermore, this "functional universality" is backed by an "international legal" universality through ratification of the Universal Declaration of Human Rights and the core United Nations conventions on human rights\textsuperscript{64}. Donnelly actually finds himself on the same ground as strong proponents of universality such as Robert Wilson who defends that human rights are nothing else but the result of social and class struggles and are both "product of" and a "response to the rise of the modern nation-state"\textsuperscript{65}.

\textsuperscript{60} Nesadurai 2009, 108-109.


\textsuperscript{63} Wang, 357. For a further analysis of these studies as applied to the case of Japan, see this author’s contribution, Japanese Civil Society as a Public Actor and International Human Rights Law, to be published.

\textsuperscript{64} Donnelly, 2007, 287-288.

\textsuperscript{65} Wilson, 17.
However enduring, the universality/relativism debate remains highly abstract and generalized, not to say outdated since it relies on an essentialist view of culture. In reaction, several scholars have tried to explore a more pragmatic approach, based on case law of international bodies, especially that of United Nations Treaty Bodies, and on case studies done in various countries to see how, in fact, international human rights standards are used and implemented in different cultural contexts, whether in front of courts or in a political discourse.\footnote{See the extensive analysis made by Addo, 601-664 as well as the collection of essays published in Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson (eds.), Culture and Rights - Anthropological Perspectives, Cambridge University Press, 2001.}

This view condones the use of the international human rights framework in any given country and lets us focus on international bodies’ practice regarding human rights and cultural diversity. Their work provides a credible standard for trying to reconcile cultural diversity and international human rights standards since it combines flexibility with legal certainty.\footnote{Addo, 615.} Moreover, it shows that defending the universality of international human rights and the respect of common standards of individual protection does not imply cultural-blindness.\footnote{Chokr, 31 and 38.}

On the contrary, as Chokr posits, universalism is better equipped to be sensitive to cultural differences and it is in fact not the role of morality to promote cooperation and solve potential conflicts based on different cultural views, but rather the role of law.\footnote{Addo, 620.} In addition, given that cultural rights are guaranteed by covenants, international human rights law, and especially ICERD and CEDAW, is particularly useful.\footnote{Steiner/Alston/Goodman, 517-518.}

This approach underscores both the essential role of civil society in the development of human rights within a state, and the fact that they are not only legal means to protect individuals against state actors but can also be tools contributing to political change and social justice.

### 3.1. Cultural Diversity under the International Human Rights Law System

#### 3.1.1. Preliminary remarks

At first glance, international human rights instruments promote a strong universalist philosophy since they aim at being applied to “everyone” and cultural variation is not expressly mentioned to define or limit them.\footnote{Steiner/Alston/Goodman, 517-518.} However, the practice of international bodies in charge of their supervision and interpretation shows that cultural diversity is indeed taken into account and that it modulates the way individual rights are defined, enforced and limited.

Indeed, since cultural rights and linguistic, religious and cultural minorities are protected by international law, the cultural factor simply cannot be dismissed. Moreover, various actors may use this argument to legitimate their claims against universal standards. On the one hand, minority groups and individuals may wish to protect their cultural traditions by...
invoking minority rights and individual freedoms against a State that wishes to implement international law. On the other hand, groups or individuals may also allege violations against a State that promotes actively traditions or that does not protect against cultural acts from other social groups that in both cases conflict with international standards. In the context of this article, we will focus on the second hypothesis. Up to what point may States - in our case, Japan - promote or tolerate institutions, laws, customs, social practices that are allegedly rooted in specific history and culture and that conflict or at least impede implementation of international human rights law?

3.1.2. United Nations Treaty Bodies and Cultural Diversity

In the United Nations Treaty Bodies' practice, culture is understood not as a static but as a dynamic and evolutive notion where individuals have an important role to play in the development and practice of cultural rights71. Contrary to the European Court of Human Rights, however, United Nations Treaty Bodies do not recognize the existence of a margin of appreciation in favor of States parties by fear of compromising universality of human rights standards72. Indeed, under the ECHR system, up to a certain point, this principle allows States to restrict minority values, not only when enforcing universal values over communitarian practices, but also when promoting societal and cultural values supported by the majority within a Member State73.

This more restrictive approach is not surprising given that United Nations Treaty Bodies have to confront States’ reservations based on cultural arguments that can be so sweeping that they create enormous hurdles to effective implementation of covenants. CEDAW faces typically such challenges since more than half the States parties have entered reservations or declarations74. CERD is another treaty that confronts directly to cultural practices that may be discriminatory in nature or effect75.

71 HRC, General Comment n°23 (ad art. 27 ICCPR), April 6, 1994, UN Doc. CCPR/C/21/Rev. 1/Add.5. Addo, 622.
73 ECHR States parties have the right to limit fundamental human rights in the name of national culture and values, on the condition that the rule of law and the proportionality principle are upheld and that there is no large, firm and established consensus, or "common ground", established among Member States on that issue. ECHR Handyside v. United Kingdom, December 7, 1976, Série A, n° 24, §48; ECHR Sheffield and Horsham v. United Kingdom, July 30, 1998, § 58; ECHR X, Y and Z v. United Kingdom, April 22, 1997, §52; ECHR B. v. France, March 25, 1992, Série A n°232 C. Patricia Wiater, Intercultural Dialogue in the Framework of European Human Rights Protection, Council of Europe Publishing, Strasbourg, 2010, 23; Luzius Wildhaber, The Role of Comparative Law in the Case-Law of the European Court of Human Rights, in: Jürgen Bröhmer, Roland Bieber, Christian Calliess (eds), "Internationale Gemeinschaft und Menschenrechte - Festschrift für Georg Ress zum 70. Geburtstag am 21. Januar 2005", Köln, Berlin, Munich, 2005, 1106; Ringelheim and Hoffmann, 7-10. In States with a strong secular tradition such as France and Turkey, where secularism is one of the founding principles, authorities are allowed to include this concept in the public order criterium and therefore restrain some expressions of religious freedom, such as wearing an islamic scarf at school or in a public office. ECHR Leyla Sahin v. Turkey (GC), November 10, 2005, ECHR 2005-XI; ECHR Dogru v. France, n° 27058/05, November 4, 2008.
75 Addo, 620.
United Nations Treaty Bodies confront the delicate question of cultural practices mainly when they review national periodic reports but also when they issue general comments regarding treaty provisions or when they review individual claims, when such optional mechanism is available 76. Analysis of periodic reports is done through a "constructive dialogue" with national authorities that allows a thorough evaluation of specific traditions and can lead to strong commitments from States77.

When it comes to the balance between minority group rights and individual rights, especially when gender issues are at stake, United Nations Treaty Bodies have attempted to define a "just multicultural arrangement" which is always made on a case-by-case basis to avoid drawing any definitive line in a sense or another78. In the words of Addo, treaty bodies "aim to strike a credible balance between the universal ideals of human rights and the reality of their implementation in different national and cultural contexts"79. They follow a line where, after a careful evaluation and balance of all interests at hand, cultural practices restricting human rights without violating the essential core of these rights are tolerated80. As Wilson argues, "universality of human rights (...) thus becomes a question of context. (...) It is possible to have contextualisation without relativisation"81.

Part II. Human Rights and the Cultural Factor in Japan

Having laid down the general framework surrounding the sensitive relations between culture, cultural diversity and international human rights law, we continue our analysis with the case study of Japan, its stand on international human rights, its official discourse on cultural values and how society and social movements have been using both culture and human rights arguments to mobilize public attention and promote social change.

The case of Japan is an adequate illustration of a non-Western society which traditions are influenced by Confucian values and where social forces endeavor to advance their position while dealing with the authority of a state apparatus and social elites that show tendencies to refer to a notion of culture that is artificially defined. We have established that even through an universalist approach, international human rights law is not adverse to cultural specificities, including those promoted by States, and is able to show flexibility to accommodate them. Therefore, referring to cultural and societal values is not, by itself, a proof of resistance to international human rights standards.

The question now at hand is to understand the actual strength and influence of the cultural factor for implementing human rights in Japan and how, in turn, Japanese social actors

76 This mechanism exists under the ICCPR (First Optional Protocol, 1966), ICERD (article 14 ICERD), CEDAW (Optional Protocol, 1999), CAT (article 22 CAT) and the Convention on the Rights of Persons with Disabilities.
77 Addo, 615-617.
78 Mullaly, 264.
79 Addo, 627.
81 Wilson, 12.
and movements use arguments based both on international human rights law and culture to promote social and legal change. We start with a short historical overview of the development of human rights in Japanese law and legal system.

1. Human Rights in Japanese Law

1.1. Historical overview

The history of the protection of human rights in Japan runs parallel to the modern legal and social history of this country. As Lawrence Beer summarizes it, from a constitutional and legal regime point of view, contemporary Japan is a non-Western urbanized industrial democracy which continues its dynamic mix of indigenous Anglo-american and continental European ingredients in a distinctive constitutional culture82.

This reality is the result of the major constitutional and legal changes introduced since foreign pressure led to the reopening of Japan's borders in 1854, the end of its isolationist foreign policy, and Japan's confrontation with the international powers of that time. The Treaties of Amity and Commerce signed between the Tokugawa shogunate and Western nations in 1858 (United States, France, United Kingdom, Holland) were unbalanced and strongly in favor of the Western states. Uncontrolled and unequal foreign trade led to economic, social, political crisis and to war with the Western powers and eventually to the Meiji Restoration in 1868 that saw the end of the shogunate83.

Even though the treaties had led to social upheaval, they were undertaken by the Meiji Regime to appease the Western states. However, on February 11, 1889, the Meiji Regime adopted Japan's first formal constitution in order to stand on equal footing with Western powers. Through this move, the Meiji Regime intended to modernize the Japanese state so that the laws of extraterritoriality imposed by Western nations could be eliminated84. It was indeed fear of being colonized that drove the leaders of the Meiji reformation85.

In an unmatched effort, European legal systems were studied, imported, adapted and tailored to suit the political needs of the regime. Japan especially followed the German approach to modern law and adopted a civil law system analog to the European continental law systems. As Feldman points out, it was not only the legal system that was pressed to adapt but the whole society itself in order to portray Japan as a "civilized" nation at the international level86.


85 Panton, 168.

The Meiji Constitution was mostly influenced by the Prussian model, giving way to an absolute monarchy regime. No Western democracies nor their constitutions were studied by the drafting committees. Regarding human rights, the people were not seen as citizens entitled to rights as per their very human nature but as imperial subjects. Invoking traditional neo-Confucian values to validate their policy, the drafters of the Meiji Constitution promoted a view of the state where family stood as the basic unit of society.

State was institutionally and emotionally identified with the Emperor and the family as an institution. Imperial subjects would submit to the Emperor, representing the head of the national family. Mackie underlines that in effect, this family-state identification sanctified family while at the same time domesticated the state, leading to strong interconnections between state, communities, families and therefore individuals. These interconnections were strong enough to have a lasting impact that can still be felt today. As Beer and Maki point out, the Meiji Constitution should be regarded not as an uniquely Japanese particularity but the expression of the values of a society sharing characteristics with other ideologies of its times, like other political phenomenons of the late 19th, early 20th Centuries.

If constitutionalism is to be understood as a doctrine regrouping democracy, the rule of law and protection of human rights, then it did not flourish in Japan before the adoption of the 1947 Constitution and the democratization of the Japanese society. This was carried out by the Japanese government under the supervision of the US Occupation forces led by General Douglas MacArthur (Supreme Commander of the Allied Powers, SCAP). This profound transformation of state and society was one of the international obligations undertaken by Japan under the Potsdam Declaration.

### 1.2. The 1947 Constitution and Japan's Domestic Human Rights Catalogue

Studies on the drafting and adoption of the 1947 Constitution tend to heavily focus on the work made by the US side while forgetting the major contributions brought by the

---


89 Beer, Maki, 20; Mackie, 22.

90 Mackie, 22.

91 Beer, Maki, 24.

92 Beer 2009, 10-19.

Japanese side94. Such contributions include the protection of the judgements of the Supreme Court against overruling by the Diet, or provisions regarding minimum standards of living (article 25), free compulsory and equal education (article 26), standards for working conditions (article 27) or the ability to file a suit for damages for wrongful arrest (article 40)95.

The 1947 Constitution is built on three pillars: pacifism, popular sovereignty and respect for fundamental human rights, three new concepts that brought radical change from previous policies and legal practices.

Under this Constitution, Japanese people went from being subjects to full-rights citizens - men and women alike becoming equal, another novelty with far-reaching social consequences. For Ramlogan, "the respect for individual rights contained in the postwar Constitution, along with the expansion of individualism in social and political development, are the most important features differentiating postwar and prewar Japanese society"96.

The 1947 Constitution was drafted under the supervision of General McArthur, a man who had strongly in mind the concepts laid out by Roosevelt's New Deal policy, including regarding relief of the unemployed and poor97. Moreover, at the time of the drafting, the Cold War had not yet broken out and frozen positions on individual rights. Thus the strong ideological and political opposition between so-called « first » (civil and political rights) and « second » (social, economical and cultural rights) generations of rights, that would deeply impact international human rights law during the following decades, did not influence its authors.

The 1947 Constitution should therefore be seen as a true child of its time, incorporating not only the 19th Century liberal view on human rights with an inclusive list of civil and political rights, but also the rights asserted by the 20th Century social democracy movement. In this sense, it is a remarkably progressive catalogue of rights that embodies the concept of indivisibility of human rights, as stated by the 1948 Universal Declaration on Human Rights and reaffirmed at the 1993 World Conference on Human Rights, in the Vienna Declaration and Program of Action98.

Of course, subsequent history and international political developments did influence how Japanese judiciary and political bodies came to interpret the scope and meaning of the social rights listed in the Constitution. For example, the Supreme Court of Japan has repeatedly stated that article 25, that secures the right to a minimum standard of wholesome and cultured living, is left to the legislature's broad discretion. It should not be construed as putting any obligation on state authorities but is instead realized only through social legislation99.

94 Beer, Maki, 84. Compare for example with Panton, 182: "At the close of World War II, the U.S. dictated a constitution that (...)" (emphasis added).
95 Beer, Maki, 86.
99 Supreme Court, Judgment, July 7, 1982, 7 Minshuu n°1235, quoted by Tsunemoto, Teruko, Juristo Commentary on Important Legal Precedents for 2006: Trends in Constitutional Law Cases, Asian-
This restrictive view is contested, notably by Amelia S. Kegan who holds in favor of interpreting article 25 in accordance with its textual meaning and original intent, and to see it also as "a negative, concrete right, allowing individuals to seek judicial relief". Kegan's views have merits and formally speaking, the 1947 Constitution grants the Japanese judiciary body much room to adopt a broad and progressive view of human rights that actually reflects international policy in this matter. This potential is however thwarted by a conservative trend regarding judicial activity that we will discuss further below.

The Supreme Court's opinion on social rights is shared by a vast majority of Western supreme courts that do not try to challenge its political ideology. Notable exceptions demonstrate however that economic, social and cultural rights may be construed in a way that some of their aspects may be judicially enforced. The case law of the Constitutional Court of South Africa is well-known in that regard since it has adjudicated cases recognizing the actionability of socio-economic rights.

In Europe, the European Court of Human Rights itself has also contributed to reduce the ideological gap between the traditional categories by granting a social and cultural dimensions to civil rights. This tends to demonstrate how artificial it is to construe civil rights only as « shield rights », conversely economic, social and cultural rights only as « rights to ».

Contrary to the Japanese Constitution, the Swiss Federal Constitution makes a distinction between several social rights and «social goals» that the Federal state should try to fulfill if and when it can. The social rights listed in the Constitution

---

100 Kegan, 735, 746.

101 The Japanese Supreme Court is "widely and justifiably considered the most conservative constitutional court in the world" from the point of view of both political ideology and judicial activism. As David S. Law argues, there are political and institutional reasons explaining this and that none are inherent nor necessary; David S. Law, The Anatomy of a Conservative Court: Judicial Review in Japan, Texas Law Review, vol. 87, 2009, 1545-1549.


104 Article 12: right to assistance when in need, article 19: right to primary school education, article 28 (3): right to strike, article 29 (3): right to free legal advice and assistance in criminal process.

105 Article 41 of the Swiss Federal Constitution.
are enforceable while any other, including those of the ICESCR ratified by Switzerland, are left to the legislative body's discretion to implement\textsuperscript{106}.

### 1.3 Ratification of International Human Rights Covenants

It was a mix of both internal and external pressure that led the Japanese government to ratify the core human rights instruments and undertake international obligations. In the 1970s and 1980s, domestic human rights records became relevant on the international stage and it became necessary to adopt international standards in that regard\textsuperscript{107}. Moreover, domestic citizen groups such as those defending the Korean minority or women’s rights also began to organize themselves and start lobbying in favor of ratification of international human rights treaties\textsuperscript{108}.

As of 2010, Japan has ratified all major human rights conventions, the so-called "core human rights instruments", some with reservations but the majority without any.

The International Covenant on Civil and Political Rights\textsuperscript{109} (ICCPR; 1966) and the International Covenant on Economic, Social and Cultural Rights\textsuperscript{110} (ICESCR; 1966) were ratified in 1979. The Convention on the Elimination of All Forms of Discrimination against Women\textsuperscript{111} (CEDAW; 1979) was ratified in 1985, the Convention of the Rights of the Child\textsuperscript{112} (1989) in 1994 and the International Convention on the Elimination of All Forms of Racial Discrimination\textsuperscript{113} (ICERD; 1965) in 1996.

Japan also accessed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment\textsuperscript{114} (CAT; 1984) in 1999. However, the Convention on the Rights of Persons with Disabilities\textsuperscript{115} (2006) has been signed in September 2007 but not ratified. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families\textsuperscript{116} (1990) is yet to be signed.

Up to now, Japan has not accepted to recognize the competence of any Treaty Body to review individual claims regarding alleged violations. However, the government elected in


\textsuperscript{108} On the relations between civil society and the Japanese state regarding international human rights law, see this author's contribution, Japanese Civil Society as a Public Actor and International Human Rights Law, to be published.


\textsuperscript{110} United Nations, Treaty Series, vol. 993, p. 3.


\textsuperscript{112} United Nations, Treaty Series, vol. 1577, p. 3.


\textsuperscript{115} United Nations Doc.A/61/611.

\textsuperscript{116} United Nations, Treaty Series, vol. 2220, p. 3.
2009 has decided to "seriously" consider ratifying the First Optional Protocol to ICCPR and is currently analyzing the legal and political consequences of such a ratification117.

The ratification of the main international covenants protecting human rights seems to contradict the view that State actors give priority to traditional Japanese values that would oppose individual human rights. In order to avoid subsequent conflicts, the Japanese Government always reviews the existing legal order and endeavors to modify statutes before ratifying a treaty so that domestic norms are in tune with international law. There was for example a five-years gap between the signature of CEDAW and its ratification, in order to adopt new statutes that would adapt Japanese laws118.

As Flowers explains, implementation of human rights covenants is not much an issue in Japan119. However, compliance with international norms raises sometimes difficulties, especially when the degree of conflict between domestic and international norms is high. In Flowers' view, international commitment and legal obligation to obey international norms lead in Japan "to fairly high levels of implementation [but are] not sufficient to secure equally high levels of compliance"120.

2. Culture, Politics and Human Rights in Japan

2.1. The Cultural Factor in Academic Works on Japan

While the 19th-century legal reception of Western constitutional and political models were done willingly, it not only brought Western modernity but also challenges to the Japanese social and political worlds since the new models were based on a liberal political order. On the one hand, the new liberal model aimed to ensure that individuals would fulfill self-defined goals through an environment sustained by the state. On the other hand, traditional Japanese law, morals and society were made to reinforce community interests over individual pursuits121.

In academic research on human rights in Japan, culture and tradition are often equated with conservative values opposed to individual rights. Commentators are quick to point out that it is mainly a lack of indigenous human rights tradition that would explain failure to comply with many international standards122. However one may regret that only a few authors link human rights issues and social inequalities to political choices set out by the

117 On this issue, see this author's article, Japanese Courts and the Right to an Effective Remedy: The Impact of the Lack of International Review on Japanese Case-Law, to be published.


120 Flowers, 19.


122 See Ramlogan, 142.
Japanese State, including social, educational and economical policies aiming at fast industrialization and economic growth\textsuperscript{123}.

History shows that traditions did not equate necessarily with overwhelming popular support. At the end of the war, many groups and individuals sent their own constitutional drafts to the government and SCAP, with proposals often much more progressive and liberal than the one finally adopted after lengthy and difficult negotiations between government official and Occupation forces\textsuperscript{124}.

The new Constitution was quickly endorsed by the vast majority of the Japanese population and fundamental human rights took roots rapidly. The new rights and democratic principles were so welcomed that the conservative Japanese government refused to submit its text to a popular referendum, afraid that the result would be widely in favor of the new constitution - therefore undermining their own authority and making it impossible to denounce it later as an foreign product, alien to Japanese values\textsuperscript{125}. Thus, even though the 1947 Constitution and its three main leading principles were not the result of a domestic revolution and democratic choice, they were nevertheless readily accepted by a majority of the Japanese people.

This demonstrates that when discussing the relations and respective legitimacy of indigenous traditions and foreign imported models, one should not forget the reality of a more prosaic battle between political forces. In general but in Japan in particular, it is necessary to understand how culture is used as a political tool by state and social actors, how it can be constructed and even indoctrinated by elites.

\textit{2.2. Nihonjinron and the Creation of Artificial Culture}

Culture can be artificially structured and imposed by political and social power structures. Indeed, as Addo explains, it is "the reality of modern culture, of which human rights is seen as a part, that its scope is, to a large extent, defined by the elite and dominant interests"\textsuperscript{126}. As a result, culture is politically contested and its contents are porous: many disputes over cultural values are in fact competitions over power and they can fan out at all levels, locally, nationally or even on a transnational basis\textsuperscript{127}.

In this context, "cultural relativism gives credence to cultural ideology rather than to culture"\textsuperscript{128}. We can add that while "genuine" culture evolves and changes naturally thanks to outside influence and inner movements, "artificial" culture may be less subject to transformation since it is more or less controlled by state and elites.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{124}] Inoue K.
\item[\textsuperscript{125}] Brown Hamano, 439-440; Ramlogan, 142
\item[\textsuperscript{126}] Addo, 609.
\item[\textsuperscript{127}] Merry, 525.
\item[\textsuperscript{128}] Marfording 432-433.
\end{itemize}
\end{footnotesize}
In Japan, *nihonjinron* literature is an example of an official cultural discourse shaped and promoted over the years by political, intellectual and business circles trying to demonstrate that the Japanese nation and people are unique\(^\text{129}\). Under the Tokugawa shogunate, cultural values such as harmony, consensus, hierarchy and loyalty were imposed by shoguns on the population rather than forming naturally, for political motivations. This process was repeated during the Meiji period, where the preexisting family system was expanded to the state level, tying at the same time language, culture and blood\(^\text{130}\). This political use of cultural values constitutes the basis for *nihonjinron* doctrine\(^\text{131}\).

The *nihonjinron* discourse promotes Japan’s homogeneity, its group orientation, its respect for hierarchy, harmony, consensus and group loyalty. It tries to demonstrate that Japanese culture and behavior is so removed and different from other societies that it cannot be properly understood\(^\text{132}\).

As such, *nihonjinron* is a cultural ideology – some call it also a kind of cultural nationalism\(^\text{133}\) - which is in fact rooted in modernity and is not unique in world history since European countries such as Germany have also experienced similar theories in the 19th Century\(^\text{134}\). Failure to recognize it as an official myth is also a failure to see the political consequences that are linked to its use\(^\text{135}\). It is still heavily influencing and influenced by bureaucrats, state actors, including courts, as well as business elites\(^\text{136}\). Scholars stress out the importance of education policy to spread out this doctrine within civil society through state-approved moral and civic values programs taught at school\(^\text{137}\).

As a kind of ideology, *nihonjinron* "assumes that culture itself precedes and determines existence (and) depicts Japanese individuals as having no motives other than those implanted in them by their culture"\(^\text{138}\). In other words, it exemplifies cultural essentialism where an overwhelming majority of any group is supposed to share a particular type of


\(^{131}\) Marfording, 435.

\(^{132}\) O. Feldman, 335.

\(^{133}\) O. Feldman, 330.


\(^{136}\) Siddle, 448.

\(^{137}\) McVeigh, 12-13, 51; Marfording, 440-441, 444.

\(^{138}\) O. Feldman 330.
cognition and where culture, regarded as stable and unchanging, heavily impacts people's thinking and acting\textsuperscript{139}.

Like other essentialist theories, however, it fails or chooses not to address socioeconomic, political, individual and values changes in Japan that have been associated with mobility (both geographical and occupational) as well as education, growing equality income and lifestyle\textsuperscript{140}.

\subsection*{2.3. Nihonjinron Literature and Human Rights}

The nihonjinron literature has spread out both within and outside Japan. It is one of the main reasons explaining why essentialist notions of culture still endure in studies on Japan, in a general sense, as well as on the scope and use of individual human rights within the Japanese society\textsuperscript{141}. The preference given to groupism that implies the submergence of the individual within society explains why this ideology conflicts with international standards\textsuperscript{142}.

It is important to stress out that cultural relativism of international human rights standards is not endorsed by Japan at the international level. As an industrialized and democratic state, with a Constitution proclaiming since 1947 an impressive catalogue of individual human rights, including civil and political rights, it was not possible for Japan to officially join the views on Asian values expressed by its fellow East Asian neighbors in 1993.

In fact, Japan expressed dissent with the Bangkok Declaration and is not a proponent of cultural relativism on the international stage. Japan's approach to the Asian values debate reflects the need to consider both its Western political identity and its Asian geo-cultural identity from the very early stages\textsuperscript{143}. However the use of nihonjinron discourse within power circles can influence the way that human rights are enforced by state actors at the domestic level\textsuperscript{144}.

\subsubsection*{2.3.1. Homogeneous Japan and the Multicultural Reality}

Promoting a view of an ethnic and linguistic homogeneous Japan, the nihonjinron doctrine has led until recently to an official denial of the existence of any kind of social, cultural and ethnic minorities or indigenous peoples in Japan, even though it is estimated that between

\begin{footnotes}
\item[139] Miyazawa, 928.
\item[140] O. Feldman, 328.
\item[141] McVeigh, 21; Siddle, 448, 456.
\item[142] O. Feldman, 331.
\item[144] Marfording, 432-433, 446.
\end{footnotes}
4 and 6 millions of people belong to one of these minority groups. This denial has deep political roots since it is closely linked to the ideological construction in the 19th Century of a Japanese race and identity which is defined through exclusion of other peoples and groups. It has given way to politics pushing exclusively in favor of complete assimilation of individuals belonging to ethnic or cultural minorities.

At the academic and political level, the balance has however shifted during the last twenty years and the dominant discourse underscores today the reality of a multicultural Japan which underscores the artificial quality of the *nihonjinron* discourse.

This shift also appears in Japan’s periodic reports to United Nations’ Treaty Bodies such as the Human Rights Committee or the CERD Committee: after initially denying it, the Japanese government recognized in 1992, in its Third Periodic Report, the existence of minorities under article 27 ICCPR.

This official recognition was reflected in the courts' case-law first in 1997, the same year of the adoption of the Ainu Cultural Promotion Act (Law n°52). One should point out that while this legislation has been regarded as the first "multicultural" act in Japan, it focuses exclusively on cultural rights and sets aside any political or economical rights that would support the Ainu population as a distinct ethnic or even indigenous group. Therefore, the "Resolution on demand to classify Ainu as indigenous peoples" passed in June 2008 should be seen as an important step forward.

### 2.3.2. The Public Welfare Clause and Judicial Review

Under the 1947 Constitution, individual rights are limited by a "public welfare" clause. Article 12 states that the people "shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare". Article 13 provides that those rights shall, "to the extent that it does not interfere with the public welfare clause, be recognized by the courts in accordance with the public interest.“

---

145 Ramlogan 132; Siddle, 447-448.


151 Siddle, 449.
welfare, be the supreme consideration in legislation and in other governmental affairs." Through the Supreme Court's case-law, this limitation clause has been extended to all rights and freedoms guaranteed by the Constitution152.

The courts' interpretation of "public welfare" and of "other private interests" is extensive. The Supreme Court has for example used the public welfare argument to state that the community is traditionally entitled to live in a safe and secure environment, and that this right exceeds the rights of an individual to privacy against the state's invasion153. To some scholars, this kind of statement is another proof that Japanese authorities give more weight to social and community rights than to individual rights154.

Indeed, the very existence of the public welfare clause has been interpreted as a typical example of Japan expressing its cultural "uniqueness" in legal matters, especially regarding human rights. For some scholars, the mention of this "public welfare" clause in the Constitution is a direct result of the state's will to do an "explicit balancing of individual rights against the demands of communal living"155.

For Norton, through the public welfare clause, "constitutional rights are defined by social context and legislative prerogative"156. In turn, Roe Gilmer argues that Japan has "always been more focused on group welfare than individual rights" and that this is reflected in the Supreme Court's "narrow" interpretation of individual rights which enforcement is supposedly "an anathema"157.

To support her allegations, Roe Gilmer points to several factors: (1) the Supreme Court has ruled that individual rights can suffer limitation for the public welfare, (2) their effect can be modified by legislation, (3) the very concept of "public welfare" is not absolute and can change overtime and (4) it is up to the judiciary body to rule over what the standard of public welfare should be158. For Roe Gilmer, the fact that no jury takes part to the setting of this standard is "significant"159.

However, the factors laid out by Roe Gilmer, for example, are not "culturally" distinctive. First of all, individual freedoms such as freedom of thought or religious freedom are made to be limited by state activity, under a certain number of conditions, including a legal

154 Ramlogan, 142.
155 Brown Hamano, 434; see also Ramlogan, 134, Roe Gilmer, 917.
157 Roe Gilmer, 911.
159 Roe Gilmer, 911-913.
There are few if any of individual human rights that may create absolute entitlements. Indeed, the "public welfare" notion is quite similar to the "public interest" found in Article 36.2 of the Swiss Constitution, or the various legitimate aims of Articles 8.2, 9.2, 10.2 and 11.2 of the European Convention of Human Rights. In both case, these aims justify restrictions to individual rights and are subject to change in time, along with social and cultural evolution of society. In this context, courts usually confirm the legitimacy of the state's action.

As Haley points out, the standards of the Supreme Court for evaluating whether the "public welfare" requires indeed a limitation are those prevailing within Japanese society. These standards are the sum of the understanding of separate individuals but they are also a collective understanding that transcends both. In practice, it tends to foster a conservative take on issues by preserving basic liberties and not primarily act as a promoter of change but courts have nevertheless demonstrated their ability to take into account social change and international standards.

Indeed, in a 2008 decision regarding the constitutionality of the Japanese Nationality Act, the Supreme Court referred both to the changing Japanese socio-economical context and also to international prohibition of discrimination to strike down a statute discriminating against children born out of wedlock of foreign mothers and Japanese fathers and who had not been recognized by their fathers before birth.

In fact, it appears that it is not so much the very existence of the "public welfare" clause than its use and implementation by courts that raises issues regarding human rights enforcement in Japan. In that context, a closer look at the application of the proportionality principle should be in order, to see whether the situation of the plaintiff is, in each case, correctly assessed when opposed to the general and legitimate goals pursued by the State.

Furthermore, when referring to international covenants, it is indeed highly questionable to apply a domestic limitation provision to an international norm, especially when this

---

160 See Article 36.1 of the Swiss Federal Constitution (Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act.) as well as Articles 8 to 11 of the European Convention of Human Rights.

161 Addo, 627.

162 Article 36.2 reads: "Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others."

163 Those provisions list aims such as national security, territorial integrity, economic well-being of the country, public safety, prevention of disorder or crime, protection of health or morals, protection of the rights, reputation and freedoms of others.

164 Auer, Malinverni, Hottelier, 99-100.

165 Haley 1991, 184.


statute does not provide any. This has however more to do with methodological and
legal technicalities, as well as with a lack of knowledge regarding international law than
with culture.

3. Human Rights, Culture and Promotion of Social Change in Japan

Since the Western legal models were imported in Japan, both sets of new and older rules
have mutually adapted to each other in a continuing process that has given birth to a
unique and distinctive system. So far, this mutual adaptation has been mostly in favor of
traditional values. One could argue that this reflects how enduring the nihonjinron
discourse remains, especially since key agents of change remain the country’s elites as well
as the bureaucracy.

Without denying its continuing influence, one should not assume that no change can
actually be processed from society, in particular through the use of international human
rights law. Indeed, regardless of official conservative positions, the opinions and the views
of the ruling elite, who champions the nihonjinron discourse, should not be interpreted as
reflecting the whole and entire reality of the Japanese tradition on this matter.

While this literature submits that harmony and consensus prevail in Japan, social conflicts
supported by opposition parties have erupted throughout the 20th Century on labor,
environmental, anti-war, minority or consumer protection issues. Brown Hamano posits
that the political history of modern Japan is indeed mainly a struggle between conservative
elites and various social movements endeavoring to redefine the values and aims of the
State.

Eric Feldman further argues that in Japan, legal and social change has not simply unfolded
against traditional values, but in fact also thanks to changing culture and social practices.
This author points out to the raising attractiveness of litigation that can be linked to an
erosion of public trust in elites. Therefore, it is actually the cultural factor that could
explain the pace and intensity of recent legal reforms in Japan. One should add, the
genuine cultural factor.

Beyond the nihonjinron doctrine based on an essentialist Japanese culture lies a reality
where laws, cultural and social practices influence and change each other, where the social

168 In its 1997 decision regarding the Nibutani Dam, the Sapporo District Court held that "even the right
under Article 27 of [ICCPR] is not absolute and may be restricted for reasons of the public welfare as
specified in Articles 12 and 13 of the Japanese Constitution"; Sapporo District Court, Judgment,
March 27, 1997, X. et al. v. Y, Hanrei Jiho n° 1598, 33, English translation in the Japanese Annual of
International Law, n° 41, 1998, 93.

169 Haley 1991, 2; Eric Feldman, Legal Reform in Contemporary Japan, in: Harry Scheiber and Laurent


171 Brown Hamano, 417-419.

172 O. Feldman, 335-336.

173 Brown Hamano, 418.

174 E. Feldman 2006, 809; Eric Feldman, Law, Society, and Medical Malpractice in Japan, Washington
and cultural context gives law its meaning and scope. Culture is in constant motion and thus cultural norms cannot be set in stone, even less become a cliche, neither in Japan nor elsewhere. If the cultural factor cannot be set aside when discussing human rights and compliance with international norms in an analytical framework, turning to the sociology of social movements contribute to avoid any essentialist pitfall, as Miyazawa suggests\textsuperscript{175}.

3.1. Social Movements, Social Change and the Cultural Factor

3.1.1. Social Movements and Compliance with International Law

A social movement is defined as a mobilization of opinions, activities, beliefs and sentiments within a segment of the population that intend to achieve change in social relations, structure or system, by making assertions against political and economic authority, but also by seeking attitudinal changes within civil society\textsuperscript{176}. Cichowski defines movement activism as "sustained challenges, by individuals or groups with common purposes, to alter existing arrangements of power and distribution"\textsuperscript{177}.

In the specific Japanese context, Eto describes social movements as "a series of collective activities in which autonomous individuals, who lack political power and material resources, are voluntarily engaged, and which aim to change the status quo not only towards deepening social justice but also towards creating new values and policies, based on individuals' beliefs that are in opposition to the authorities"\textsuperscript{178}.

Miyazawa asserts that the "rise and success" - the strength - of any social movement is based on three requirements: (a) opportunity to access the policy-making process, (b) mobilization of members, money, media and other resources in order to build up and maintain the movement, and (c) framing of proposals so that potential adherents, the public and constituents are effectively mobilized.

Miyazwa's proposal is particularly interesting in our case, especially when discussing how proposals for social changes and legal reforms are based on international human rights. As far as international human rights law is concerned, "compliance is about identification; to achieve compliance with contested norms, state identity must change"\textsuperscript{179}. The question of "state identity" points of course to cultural issues but most of all to political power relations. Compliance implies a consistent participation of civil society actors, such as NGOs.


\textsuperscript{179} Flowers, 19.
In Japan as elsewhere, civil society has therefore a powerful role to play in order to make the state fulfill its international obligations and eventually promote social change. Flowers notes that the strength of domestic advocates in Japan is precisely one factor that will influence the level of compliance with international law. This is consistent with studies showing that low-level commitments made by governments regarding reforms to implement international law actually prompt human rights activists to increase domestic pressure, strengthen their position and embolden them to demand further actions and reforms.

3.1.2. Social Movements and the Cultural Factor

It is at the framing stage that the cultural factor has the most impact since it will be the relation between the arguments used by the proponents of change and existing cultural values that will influence their success. Culture is used instrumentally and selectively as a tool, to make issues and new ideas acceptable and more understandable to the public. In particular, rights will be presented in local cultural terms to become persuasive and then challenge relations of power to be effective; in other words, culture serves here as a context for human rights mobilization.

Since only parts of the local cultural background are used or challenged to frame the debate, opponents may also instrumentalize other parts, including *nihonjinron* discourse, to build counter-arguments. This strategic selection means that while culture has its role to play, it is not viewed as an essentialist concept by social movements.

Eric Feldman further identifies three criteria which allow non-domestic norms - and international human rights law should be included here - to trigger change in Japan. First, the norm should be appealing and useful to local judgment, second there should be local actors who will transmit and transfer the norm into the domestic arena, and third the receptivity of local conditions to the norm, such as values, market or politics, is of foremost importance.

Here Feldman's, Miyazawa's and Flowers' analysis regarding social movements in Japan converge: culture will determine what is appealing and useful, "local actors" (such as human rights activists) will use it to transfer the norm to a given social context, in order to achieve compliance with international obligations. This process is not exclusive to

---

182. Miyazawa, 930; Merry, 525.
183. Merry, 524-525.
184. See Wolff, 530-531, referring to Hasegawa's arguments against international norms against women's discrimination in favor of domestic cultural norms to regulate gender-based conflicts.
185. Miyazawa, 930.
187. See also Merry, 524, who points out that "considerable research on law and everyday social life shows that law's power to shape society depends (...) on becoming embedded in everyday social practices, shaping the rules people carry in their heads" and that "intermediaries such as NGO and social
Japan: human rights activists worldwide work to negotiate between local and global systems of meaning and translating international discourse into specific reality\(^\text{188}\).

### 3.2. Social Change through Human Rights Litigation

Since law is a component of the social structure, a movement in favor of legal change is a kind of social movement. Therefore, studies on social movements can offer insights on the success or failures of legal reforms\(^\text{189}\) as well as on the ability of social forces to make use of the "politics of rights", that is to use right-based arguments in front of courts or in political struggle to achieve their goals\(^\text{190}\).

#### 3.2.1. Human Rights Issues and Litigation in Japan

Scholars studying Japan have long denounced the obstacles surrounding civil litigation in Japan, linking them to a poor judicial enforcement of human rights and legal norms in general. Commentators have also argued about a culturally grounded popular reluctance towards litigation and a marked preference for informal dispute resolution\(^\text{191}\). Usually, these arguments are based on a comparison with the U.S. system where civil litigation is used as a powerful and pervasive instrument giving individuals and courts an active role in legislative matters, complementary to the action of the legislative and executive bodies\(^\text{192}\).

In the same vein, recurring criticisms against the Japanese judicial system are the absence of a jury system, the existence of various pre-trial settlement methods, restrictive discovery rules, lack of punitive damages, inexistent class actions, filing fees based on the amount at issue, or even lack of contingent fees\(^\text{193}\). Goodman points out that legislation is typically drafted in a way that excludes private right cause of action that can be enforced by a civil damage action and quotes, as an example, the Administrative Procedure Law of July 1994 that does not contain any provision for judicial review of public agents' actions\(^\text{194}\).

---


\(^{189}\) Miyazawa, 929.


\(^{193}\) Landis, 73.

\(^{194}\) Goodman, 773.
Given the civil law inspiration of the Japanese systems, and when compared to European countries, one may wonder whether culture is a relevant factor in this issue and whether proper enforcement of human rights law is in fact limited by the lack of such institutions. Civil law scholars are used to see administrative and constitutional courts - and not civil courts - as the main theaters for constitutional and human rights litigation\textsuperscript{195}, not only since human rights are primarily conceived to rule the relations between individuals and public authorities but also given that international law impose obligations only on states and not on individuals\textsuperscript{196}.

Administrative action, rather than civil damage action, is therefore the primary processual way to use against decisions based on administrative laws. In this context, plaintiffs may only refer to self-executing, or directly applicable, international provisions to back their claims directly. Non self-executing norms may only be used for interpreting domestic law, through indirect application which can actually be a very effective method to bring domestic provisions in line with international obligations\textsuperscript{197}. Because direct applicability depends on both a provision's wording and the context in which it is invoked, in Japan, like in Switzerland, it is decided by courts on a case-by-case basis\textsuperscript{198}.

When it comes to civil litigation between private parties, implementation of human rights standards is done first of all through adoption or modification of civil or criminal legislation by the national legislator. In such cases, international or constitutional-based human rights norms are used for interpretation purpose and courts refuse to apply them directly even when they are self-executing\textsuperscript{199}.

In Japan, this is especially meaningful in racial discrimination cases. In matters related to discrimination, the rules of tort law, which main principle is codified in article 709 of the Civil Code\textsuperscript{200}, are actually the only way available to get judicial redress when subjected to private acts of discrimination\textsuperscript{201}.


\textsuperscript{197} Iwasawa, 82-89.

\textsuperscript{198} Yakushiji, 5-6; Iwasawa, 48. Tokyo High Court, Judgment, March 5, 1993, Hanrei Taimuzu n° 811, 87; Swiss Federal Supreme Court, BGE 129 I 217, § 1.2, A., B., C., D., E.

\textsuperscript{199} Tokyo High Court, Judgment, January 23, 2002, Hanrei Jiho, n° 1773, 36: the court did not sanction a private association, a golf club, that refused access to the plaintiff on grounds of the plaintiff's foreign nationality. See also Iwasawa, 89-90 and Yakushiji, 25, but compare with the opinion of Timothy Webster who argues that while Japanese courts once "hesitated to apply international law" in the name of "classical view of international law", lately judges "have warmed to the idea that international law applies to private persons" and a string of recent lawsuits has "challenged the old distinction between private and public"; Webster 2010, 245-246.

\textsuperscript{200} "A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence".

\textsuperscript{201} Fujimoto Mie, \textit{Presentation by the Japan Civil Liberties Union for Mr. Doudou Diène, the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance}, July 6, 2005, 2, available at http://www.jelu.org/index_e.shtml (last checked: November 26, 2010).
Because of the lack of domestic law regarding racial discrimination, Japanese courts have referred to ICERD principles in lawsuits opposing private parties\(^{202}\). This has been done only in an indirect way, as an interpretative basis for the Civil Code\(^{203}\). In those cases, international human rights law has been used as criteria for evaluating whether constitutive elements of tort law were met or not, and therefore whether disputed private conducts were lawful or not\(^{204}\). Article 90 of the Civil Code, that renders null and void any private contract contrary to "public policy", has also been interpreted taking into account ICCPR and ICERD to protect individuals against illegal infringements committed by other private persons\(^{205}\).

Using Switzerland as a comparative point, it appears that lack of a jury in civil matters, inexistent class action or punitive damages are not related to the efficiency of judicial remedies in general nor in human rights issues in particular, whether based on domestic on international law. As such, such institutions do not influence how and to what extent human rights can be used by litigants in front of court nor how courts will decide.

Recently, legal and structural barriers that made civil litigation difficult, time-consuming and costly have been softened\(^{206}\). However, changing the rules of civil litigation is not the generic answer to all hurdles against a better judicial enforcement of domestic and international human rights law and, \emph{in extenso}, to use human rights litigation for promoting social change. Goodman is right to point out the necessity to insert, in administrative statutes, provisions allowing individuals to file suits in case of misapplication.

What further matters for enforcing the right to an effective remedy of alleged human rights violations\(^{207}\) are the self-assumed role of courts in a democratic system in their relations with other authorities, good training in international law of legal professionals and judges, processual solutions allowing claims based on international law arguments, and sound methodological tools used by courts for analyzing and implementing international law. These points have yet to be properly addressed in Japan and do raise issues for implementing international human rights law\(^{208}\), as we further argue elsewhere\(^{209}\).

---


\(^{204}\) Hamamatsu Branch of the Shizuoka District Court, Judgment, October 12, 1999, Hanrei Jiho n° 1718, 101; Sapporo District Court, Judgment, August 19, 2002, Hanrei Jiho n° 1806, 92-93. On this question, see Yakushiji, 25-26.


\(^{206}\) E. Feldman 2009, 258.

\(^{207}\) See article 2 (3) ICCPR, article 6 ICERD, article 14 CAT, article 39 CRC.

\(^{208}\) See in general on this issue Yakushiji, 1-45.
Culture, however, is not at stake here but rather the balance of power between the three state bodies.

3.2.2. Social Change and the Role of Courts

Civil litigation reforms have a meaningful impact for enforcing international human rights standards in relation to discrimination. Even though these reforms signal the State's willingness to make litigation more accessible as well as changing social factors regarding tort-based claims, the real potential of lawsuits for enforcing human rights law remains under pressure due to the enduring policy of the State to keep a high hand on the pace of social reforms210.

Indeed, the conservative strike of the Japanese human rights record needs to be linked to the fact that the State attempts to retain as much control over social conflict and social change as possible, notably thanks to a skillful bureaucracy which intervenes actively in society and private relations notably through guidelines and recommendations211.

Dynamics of law and social change should in fact be put in the perspective of the tensions between courts and bureaucracy and their respective roles in the Japanese system212. Like Kitamura explains, law is therefore "predominantly publicist and dirigiste", following the Kelsenite pyramid model213.

Patel posits that the system itself favors solutions that are forced top down, in accordance with Ministries' guidance, and not in response to the invocation of human rights or in the name of their protection214. Indeed, bureaucracy is considered as the main enforcer of legal norms and not individuals, through judicial action215.

So-called "bottom up" impulse for initiating change through litigation is therefore not self-evident, something that human rights movements are aware of. Therefore, when analyzing the impact and use of international human rights law in Japan, it is necessary to look not only at what happens (or not) in courts, but also outside the strict context of judicial process since multiple channels, including social and political ones, are used by social movements to reach out to society at large216.


212 Haley 2006, xviii.


215 Goodman, 772-773.

Depending on one’s view on the role of the judiciary body, one may regret the general restraint shown by Japanese courts when exercising their competence for judicial review, especially their application of the so-called “legislation discretion doctrine” when individual rights are at stake. However, Asian values and traditional Japanese culture and history are not specifically relevant for explaining this practice. The political debate regarding the role of judges in a democratic state and their legitimacy to strike down statutes adopted by democratically-elected parliamentarians, especially on the base of international law, is not specific to Japan and is found also in Western countries.

Japanese courts’ reluctance reflects a view on the relations between the judiciary and the two other state bodies in a democratic state which is different in every country and remains debated in legal and social philosophy, including within Western academic circles. For some commentators, the majoritarian legislative rule is considered as the only legitimate rule. It should be not limited by human rights constraints enforced by judges that are seen as democratically unaccountable and therefore illegitimate to limit legislative acts.

---


218 Compare with the situation in Switzerland where article 190 of the Swiss Federal Constitution prohibits courts to strike down federal statutes, including on grounds of unconstitutionality, given that these statutes are adopted by the federal legislative body which includes, at least implicitly, the participation of the population via a facultative referendum (article 141, Swiss Fed. Cst.). However international law, and especially international human rights law, may overrule these statutes (article 5 (4), Swiss Fed. Cst.), a fact accepted by a large majority of legal professionals and political actors but which is nevertheless debated. The balance between individual human rights and legislative, or even administrative, acts when the people directly participate to the decision-making process is subject to highly charged political debates. The active role of the judiciary body when enforcing the rule of law and human rights finds itself especially under criticism in the name of the democratic, majoritarian rule. Denouncing the European Convention of Human Rights has even been considered by some political factions for this reason. Regarding this debate in Switzerland, see among others Andreas Auer, Direkte Demokratie und Rechtsstaat, in: "Demokratie, Regierungsreform, Verfassungsförderung: Symposium für René Rhinow zum 65. Geburtstag", Giovanni Biaggini, Georg Müller, Jorg Paul Müller, Felix Uhlmann (eds), Basel, 2009, 31-42; Bénédicte Tornay, La démocratie directe saisie par le juge, Schulthess, Zurich 2008; Andreas Auer, Bénédicte Tornay, Aux limites de la souveraineté du constituant : l’initiative populaire « pour des naturalisations démocratiques », Pratique Juridique Actuelle, vol. 6, 2007, 740-747; Maya Hertig Randall, The Europeanisation of Fundamental Rights Protection in Switzerland: Two Steps Forward, One Step Back, in: Henk Snijders, Stefan Vogenauer (eds), "Content and Meaning of National Law in the Context of Transnational Law", Sellier European Law Publishers, 2009, 53-78.

That being said, Haley points out that litigation has the ability to be a powerful instrument of legal and political reform in Japan\textsuperscript{220}. Even though the elite has been able to overrule "dissident tradition" from social movements over the years, these currents have endured and have in fact impacted Japanese constitutional litigation\textsuperscript{221}. Indeed, litigation has been instrumental to inducing legislative action to cure industrial pollution, to reduce hazards of toxic chemicals, to correct inequalities in employment of women and to carry through the political and social ideals of the Constitution\textsuperscript{222}.

Moreover, one may see a marked evolution in Japan's first periodic reports to UN Treaty Bodies, but also in the legislation and courts' case law and implementation of international law, as well as a growing openness towards arguments based on individual rights. This shows that hesitation or reluctance is not set in essentialist cultural stone and that change and transformation initiated in a "bottom-up" effort can happen.

It is striking to see that in 1995, Kevin Yamaga-Karns analyzed that individuals who "insisted upon their individual legal rights" were seen as free riders by society and that it could explain an "overall lack of success of illegal foreign workers" when seeking redress in front of courts\textsuperscript{223}.

However, recently courts have shown a more positive attitude toward claims filled by illegal foreign workers\textsuperscript{224}. A 2008 Supreme Court decision regarding nationality of children born out of wedlock from a foreign mother and a Japanese father also demonstrates this change since the Court specifically took into account the evolution of social mores, international law and international practice\textsuperscript{225}.

Studies have shown that even though there is no class action in Japan, using collective lawsuits and communication with the public through mass media, victims groups and other social movements have been able to make strategic assertions of rights in courts. Afterwards, they were successful in convincing the government to accept responsibility for wrongdoings and win comprehensive redress, including official apology, compensation and campaigns against discrimination related to medical care\textsuperscript{226}.

Once again, it appears that the situation in Japan is not so much about culturally- based

\begin{flushright}
\textsuperscript{220} Haley 2006, xviii. \\
\textsuperscript{221} Brown Hamano, 419. \\
\textsuperscript{222} Haley 2006, 34. \\
\textsuperscript{224} Kyodo Press Agency, \textit{Foreigners win Yen 17 million for Trainee Abuse}, The Japan Times Online, January 30, 2010. \\
\end{flushright}
restraint and deference to legislative and executive authorities, or defiance against individual rights in a group-oriented society, than rather about a more general issue, discussed in other countries as well, regarding the political balance of power between state actors and the impact of international law on domestic institutions and legal system. This is however a debate subject to social and political evolution, including at the hand of social actors pushing for institutional reforms based on international law, outside and in front of courts.

3.3. A Case in Point: Women’s Movements in Japan

3.3.1. Women’s Movements and the "Asian Cultural Exception"

The case of women's movements in Japan is here of special interest not only because they promote social change using human rights and international law arguments, but also because their very existence and goals confront political elites promoting a conservative view on the social and political role of women, based on the nihonjinron discourse. This struggle addresses the reality of a Japanese cultural exception and the ability of the Japanese social and legal structures to enforce international human rights law.

Indeed, the movement for formal and substantive gender equality in Japan casts a light on how social groups that have reached out beyond national borders and which are not stopped by cultural differences that supposedly generate relativism in human rights aspirations and expectations. Even though it is set in a particular cultural, social and political context, the goals are identical as in other countries. International human rights law has offered these aspirations a common framework.

This transnational struggle also challenges the reality of an "Asian exception" promoted by some Western and Asian scholars and politicians favoring a discourse of "orientalism". This "exception" excludes the very need or even the wish for claims based on human rights that are supposedly linked to certain cultural prerequisites that make some cultures suited for democracy and human rights, while others are not.

Such a view overlooks the balance of power between communities within a country and, for example, the goals and aspirations of half the population living in those societies: women. In Japan, women’s associations have found themselves on the same ground as other groups and minorities oppressed and excluded from social and economical power for other reasons, such as Burukamin or Ainu people.

This exclusion and their will to overcome their marginalization have led them to be more distrustful of traditional political parties and at the same time be more politically active than their male counterparts, through collective actions and organizations both within and outside the usual political channels.

---


229 Eto, 117, 119.
3.3.2. The Political Struggle of Women's Movements in Japan

The history of women's groups and movements in Japan and how they have been struggling to gain the same legal, social and economical status as men is well documented\textsuperscript{230}. Contesting the prevailing soci
al order was not prevalent before the Meiji revolution. However, at that time, democratic and liberal philosophy started to spread out within Japanese society along with the dispersion of Western political ideas.

While Japanese elites and rulers researched and analyzed Western models in order to modernize their nation as quickly as possible, groups, clubs, intellectuals and mere citizens also accessed these new concepts and started discussing and endorsing notions such as individual freedoms and equality. Moreover, with the introduction of capitalism and industrialization at the end of the 19th Century, class struggles, socialism and feminism swept throughout Japan like they did in Western states where the same issues were transforming societies and economies\textsuperscript{231}.

Since their creation in the Meiji era, Japanese women's movements have challenged political status quo, promoted democratic reforms and dedicated themselves to social and legal change by pressing for peace, equal rights, improved labor conditions and better resources for families\textsuperscript{232}. Campaigns for women's rights started as early as in the 1880s among the Japanese elite, to later spread out to the other social classes\textsuperscript{233}.

In the late 19th Century, women's political activism had reached such a point that authorities passed various laws banning women from attending and sponsoring political meetings or joining political groups. Those bans were opposed by women's groups who actually found support in the Lower House of the Diet, only to be defeated by the conservative and unelected House of Peers\textsuperscript{234}.

In the pre-war period, during the Taisho democracy, women's groups created civil associations lobbying for legal and civil reforms and fighting against a vision seeing them merely as wives and mothers, and aimed at equal political rights and better state protection\textsuperscript{235}. The first female Representative was elected to the Diet just after the war. Kato Shizue was a feminist who had a major impact on the drafting of the 1947 Constitution's provisions regarding general education, women's rights and gender discrimination, especially based on the Civil Code\textsuperscript{236}. From then onwards, the new political and social rights granted to women notably on the base of the Constitution helped women's movements to further assert their goals to challenge social-cultural norms\textsuperscript{237}.

\textsuperscript{230} See Eto, 115-143; Mackie (in general); Yun, 210-216; Ilse Lenz, From Mothers of the Nation to Global Civil Society: The Changing Role of the Japanese Women's Movement in Globalization, Social Science Japan Journal, vol. 9, n° 1, 2006, 91-102, for an in-depth analysis of the history of the women's groups in Japan.

\textsuperscript{231} Beer, Maki, 29-30.


\textsuperscript{233} See Eto, 121-122 for a further analysis.

\textsuperscript{234} Falsafi, 393.

\textsuperscript{235} Falsafi, 395.

\textsuperscript{236} Beer, Maki, 87-88.

\textsuperscript{237} Falsafi, 412.
After the war, Japanese women first organized and mobilized to create massive networks of women within neighborhoods meaning to valorize women as citizens and members of the Japanese society. Then, in the 1960s, radical movements appeared, calling for liberation and readily criticizing the traditional roles played by women and bringing more diversity to the women’s organizations. During that decade, women supported by women’s associations, began filing suits against discriminating practice at the work place, over explicit discrimination in wage, retirement and reduction-in-force policies\textsuperscript{238}. Beyond gender issues, however, women’s movements found themselves leading mass social movements, notably on labor rights, democracy and peace issues\textsuperscript{239}.

It was in the early 1970s that women’s groups turned for the first time toward international law and started networking to change laws and social patterns by framing demands based on first gender equality and later on international human rights discourse. They took part to the World Conference of the International Year of the Woman in 1975. At the same time, at the domestic level, grassroots movements were set up to fight against gender-based discriminations but also in favor of peace, civil, political and social rights in general, acting on issues that go beyond feminist activism\textsuperscript{240}.

These groups have pressured state actors, both from within the country and at international events such as United Nations conferences and in front of United Nations Treaty Bodies, for example through the actions of the Japanese NGO Network for CEDAW or the Japanese Association of International Women’s Rights\textsuperscript{241}. They have created international networks with other feminist groups throughout Asia to promote human rights and thus have joined transnational advocacy networks working on global gender policies\textsuperscript{242}. At the same time, reframing their assertions and using arguments based on international treaties such as CEDAW, ratified by Japan in 1985, women’s groups have achieved significant results at the domestic level, notably through legal changes\textsuperscript{243}.

In order to comply with CEDAW and the Beijing Platform of Action, the Government enacted the Equal Employment Opportunity Law (EEOL) in 1984, just before ratifying the convention. Following the first lawsuit filed in a case of sexual harassment in 1992, where the Supreme Court recognized the management’s responsibility, the EEOL was revised in 1997 to prohibit sexual harassment and to require promotion of affirmative action in favor of women from the Government\textsuperscript{244}. The group Women’s Association to Act, established in


\textsuperscript{239} Falsafi, 412-413.

\textsuperscript{240} Eto, 118, 120; Lenz, 94-97.


\textsuperscript{242} Eto, 125, 127, 130; Lenz, 92-93.


\textsuperscript{244} Chan-Tiberghien, 56.
1975, played an active part for convincing the Government to introduce and later amend the EEOL\textsuperscript{245}.

The Basic Law for a Gender-Equal Society was adopted in 1999, a statute considered as a watershed event since it was the first statute promoting a gender-equal society\textsuperscript{246}. A Gender Equality Bureau was also set up within the Cabinet Office and the national machinery to implement the National Action Plan for Gender Equality, and local action plans and women’s centers were created in most local municipalities\textsuperscript{247}. In 2000, an anti-stalking law was promoted and in 2001, a law in favor of domestic violence prevention was enacted\textsuperscript{248}. In 2006, the EEOL was revised once again and strengthened to prohibit discrimination, including indirect discrimination, at any stage of employment, as well as to enhance employers’ obligations in measures against sexual harassment and impose administrative fines.

While these steps are noteworthy and relevant, showing a "medium degree of compliance" with international law\textsuperscript{249}, NGOs and women’s movements point out that actual gender equality is not yet a reality in Japan, notably because of social attitude regarding the role of women in society. Women still face social pressure to not pursue careers and stay home and raise children after marriage. In the 1990’s, high-profile politicians were known to make gender-based discriminatory remarks in the media\textsuperscript{250}. Since the 2000’s there have also been occurrences of anti-gender equality backlash in local prefectures, led by policy makers, media and right-wing groups\textsuperscript{251}.

Discriminatory clauses against women are still present in the Civil Code. Minimum age for marriage is 16 years old for women while it is 18 years old for men (article 731) and only women are not allowed to remarry for six months after divorce for the reason that it is necessary to determine the paternity of a child (article 733 (1)). Until recently, a provision in the Nationality Law also created a discriminatory difference between children born out of wedlock from parents who were not both Japanese. Before an amendment was passed in 2008, providing that children born of either a Japanese mother or a father were Japanese\textsuperscript{252}, only children born of a Japanese mother could become Japanese. Those born of a foreign mother and a Japanese father who did not marry her before the birth did not get Japanese nationality at birth.

This kind of norms and other gaps between the formal legal framework, including international law, and the social reality may have cultural grounds. However, as far as they promote a gender-based separation of social and economical roles, they are not specific to

\textsuperscript{245} Eto, 126.
\textsuperscript{246} Takao Yasuo, Women in Japanese Local Politics: From Voters to Activists to Politicians, Japan Focus Online Journal, January 29, 2008, 3.
\textsuperscript{248} Chan-Tiberghien, 65.
\textsuperscript{249} Flowers, 71.
\textsuperscript{250} Flowers, 69-70.
\textsuperscript{251} Asian-Japan Women’s Resource Center, 5.
\textsuperscript{252} Amendment of Nationality Law through Law n° 88 of 2008.
Japan or to Confucian societies in general since the patriarchal social model is found throughout the world.

The case of Switzerland demonstrates that such provisions are also found in Western countries in spite of completely different historical and cultural roots. Like Japan, the *jus sanguinis* rule is applied on nationality issues. The Swiss Law on Nationality makes a difference between children born out of wedlock of a Swiss mother and foreign father, and those born of a Swiss father and foreign mother. Only the first children are Swiss *ex lege* at birth\(^\text{253}\). The second group of children get Swiss nationality only after the Swiss fathers have legally acknowledged them after their birth. The effect is retroactive to the time of birth\(^\text{254}\). According to administrative practice but not to law, if their parents marry each other after their birth, acknowledgement is not necessary\(^\text{255}\). Nevertheless, those whose parents do not marry each other and are not acknowledged by their father do not become automatically Swiss, creating an unequal situation between children based on the nationality of their mothers.

Moreover, with an average of 24% difference between wages in the private sector\(^\text{256}\), a strong conservative current in favor of traditional roles in the family and an enduring social pressure on women to quit the paid labor market after marrying, a majority of female part-time workers with low salaries and partial social security coverage\(^\text{257}\). Equal political rights were granted to Swiss women even later since they had to wait until 1971 to be able to vote at the federal level.

**Conclusion**

Like any other country, Japan is entitled to promote and protect its culture and traditions. Its authorities may refer to its history and traditions when defining social values and public order. Likewise, international human rights law does not dictate the exact nature of the relations between state bodies, for example regarding the balance between the democratic principle and the rule of law, that is the respective weight of the legislative and judicial bodies. In matter of enforcement of human rights, international law and the practice of treaty bodies offer room for political traditions but also for cultural adjustment, especially through the application of the proportionality principle.

However, cultural values must never lead to discrimination and outright violations of individual rights. Like domestic constitutionalism, international human rights law does
provide a minimal framework that limits the majoritarian rule. International law imposes that effective remedy for alleged violations must be available and that minority social groups and individuals must be protected against the acts and conflicting values of the majority. As a result, the judiciary body needs to receive proper formation to be able to enforce international standards and rules.

The history of women's movements and their struggle for effective equality in Japan shows that any shortcomings in Japan's domestic record on human rights implementation should not be imputed to cultural specificities that would make it allegedly unable to fully implement individual rights. This is a telling example of a conflict between social and political actors where individual rights, whether protected by international or domestic law, are used by some to promote their agenda and denounced by others as alien values in order to reinforce their position.

This kind of conflict gives credence to Donnelly's view on human rights as being not the result of a specific culture and traditions but more as the result of modernity, the rise of the modern state and the diffusion of political, economical and social theories that go with it. This struggle exemplifies how the history, traditions and culture of a country do not prevent parts of its population to embrace human rights-based arguments and build strong social movements that challenge established power structures and relations.

In the case of Japan, it also demonstrates that the nihonjinron literature is indeed more a political tool than a manifestation of a social reality that would remain frozen over time. The fact that this discourse remains a reference among the ruling elite merely reflects the enduring political and economical strength of those who continue to promote it.

While international human rights law and rhetoric are now part of the universal language among States and civil society on the global stage, it is first of all at the national level that they are used by domestic actors. In that context, both human rights law and culture become very pragmatically tools and arguments used together or against each other in discourses to reach out to the public and promote, or oppose, social change.

---

258 Donnelly 2007, 281-283.

259 Lenz, 100-101.