The Japanese International Law 'Revolution': International Human Rights Law and Its Impact in Japan

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Abstract
Some observers have argued that because of a lack of enforcement powers, international law has relatively little impact on the conduct of nations and, in fact, may not be "law" at all. Others have inquired whether legal norms which underlie international human rights law have any influence on the domestic law of signatory nations. This article argues that international law can profoundly influence the development of the domestic laws of nations regardless of the lack of coercive enforcement powers. This point becomes clear through a consideration of Japan's experience in adopting and internalizing international law norms.

Keywords
international law, foreign law, Japan, human rights, treaties

Disciplines
Comparative and Foreign Law | Constitutional Law | Human Rights Law | International Law
The Japanese International Law “Revolution”: International Human Rights Law and Its Impact in Japan*

KENNETH L. PORT**

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* All Japanese source material quoted herein was translated by the author unless otherwise noted.
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I. INTRODUCTION

Some observers have argued that because of a lack of enforcement powers, international law has relatively little impact on the conduct of nations and, in fact, may not be “law” at all.1 Others have inquired whether legal norms which underlie international human rights law have any influence on the domestic law of signatory nations.2 This article argues that international law can profoundly influence the development of the domestic laws of nations regardless of the lack of coercive enforcement powers. This point becomes clear through a consideration of Japan’s experience in adopting and internalizing international law norms.

For more than 1,400 years Japan has looked to foreign legal models for guidance in developing its own legal system. As a result, its legal norms reflect ideals from China, Europe, and the United States. More recently, the Japanese government has embarked on a program of kokusaika (internationalization) to counteract its xenophobic global image and cultivate an international outlook in Japanese society that is commensurate with Japan’s economic power.3 Formal international covenants have helped to shape the Japanese legal system, especially in the area

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of human rights, and the process by which these covenants affect Japanese legal norms serves as an example of how international agreements may shape domestic law.

The structure and focus of international human rights covenants play a significant role in whether and how Japan accepts and enforces such agreements. In a nation that has adopted many Western legal principles—but which retains its own non-Western conception of “rights”—covenants using gradual, voluntary, and goal-oriented approaches have proven more effective in achieving implementation than those using rigid, law-oriented approaches.

This article first describes the various human rights treaties currently in force in Japan. It then reviews the role foreign nations have played in the transformation of Japan’s social and legal regimes, and briefly explains the status of treaties and public international law in Japan’s domestic law. The fourth section analyzes the specific impact of Japan’s international human rights commitments by examining two areas in greater detail: the treatment of non-citizens in Japan under the Social Rights Covenant, and the treatment of criminal defendants under the Civil Rights Covenant. Finally, the article draws some conclusions about why the Social Rights Covenant has been more effective than its civil rights counterpart.

II. INTERNATIONAL HUMAN RIGHTS TREATIES IN FORCE IN JAPAN

A. Human Rights and the Japanese Constitution

Many of the principles embraced by international human rights law are already articulated in the Japanese Constitution. The Constitution states that the people shall not be denied “fundamental human rights” and that these rights are “eternal and inviolate.” It guarantees rights including freedom of thought, equality under the law for all people, freedom of religion, academic freedom, the right to an equal education, the right to a

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4 See infra notes 103-127 and accompanying text.
5 See infra notes 128-166 and accompanying text.
7 Kenpō [Constitution] art. 11.
8 Id. art. 19.
9 Id. art. 20.
10 Id. art. 20.
11 Id. art. 23.
minimum standard of living,\(^{19}\) and the right to work.\(^{14}\) International human rights covenants focus on many of these same concepts. Nonetheless, Japan, like many other countries, has begun to adopt international human rights agreements in order to clarify what these broad rights entail, as well as to help promote Japan’s internationalization.

B. The Covenants

Japan had ratified only two international human rights agreements\(^{15}\) before 1979, when it ratified, with qualifications, the International Covenant on Economic, Social and Cultural Rights\(^{16}\) (hereinafter the Social Rights Covenant) and the International Covenant on Civil and Political Rights\(^{17}\) (hereinafter the Civil Rights Covenant). Although these two covenants appear similar in purpose,\(^{18}\) the structures that they contain and the regimes that they establish are quite different, and these variations in approach have caused distinct differences in Japan’s acceptance and adoption of their principles.\(^{19}\)

The Social Rights Covenant calls for the progressive realiza-
tion of a broad range of “social welfare rights.” In general, parties to the Social Rights Covenant recognize and agree to help promote the right to work, to just and favorable working conditions, to social security, to an adequate standard of living, to health, to education, and to participation in and enjoyment of the fruits of culture and science.

The Civil Rights Covenant, on the other hand, requires each state immediately “to respect and to ensure” certain enumerated rights. For example, Article 14 grants each criminal defendant, among other things, the right to a fair and public trial, the right to be presumed innocent until proven guilty, the right to assistance of counsel, and the right not to be compelled to testify against himself or to confess guilt. The Civil Rights Covenant


21 Trubek uses this term to summarize the ideas behind the Social Rights Covenant. See Trubek, supra note 20, at 205.

22 See Social Rights Covenant, supra note 16, arts. 6, 7, 9, 11, 12, 13, 15.

23 Civil Rights Covenant, supra note 17, art. 2(1).

24 In its entirety, article 14 reads as follows:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
also requires higher levels of monitoring from the ratifying states, including the submission of reports to the Human Rights Committee within one year of the covenant's entry into force, and subsequent reports “every five years from the date the initial report was due.” Japan's reports under this procedure provide insight into how its government views its human rights commitments and into the role of international law in Japan.

Japan submitted its initial report under the Civil Rights Covenant in October of 1980, and its most recent report was issued in 1986. The Human Rights Committee formally considered Japan's last report in 1988. At that time, the Japanese representative stated to the committee that Japan was “becoming increasingly aware of the importance of human rights.” The representative further indicated that many changes were taking place, but that Japan still remained “hampered... by a number

(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Id. art. 14.
25 Id. art. 40(1)(a).
29 Id. at 137.
of deeply-rooted prejudices and practices . . .”

However, deeply-rooted prejudices and practices are not the only factors that hamper the wholesale implementation of human rights in Japan. The peculiar Japanese conception of rights and the varying form in which international human rights principles enter Japan also have shaped and sometimes hindered the development of human rights in Japan.

Before analyzing Japan’s responsibilities under specific international human rights treaties and the significance of these commitments (as well as international law) to the formulation of modern Japanese domestic law, an explanation of the procedure by which laws of individual states, treaty law, and customary international law have influenced the Japanese legal system is necessary.

III. The History of the Adoption of Foreign Cultural and Legal Concepts by Japan

A. Importation of Linguistic, Social, and Legal Systems from China

Japan’s experience with adopting foreign concepts began in the seventh century when it adopted important cultural, social, and legal norms and ideas from China. These included a written language, Zen Buddhism, and Confucian moral codes of ethics. In conjunction with its adoption of Chinese social systems, Japan also imported Chinese laws. For example, Japan adopted, almost verbatim, the Chinese codes regarding the structure of government.

Thus, roughly 1,400 years ago the Japanese initiated a trend toward absorbing foreign concepts and legal institutions in order

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30 *Id.* at 138.
31 Although this section argues that Japan has tended to look abroad for tools for social change, Japan has never given up its own distinct culture in adopting these foreign concepts. Rather, through a process of adoption and assimilation, Japan has been able to conform the concepts it imports to fit into its culture. In fact, Japanese culture may be characterized as a melting pot of paradigms. See generally Edwin O. Reischauer, *The Japanese Today* 45 (1988).
32 The Japanese language contains three alphabets: two function phonetically and are used to conjugate verbs and for foreign words, among other uses. The third consists of the characters that represent most of Japanese written material. The name for this alphabet, *kana*, means “letters of China.”
to modernize their legal system and society. The Japanese have since then repeated this process of adopting foreign concepts of law and culture to be used as tools of transformative social change several times.

B. Use of European Legal Systems to Promote Change During the Meiji Restoration (1868-1912)

In 1853, following the “opening” of Japan to international contacts by Admiral Perry, the United States, England, Russia, Holland, and France quickly forced Japan into a series of unequal treaties. In essence, these treaties provided for three things: first, port cities were opened to foreign trade; second, Japanese tariffs were placed under Western control and fixed at very low levels; and third and most importantly, a system of extraterritoriality was established under which foreign people in Japan were subject to their own consular courts and not to Japanese law. To the Japanese, these unequal treaties exemplified the failure of the isolationist Tokugawa government—its inability to keep Japan’s sovereignty free of foreign influence.

The unequal treaties of the nineteenth century became a primary motivating force for the Japanese government to modernize in order to re-establish the sovereignty it had enjoyed for more than 2,000 years. The first step in this modernization occurred in 1868 with the overthrow of the Tokugawa government. The new Meiji government set out to modernize Japan

36 The Tokugawa Shogunate government (1600-1868) closed Japan to foreigners because it had seen in other non-European countries a pattern ending in subjugation: first came Christian missionaries, then European culture, and then colonization. Japan expelled most foreigners and refused all outside contact except for some very limited Dutch trading through the port of Nagasaki for 250 years. Except for a few Dutch natural science texts, all Western literature was banned. United States Admiral Perry brought this isolationism to an end with negotiations in Tokyo backed by four war ships anchored in Tokyo Bay. See Kenneth B. Pyle, The Making of Modern Japan 14-17 (1978). See generally Reischauer, supra note 31.

37 See Pyle, supra note 36, at 53-54. See also Harris Treaty, July 29, 1858, U.S.-Japan, 12 Stat. 1051.

38 In this context modernization meant “Westernization.” Western nations argued during the negotiation of the unequal treaties that extraterritoriality was necessary in order to protect Western people from the “unsophisticated, primitive” Japanese legal system.

39 On the issue of whether this change amounted to an actual revolution or just a changing of the guard—a debate which lies beyond the scope of this paper—see W.G. Beasley, The Meiji Restoration (1972); Marius B. Jansen, Sakamoto Ryoma and the Meiji Restoration (1961); Albert M. Craig, Choshu in the Meiji Restoration (1961).
by "copy[ing] from foreigners where they are at their best . . . ". This means that the Meiji government was to abandon the attitude of "the frog looking at the world from the bottom of a well" and rather learn from foreigners by "adapting their best points and making good our own deficiencies."

During the Meiji Period (1868-1912), Japan looked to Western nations to find tools for social engineering and for modernization. The Japanese showed extraordinary "intellectual mobility" by following their new national leaders in abandoning almost overnight the intense xenophobia that had been aimed at the "Western barbarians" during the Tokugawa Period and adopting an intense fascination with Western culture.

At this time Japan began importing Western legal concepts at a staggering pace. At first, Japan embraced the French Code and legal system wholeheartedly. However, some Japanese colleges and universities soon began to teach the German model. By 1890, a civil code virtually identical to the French Civil Code, prepared by a French advisor, Gustave Emile Boissonade de Fontarabie, and a commercial code virtually identical to the German Commercial Code were drafted and ready for implementation.

At this time, however, a debate between two schools of legal thought stalled implementation of the new codes. Some lead-

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40 See Beasley, supra note 39, at 117 (quoting Masahiro Abe, Council of Elders' member, discussing Japan's future in 1856).
43 See Pyle, supra note 36, at 63.
44 R.R. Palmer & Joel Colton, A History of the Modern World 600 (4th ed. 1971) ("The westernization of Japan (during the Meiji Period) still stands as the most remarkable transformation ever undergone by any people in so short a time.").
45 See Beasley, supra note 41, at 92-93.
46 See Kenzo Takayanagi, Reception and Influence of Occidental Legal Ideas in Japan, in Western Influences in Modern Japan 70, 75 (Inazo Nitobe ed., 1951).
47 In the late 1870's the Japanese Minister of Justice aggressively advocated not only translating the French Civil Code but implementing it in toto in Japan by just substituting the word "Japan" where "France" had appeared. Id. at 74.
48 See id. at 78.
49 This debate may be characterized as one of "Law and Social Theory." Law and social theory is the analysis of law using a variety of social sciences to pursue the fundamental question of how and why laws develop in the way they do. Although this description obviously greatly oversimplifies the field, more detailed analysis can be found in Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Social Thought in America, 1850-1940, in 3 Research in Law and Sociology 3 (S. Spitzer ed., 1980); Gary Peller, The Metaphysics of American Law, 73 Cal. L. Rev. 1152 (1985); Roberto M. Unger, Social Theory: Its Situation and Its Task (1987); David
ers advocated their immediate implementation, contending that law is a normative, natural concept based on human nature. Proponents of this school of thought argued that law is universal and that because the French law embodied the rules of a civilized country, it could be directly implemented in Japan. Opponents of the proposed codes held that law, like language, is an expression of national and cultural character and a direct product of the history of a people. They therefore shunned the use of a foreign legal system or code.

This philosophical debate ended in compromise. Members of each faction jointly re-wrote both the civil and commercial codes. Although still heavily relying on the French and the German civil law systems, the revised Japanese codes probably more accurately reflected the Japanese social situation. The Japanese Civil Code entered into force in 1896 and the Commercial Code took effect in 1899. The outcome of this law-drafting process indicated that although the Japanese government was open to borrowing generously from foreign legal systems, it also believed that those systems had to be refined to render them compatible with Japanese culture.

The implementation of the new codes allowed Japan to negotiate treaties abolishing the extraterritorial jurisdictions of all the major Western powers within Japan. Western governments trusted the Japanese legal system because principles of Western law would govern the treatment of their citizens. Thus, ironically, the Japanese government reestablished its sovereignty by adopting many of the legal principles of those nations which had removed its sovereignty.

C. Japan’s “American Revolution”

The Japanese propensity to implement foreign legal structures once again appeared during the U.S. occupation following World War II. This process has been characterized as “Japan’s

50 Takayanagi, supra note 46, at 79.
51 For a more thorough description of the various contending schools and issues during the importation of foreign law during the Meiji Period, see id. at 77-80.
52 See Takayanagi, supra note 42, at 36-40.
53 Minpo, Law No. 89 of 1896.
54 Shōhō, Law No. 48 of 1899.
55 See Takayanagi, supra note 42, at 78.
American revolution." The 1947 Japanese Constitution, especially in its Articles 10-40, is dramatically similar to the Constitution of the United States. Under this Constitution and for the first time in Japan’s 2,000 year history, sovereignty “resided with the people” rather than with an oligarchy. In this new system rights were vested in the Japanese people rather than being a benevolent gift from the Emperor. Many of the rights established by the constitution are similar to the ones being promoted by human rights instruments.

The similarities between the Japanese and U.S. constitutions are not surprising. Although the official story of the drafting and adoption of the 1947 Japanese Constitution claims that the Japanese themselves carried out the endeavor, currently accepted theory holds that SCAP (Supreme Commander for the Allied Powers) officials drafted the constitution, translated it into Japanese, and placed it in the hands of the Japanese Cabinet. Because of political constraints at the time, Prime Minister Shidehara could not refuse to endorse the constitution, and he thus adopted SCAP’s “official” version of the story. The Cabinet also did not oppose the will of SCAP out of a fear that it would lose legitimacy with the people. As a result, the new con-

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57 Kenpō [Constitution].

58 Significantly, this section is titled “Rights and Duties of the People.” Id. arts. 10-40.

59 Kenpō [Constitution] pmbl.

60 For example, the Meiji Constitution, existing at that time, expressly placed national sovereignty in the Emperor. Relevant portions of the Meiji Constitution read as follows:

Art. I. The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.

... Art. IV. The Emperor is the head of the Empire combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution.


61 See supra notes 6-14 and accompanying text.


stitution came into force in 1947 with little actual input in its drafting from the Japanese people.

Although the original impetus for change came from non-Japanese sources, the Japanese people nevertheless once again followed their leaders in a radical transformation of their society. This time, U.S. notions of law and rights served as transformative tools for social change. Although this radical shift stemmed from the defeat of the Imperial Japanese Army and the ensuing Allied occupation, the zeal with which the Japanese progressed towards the realization of human rights after World War II resembled their previous adoptions of foreign legal norms.

One example of the dramatic change in Japanese treatment of human rights is the downfall of the "Peace Preservation Law." The law was designed to keep the population under control by reinforcing dedication and devotion to the Emperor. Just four years after the end of the war, promulgation of the Civil Liberties Commissioners Law reflected an entirely new approach. The Civil Liberties Commissioners Law tried to ensure and protect human rights throughout the country. One commentator described this law as one of "the most significant pieces of legislation in the worldwide history of human rights," both because of its contents and because of the speed with which it appeared. In four years Japan had shifted from imprisoning people for thoughts against the Emperor to punishing people (though largely informally) for interfering with others' basic human rights.

64 In fact, the Japanese Constitution reflects an extension of Roosevelt's New Deal. For example, the drafters made it more progressive than the U.S. Constitution by including a right to social security. Kenpō [Constitution] arts. 25, 27.

65 Peace Preservation Law, Law No. 54 of 1941. For example, in Akira Iwasaki, Sensyu-Sareta Screen [The Occupied Screen] (1975), Iwasaki describes an incident in which an assassin almost killed him at his own doorstep because of Iwasaki's anti-war sentiments. Iwasaki, who later became famous as the producer of the only existing movie footage of the effects of the atomic bombings of Hiroshima and Nagasaki, instinctively drew back just in time, so that the unknown assailant's sword tip missed beheading him by inches. Iwasaki instead received a four inch gash in his cheek. Id. at 212-16. Iwasaki also reports that the Japanese people felt an absolute terror against speaking out regarding the war because of the fear that what happened to Iwasaki might happen to them. In fact, the government so misled the people about the war that Iwasaki reports that his neighbor thought that the now famous surrender speech by the late Emperor Hirohito was going to be an announcement that the United States had unconditionally surrendered. Id. at 9.

66 Peace Preservation Law, supra note 65, art. 7 (attempting to prevent desecration of the sanctity of the Imperial Household); Hugh Borton, Japan's Modern Century 309-10 (1955).

67 Law No. 139 of May 31, 1949.

68 Id.

69 Beer & Weeramantray, supra note 17, at 6.
rights. Not only was this law a major victory for the realization of human rights, but it also symbolized the profound social change that occurred in Japan through the embrace of foreign juristic concepts.

D. Conclusion

This historical analysis suggests that Japan has consistently looked abroad for transformative tools of social engineering. Japan now employs a hybrid legal system that contains aspects of both common and civil law institutions derived from China, Europe, and the United States. Recently, Japan’s economic maturity has combined with the United States’ economic troubles to decrease the influence of American models and concepts on Japanese legal and social institutions. In addition, some scholars

70 See Reischauer, supra note 31, at 25.

71 See Daniel Burstyn, YEN! 21 (1988). Historically, the leading creditor nation also leads in world-wide political influence. Japan has arguably won the war for economic dominance.

An example which reveals how Japan is turning away from America as its favorite role model is found in a book co-authored by Akio Morita, Chairman of the Board of Sony. Akio Morita & Shintaro Ishihara, No to ieru Nihon [Japan That Can Say No] (1989). In his portion of the book, Morita argues that Americans have completely lost sight of the importance of having a manufacturing base in the economy and deems it foolish to base one’s economy on mergers and acquisitions, or as Morita calls them, “money games.” Id. at 22. Furthermore, Morita argues that Americans are too shortsighted. Whereas America looks only ten minutes into the future, Japan looks ten years. Id. at 26.

The manner in which Morita chose to express this distinction raises another interesting issue. Rather than saying “Americans” and “Japanese,” Morita says “America looks 10 minutes into the future” and “Japan looks 10 years into the future.” This difference alone points out an enormous conceptual difference between the way that Japanese view society when compared with that of Americans. To assume that Japan as a whole can look ten years into the future may be possible; to expect America, as a whole, to assume such a group-oriented approach seems unrealistic. Therefore, Morita’s statement suggests an ignorance of the reality that America is not the homogeneous society that Morita implicitly argues Japan is.

The United States’ economic problems, the fear of AIDS, and the high United States crime rate have also played a role in removing the United States from being Japan’s mentor nation. Much of the Japanese fear of U.S. crime can be traced to an ironic event known as the “Miura Incident.” In 1981, a Japanese tourist by the name of Kazuyoshi Miura and his wife, Kazumi, were gunned down in Los Angeles. They both initially survived their wounds. In response to a public outcry in Japan regarding the violence of American society, the U.S. Air Force transported Mrs. Miura to Japan on a specially equipped hospital plane. Mrs. Miura subsequently died of her gunshot wounds. Her death evolved into a major controversy when investigators discovered that Mr. Miura had staged the entire event in a conspiracy to murder his wife. He is currently serving a six-year sentence for an earlier failed attempt at murdering his wife. Nonetheless, this incident brought to the forefront the horror that the Japanese feel toward crime in American society. See Robert W. Stewart, Suspect in ’81 Murder Held on Japanese Gun Charge, Oct. 18, 1988, L.A. TIMES, § 2, at 3.
now argue that Japan's adoption of U.S. law during the Occupation was, at least in some instances, an inappropriate policy.\textsuperscript{72} For example, Japan adopted antitrust laws during the Occupation that attempted to combine elements of the Sherman, Clayton, and Federal Trade Commission Acts.\textsuperscript{73} This transplanting of U.S. antitrust law\textsuperscript{74} has proved largely unsuccessful because of the vast differences in structure between the U.S. and Japanese economic systems and has contributed to the trade friction between the United States and Japan.\textsuperscript{75}

The evolving role of Japan in the community of nations is also creating pressure for legal changes. The Japanese government has been attempting to use its economic clout to catapult it into a position of world economic and political leadership. As Japan attempts to move away from U.S. domination of its legal, social, and cultural institutions, international law may fill the role of supplying new legal norms.

IV. The Process by Which Treaties and Customary International Law Affect Domestic Conditions in Japan

A. Treaty Law

In general, treaties have the force of law in Japan; they are self-executing and give rise to individual rights. By contrast, U.S. courts consider most treaties non-self-executing; they usually do not establish specific rights in the United States unless Congress adopts implementing legislation.\textsuperscript{76} In addition, courts in the United States have consistently held that Congress can supersede treaties at will.\textsuperscript{77} By comparison, Japanese courts appear to accord international law a great deal of respect.


\textsuperscript{74} Shiteki dokusen no kinshi oyubi kosei torihiki no kakuko ni kansuru horitsu [Law Concerning the Prohibition of Private Monopoly and the Preservation of Fair Trade], Law No. 54 of 1947.

\textsuperscript{75} Haley, supra note 72, at 354-60.

\textsuperscript{76} See, e.g., Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (international law is not immediately relevant in the United States when there is no settled consensus regarding the appropriateness of a law) (Scalia, J., dissenting).

1. Force of Law

In Japan, treaties have the same force as domestic law. The Japanese Constitution of 1947, like the American Constitution, has a supremacy clause.\(^\text{78}\) Article 98(2) of the 1947 Constitution states that “the treaties concluded by Japan and the established laws of nations shall be faithfully observed.”\(^\text{79}\) In contrast to the U.S. view, Japanese scholars and the government agree that this Article gives treaties in Japan the force of law,\(^\text{80}\) and the Japanese Supreme Court applies treaties in this manner.\(^\text{51}\) The Japanese representative to the UN Human Rights Committee’s debate on Japan’s first report under the Civil Rights Covenant in 1981 stated that “treaties had long been regarded as forming part of Japan’s legal framework and had been given the appropriate force.”\(^\text{82}\) Observers disagree as to whether treaty law supersedes even the Japanese Constitution. The Japanese government apparently believes that treaty law prevails over the Constitution if a treaty represents the “established laws of nations.”\(^\text{83}\) Most recent scholarship, however, supports the idea that the Constitution supersedes treaty law.\(^\text{84}\)

2. Self-Executing Status

Japanese courts usually interpret and apply treaties directly without questioning whether or not they are self-executing.\(^\text{85}\) One commentator notes that the status of the Civil Rights Covenant in Japan “as a self-executing, binding treaty . . . appears to

\(^{78}\) Kenpō [Constitution] arts. 47-49.

\(^{79}\) Id. art. 48(2).


\(^{82}\) First Report, supra note 27, at 2.


\(^{84}\) See Iwasawa, supra note 20, at 136.

\(^{85}\) See id. at 155.
be confirmed."\textsuperscript{86} The Japanese government has informed the Human Rights Committee that treaties are self-executing in Japan.\textsuperscript{87} More specifically, when confronting the issue, Japanese courts have "assumed sub silentio"\textsuperscript{88} that Articles 2(1), 7, 9(3), 18, 19, 25, and 26 of the Civil Rights Covenant create standing for individual human rights plaintiffs.\textsuperscript{89}

Despite this general acceptance of treaties as self-executing, Japanese courts have denied certain kinds of treaties this status. Significantly, the Osaka High Court has categorically ruled that the Social Rights Covenant is not self-executing.\textsuperscript{90} The court stated that "the [Social Rights] Covenant is not the type of treaty which can be applied in exactly the same manner as the domestic laws of Japan. Rather, it is the type of treaty which requires legislative proceedings in order to implement its contents. The [Social Rights] Covenant cannot become self-executing . . . ."\textsuperscript{91} The Osaka High Court differentiated the Social Rights Covenant on the grounds that it includes language that specifically calls for legislative changes.\textsuperscript{92} Japanese courts thus appear to require implementing legislation only for treaties that directly state their non-self-executing status.

B. Customary International Law

The Japanese judiciary has proved generally receptive to customary international law, and this stance suggests that an opportunity exists for wider implementation of international human rights norms in Japan. As early as 1876,\textsuperscript{93} the Japanese government directed its courts to decide cases according to international custom where the provisions of the civil code did not provide a solution.\textsuperscript{94} Japanese courts thus have an established tradition of looking for guidance from customary international law.

This early reliance on customary international law may ex-

\textsuperscript{86} Repeta, supra note 80, at 4-5.
\textsuperscript{87} First Report, supra note 27, at 3.
\textsuperscript{88} Iwasawa, supra note 20, at 142.
\textsuperscript{89} See id. at 142 n.54.
\textsuperscript{90} Judgment of December 19, 1984, Osaka Kōsai [High Court], 1145 Hānjī 3.
\textsuperscript{91} Id. at 22.
\textsuperscript{92} Id.; see Social Rights Covenant, supra note 16, art. 2(1).
\textsuperscript{93} Daijokan [Great Council of State] Decree No. 105 of June 6, 1876, art. 3 ("Civil trials shall depend upon custom when there is no written law . . . .").
\textsuperscript{94} See Takayanagi, supra note 42, at 25.
plain why, as early as 1928, the Great Court of Judicature\(^{95}\) implicitly recognized the "domestic validity" of customary international law in Japan.\(^ {96}\) Japanese courts have continued to apply international law by interpreting Article 98(2) of the 1947 Constitution as incorporating customary international law into domestic Japanese law and giving it the force of law.\(^ {97}\)

C. Ranking of Domestic and International Law

One remnant of Japan's semi-colonial status\(^ {98}\) is that treaty law and even customary international law in Japan can take precedence in certain circumstances over domestic law, regardless of which was established first.\(^ {99}\) The Japanese representative to the Human Rights Committee confirmed this position in Japan's 1981 report, stating that "treaties are deemed to have a higher status than domestic law . . . ."\(^ {100}\)

Regardless of the specific ranking among treaties, customary international law, Japan's constitution, and Japanese domestic law, Japan's courts have proven extremely receptive to giving the norms of international law domestic legal effect. Because of this receptivity, Japan has great potential for giving real life to international human rights law within its borders. The next section analyzes whether Japan's legal institutions have actualized this potential.

V. The Impact of Japan's International Human Rights Commitments

Although Japan has historically had a reputation as an insular

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\(^ {95}\) The equivalent to a supreme court under the Meiji Constitution. See Constitution of the Empire of Japan (1889), arts. 57-61, supra note 60, at 16.

\(^ {96}\) Judgment of December 28, 1928, Daishinōin [Great Court of Judicature], 7 Daihan Minshū 1128, 4 Ann. Dig. 168. See also Iwasawa, supra note 20, at 134.

\(^ {97}\) See Iwasawa, supra note 20, at 135. See also Judgment of July 18, 1957, Tokyo Kōsei [High Court], 8 Kaminshū 1282, 1284 (courts may look to international precedent); Judgment of June 9, 1954, Tokyo Chisai [District Court], 5 Kaminshū 836, 840 (if no controlling domestic law exists then the courts can look to customary international law).

\(^ {98}\) See supra notes 36-37 and accompanying text.

\(^ {99}\) See, e.g., Judgment of September 10, 1966, Tokyo Chisai [District Court], 17 Rōminshū 1042. This is merely a district court opinion not binding on other courts in Japan. However, the opinion represents the generally accepted position of Japanese courts. See S. Kiyomia, Kenpō [Constitutional Law] 449 (3d ed. 1979); Yuichi Takano, Kenpō to Joyaku [The Constitution and Treaties] 209-213 (1960); Iwasawa, supra note 20, at 136.

\(^ {100}\) First Report, supra note 27, at 2.
and race-conscious society, its accession to international human rights treaties since 1979, and in particular its ratification of the Social Rights Covenant, has profoundly influenced Japanese law. These developments have led to the adoption of laws supporting the rights of women and minorities, among other

101 See, e.g., Ronald E. Yates, Japan Seeks UN Security Council Seat, CHI. TRIB., June 17, 1991, at 10. Yates states that Japan has signed only eight of twenty-four human rights related covenants—the fewest number of any of the top seven industrialized democracies. However, this broad statement is totally misleading. Virtually all countries, the United States and Japan included, require their respective legislative bodies to ratify or assent to treaties and covenants after they are signed by the executive branch and before they enter into force. See, e.g., U.S. Const. art. 2, § 2, cl. 2; Kenpō [Constitution] art. 75(iii). Japan, in fact, has a much better record of ratifying human rights related treaties after they are signed by the executive branch than the United States. Of the twelve most significant human rights related treaties, Japan has ratified three, while the United States has ratified none. The United States still has not ratified the Civil Rights Covenant or Social Rights Covenant, which President Carter signed in 1977. A detailed comparison follows (N/S/R indicates the country has neither signed nor ratified the treaty):

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Japan</th>
<th>U.S.</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. International Covenant on the Elimination of All Forms of Racial Discrimination</td>
<td>N/S/R</td>
<td>N/S/R</td>
</tr>
<tr>
<td>5. Optional Protocol to the International Covenant on Civil and Political Rights</td>
<td>N/S/R</td>
<td>N/S/R</td>
</tr>
<tr>
<td>6. Convention on the Non-applicability of Statutory Limitation to War Crimes and Crimes Against Humanity</td>
<td>N/S/R</td>
<td>N/S/R</td>
</tr>
<tr>
<td>9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
<td>N/S/R</td>
<td>Signed (4/18/88)</td>
</tr>
<tr>
<td>10. International Convention Against Apartheid in Sports</td>
<td>N/S/R</td>
<td>N/S/R</td>
</tr>
</tbody>
</table>

beneficiaries. The following two case studies attempt to reveal areas in which international human rights norms have altered Japanese law, as well as areas that have remained largely unaffected.

A. Treatment of Foreigners in Japan—The Positive Impact of International Human Rights Law

Several recent events reveal the rising influence of international human rights law in Japan. Japan ratified the Civil and Social Rights Covenants in 1979, the Refugee Covenant in 1982, and the Sex Discrimination Convention in 1985. Moreover, Japan’s initial report to the UN Human Rights Committee forced the Japanese government to focus on and respond to specific human rights issues. In 1980, the UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, accepted communications under the “1503 Procedure” regarding human rights in Japan and referred them to the Commission. Japan then became a member of the UN Commission on Human Rights in 1982. In 1984, a Japanese expert was elected to the Commission’s Sub-Commission. Japanese participation in these agreements and international non-governmental organizations has “caused most of the changes in Japanese [domestic human rights] law.”

Japanese human rights laws have changed in many specific and significant ways. First, in response to its new responsibilities under the Sex Discrimination Convention, Japan amended its

102 See, e.g., Iwasawa, supra note 20, at 179 (“one may safely conclude that international human rights law has had a sizable impact on Japanese law”).
105 First Report, supra note 27.
107 Although the Commission on Human Rights took no specific action regarding these reports, the questions which the Commissioners asked the Japanese representative indicate that they were well aware of the reports’ contents. See Second Report, supra note 28.
109 Iwasawa, supra note 20, at 179.
Nationality Law.\textsuperscript{110} Previously, only children born of Japanese fathers could claim Japanese nationality, but with the passage of the new law, children born of a foreign father and a Japanese mother can now claim nationality.\textsuperscript{111} The new law also grants nationality to children under 20 years old whose foreign fathers (usually American servicemen in Okinawa) abandoned their unmarried Japanese mothers. Until 1985, when the amendments took effect, these children had no nationality\textsuperscript{112} because neither Japan nor the United States recognized them as its citizens. These children could not obtain passports or secure voting and other fundamental human rights; they essentially had no legal existence.\textsuperscript{113}

Second, although becoming a naturalized citizen of Japan has never been impossible, in the past serious procedural stumbling blocks stood in the way. One major disincetive required that foreigners show that they had become assimilated into Japanese society.\textsuperscript{114} The government interpreted this provision to require applicants to adopt Japanese names and completely abandon their old names.\textsuperscript{115} This provision contradicted Article 27 of the Civil Rights Covenant which requires ratifying states to allow minorities in their societies to maintain their own ethnic or cultural identities.\textsuperscript{116} The Japanese legislature therefore revised the law to allow naturalized citizens to keep their original names.\textsuperscript{117} Despite this advance, however, the effects of this change on the ac-

\begin{flushleft}
\textsuperscript{110} The earlier nationality act, Kohuseki hō [Nationality Act], Law No. 147 of 1950, art. 4, was amended in 1984. See Amendments to Law No. 147 of 1950, Law No. 45 of 1984 [hereinafter Nationality Act Amendments].

\textsuperscript{111} Hosokawa Kiyoshi, Japanese Nationality in International Perspective, in NATIONALITY AND INTERNATIONAL LAW IN ASIAN PERSPECTIVE 186-87 (Ko Swan Sik ed., 1990); Nationality Act Amendments, supra note 110, art. 2.

\textsuperscript{112} Clyde Haberman, What’s in a Name? To the Japanese, Everything, N.Y. TIMES, Mar. 29, 1984, § A, at 2.


\textsuperscript{114} Nationality Act Amendments, supra note 110, art. 4.

\textsuperscript{115} See Haberman, supra note 112.

\textsuperscript{116} The full text of Article 27 states the following:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Civil Rights Covenant, supra note 17, art. 27.

\textsuperscript{117} See Nationality Act Amendments, art. 5. Of course, this change in the law has not stopped unofficial forms of discrimination. Most Koreans, for example, who have lived in Japan for any length of time, use Japanese names to avoid social discrimination. See Iwasawa, supra note 20, at 165 n.150.
\end{flushleft}
tual lives of non-ethnic Japanese people living in Japan remain unclear.

Third, all aliens in Japan became eligible for national pension benefits in 1982, a change that the legislature made expressly to comply with the International Covenant Related to the Status of Refugees which Japan ratified in the same year.\textsuperscript{118} Prior to this change, only Japanese citizens could receive any form of hand-in-hand or old-age pensions from the national government, the primary source of pensions.\textsuperscript{119} In 1983, the Tokyo High (Appeal) Court used Japan’s responsibilities under human rights treaties as the basis of a ruling that the government must provide pensions for Koreans who had lived in Japan all of their lives.\textsuperscript{120} This change was especially significant because Koreans represent the largest group of aliens living in Japan.\textsuperscript{121} The court concluded that since 1979, pursuant to Article 9 of the Social Rights Covenant, Japan has assumed the responsibility to promote the Social Security Policy even for non-Japanese; in 1982, the nationality requirement [to receive pension benefits] was eliminated through amendments to the Adjustment Law made pursuant to Japan’s ratification of the International Covenant Related to the Status of Refugees.\textsuperscript{122} This judicial reasoning indicates the substantial role that international human rights treaties can play in Japan and the positive attitude Japanese courts display toward the country’s international human rights commitments.\textsuperscript{123}

\textsuperscript{118} Law Concerning Adjustment of the Immigration Control Order and Other Relevant Laws in Connection with Accession to the Convention Relating to the Status of Refugees, Law No. 86 of 1982; see Protocol Relating to the Status of Refugees, supra note 105.

\textsuperscript{119} Judgment of October 20, 1983, Tokyo Kōsai [High Court], 1092 Hanji 31 (overruling a denial of pension benefits to a Korean who lived in Japan and worked in Japan his entire life) [hereinafter Pension Benefits Judgment].

\textsuperscript{120} Id.


\textsuperscript{122} Pension Benefits Judgment, supra note 119, at 34.

\textsuperscript{123} In addition, the Japanese government is discussing improvements in the status of other minorities in Japan, namely the Ainu (a group of aboriginal peoples culturally and linguistically distinct from the Japanese) and Burakumin (a class of social outcasts within Japanese society differentiated based on the belief that their ancestors were associated with traditionally “impure” occupations). See generally George A. De Vos & William O. Wetherall, Japan’s Minorities: Burakumin, Koreans, Ainu and Okinawans, 3 Minority RTS. Group 1, 12-13 (1983); Mikiso Hane, Peasants, Rebels and Outcasts: The Underside of Modern Japan (1982). However, these discussions focus only on improving the social rights of these minorities (for example, their chance at finding meaningful employment) and not their civil rights (such as how they will be treated if suspected of
Japan has made many other changes in its domestic law which help to make it conform with Japan's international human rights obligations under the Social Rights Covenant. These changes include allowing aliens to receive housing and financial benefits, eliminating discriminatory grounds for deportation, allowing public universities to hire aliens, and taking corrective measures to stop gender-based discrimination in the workplace. These changes have occurred either explicitly or implicitly in conjunction with Japan's obligations under the Social Rights Covenant, suggesting that the Japanese government has pursued economic and cultural changes in preference to civil or political ones.

B. The Civil Rights Covenant and the Inadequacy of Criminal Defendants' Access to Legal Counsel

Although Japan has made the substantial and meaningful changes in its prevailing legal regime noted above, other areas have experienced fewer reforms. In stark contrast to the progress achieved under the Social Rights Covenant, the provisions of the Civil Rights Covenant have not enjoyed significant success in generating substantive changes in Japanese domestic law. A prominent example is the Japanese criminal justice system's treatment of criminal defendants, who have not yet begun to share in the progress resulting from Japan's recent commitments to international human rights law.

Japan has a reputation for being relatively crime-free. In fact, Japan has one-fifth the crime per capita of the United States. However, Japan achieves a low crime rate in part through the workings of a social system which turns even suspected criminals and their families into social outcasts at the expense of human


124 See Iwasawa, supra note 20, at 172-73.
125 See id. at 152-54.
126 Repeta, supra note 80, at 9 n.25.
rights codified in international agreements that Japan has formally accepted. The legal system's treatment of criminal suspects is equally severe. A criminal defendant going to trial in Japan has virtually no hope of gaining an acquittal. In 1982, public prosecutors brought 16,003 regular (non-summary) criminal indictments against defendants in Tokyo; of these, ten (or 0.062 percent) ended in acquittal. In 1984, "of all adjudicated defendants, 121 persons were found not guilty, indicating [an acquittal rate of] only 0.005 percent." Since 1985, the conviction rate has consistently exceeded 99 percent. The prospect of a successful criminal defense is so low that one prominent Japanese legal scholar asked, "[i]just what does the defense do? If 99.8 percent really are guilty, if that figure is correct, maybe we don't need criminal lawyers.”

What criminal defense lawyers do not do is talk to their clients when the police are holding them in custody before trial. A Japanese Civil Liberties Union report indicates that a practice has developed which systematically denies criminal defense attorneys access to their clients. Attorneys who do manage to gain access can meet with their clients for only fifteen or twenty minute periods. In one case the police held an individual charged with accepting a bribe for sixteen days, during which time the prosecutor interrogated him for an average of eight hours and fifty

131 Some commentators have argued that Japanese police practices have lead to a safer society even though their conduct "would not be tolerated in many other countries." See William B. Cleary, Criminal Investigation in Japan, 26 CAL. W. L. REV. 123 (1989).
132 TOKYO STATISTICAL YEARBOOK 470 (1982).
133 Id.
134 See 1985 WHITE PAPER ON CRIME, supra note 129, at 5.
135 Although the method of calculation differs (slightly exaggerating the contrast), 57% of robbery arrests end in conviction in New York City, 47% of all arrests in Germany, and 61% of all arrests in Austria. See HANS ZEISEL, THE LIMITS OF LAW ENFORCEMENT 24 (1982). See also Stephen J. Markman & Paul G. Cassell, Comment, Protecting the Innocent, 41 STAN. L. REV. 121, 151 n.190 (1988) (conviction rate for murder in the United States is only 25% of all murders committed). For a detailed, statistical analysis of the prosecution rate in Japan, see Annual Statistics Report of Prosecution from Government of Japan, in MINISTRY OF JUSTICE, GOV’T OF JAPAN, 1988 SUMMARY OF THE WHITE PAPER ON CRIME 95 (1988).
136 Repeta, supra note 80, at 14.
137 JAPAN CIVIL LIBERTIES UNION, CITIZENS’ HUMAN RIGHTS REPORT No. 4 (1984), reprinted in Kazuo Itoh, On Publication of the “Citizens Human Rights Reports”, 20 LAW IN JAPAN 29, 54 (1987). Japanese criminal defendants also have little chance of release on bail, even for rather minor crimes, and are denied access to evidence. One man reportedly spent 30 months in jail during trial for tax fraud only to be acquitted when the defense was finally able to put its exonerating witness on the stand. See Repeta, supra note 80, at 17 n.51.
minutes per day. During these sixteen days, the police allowed the defendant access to his attorney for a total of three hours.\(^{138}\) In addition, the interrogators systematically harassed and physically threatened the defendant, and allowed him no contact with the outside world.\(^{139}\) However, the judge in the case denied that anything improper had transpired.\(^{140}\)

Such abusive treatment does not apply only to common criminals. Rather, any person entering the Japanese criminal justice system may be subject to harsh and abusive interrogation. One defendant in the white-collar "Recruit Scandal,\(^{141}\) Hiromasa Ezoem,\(^{142}\) allegedly endured an abusive ninety-nine day interrogation in a bleak Tokyo jail\(^{143}\) during which he was questioned from morning until night. When he tried to close his eyes, the prosecutors would force him to keep them open.\(^{144}\)

Even before determination of guilt or innocence occurs, criminal defendants in Japan must submit to what have become known as "substitute prisons."\(^{145}\) Police can hold suspects in pretrial detention for long periods of time, allegedly to assure their appearance at trial.\(^{146}\) Japanese law expressly provides procedures for the prosecutor to follow in order to detain a criminal defendant for as long as three months before any evidence of his guilt is weighed.\(^{147}\)

Japanese police and prosecutors, as well as Japanese society as a whole, place a high value on confessions and favor a pattern of confession, repentance, and absolution.\(^{148}\) If the defendant

\(^{138}\) See Repeta, supra note 80, at 18 n.55.

\(^{139}\) Id.

\(^{140}\) Id.


\(^{142}\) Ezo is one of the lead defendants in the Recruit Scandal. He is charged with masterminding a bribery scheme designed to enlarge his own profile and increase his personal political influence. David E. Sanger, Bribery Scandal Spills Over into Japanese Election Year, N.Y. TIMES, Feb. 11, 1990, § 1, at 28. Mr. Ezo's poor reputation in the community in general has drastically detracted from the credibility of this argument.

\(^{143}\) Id.

\(^{144}\) Id. Since the Civil Rights Covenant is a self-executing treaty with the force of law in Japan, Mr. Ezo may attempt to use its substantive provisions in his defense.


\(^{146}\) Id. at 400.

\(^{147}\) Koji sosho ho (Code of Criminal Procedure), Law No. 131 of 1948, arts. 203, 205, 208; see also, Saito, supra note 145, at 403.

\(^{148}\) See John O. Haley, Law and Society in Contemporary Japan: American Perspectives, 17 LAW IN JAPAN 1, 2 (1984) [hereinafter American Perspectives]; see also, Haley, supra note 130, at 195-211.
does not confess, this process of absolution and reassimilation into society cannot begin; as a consequence, the criminal system assumes that confessions must be gained at any cost. Some criminal defendants even confess in order to be absolved and then released so that they can prove themselves innocent.\textsuperscript{149}

Some attorneys in Japan defend the prosecutorial system, arguing that the high conviction rate stems from the fact that prosecutors investigate very carefully and bring only truly guilty people to trial.\textsuperscript{150} The system's defenders claim that Japanese society maintains such a severe social stigma against a convicted criminal that prosecutors take extreme care to prosecute only the guilty. The argument then circularly uses the conviction data to prove that the system works. Since over 99.9\% of criminal defendants are found guilty at trial, the argument runs, the prosecutors must be effectively protecting innocent criminal defendants from the negative societal ramifications of being tried for a crime.

One aspect of this argument, however, is true: prosecutors enjoy a very high degree of discretion. The historical structure of the prosecutorial system reveals the roots of this great discretion in prosecuting crime. Under the Meiji constitution, the judiciary and the prosecutor's office were interlinked departments within the executive branch.\textsuperscript{151} Although the formal structures have changed, Japanese prosecutors today have almost unlimited discretion in deciding who will be prosecuted and who will be freed. The Japanese Code of Criminal Procedure explicitly empowers prosecutors to suspend prosecution in the interests of justice\textsuperscript{152} and articulates several factors that the prosecutor must weigh in determining whether to suspend prosecution. These criteria include the age, character, and situation of the offender, the gravity of the offense, the circumstances under which the offense was committed, and the conditions subsequent to the commission of the offense.\textsuperscript{153} Clearly, at least as the system currently operates, "conditions subsequent to the commission of the off-

\textsuperscript{149} See Repeta, supra note 80, at 17.

\textsuperscript{150} Approximately 40\% of criminal matters brought before a prosecutor in Japan are removed through dismissal or other administrative measures, totally avoiding the judiciary. 1985 White Paper on Crime, supra note 129, at 3.


\textsuperscript{152} Keiji sosho ho [Code of Criminal Procedure], Law No. 131 of 1948, art. 248.

\textsuperscript{153} Id.
fense” refers to whether or not the defendant confessed and apologized.

A better explanation of the extremely high conviction rates suggests that prosecutors are taking over the judicial function—that is, using their discretion to decide who is guilty. In fact, the discretion and level of authority possessed by the prosecutors lead one commentator to state that the “ability to control virtually all aspects of the investigation of the offense . . . amounts to a quasi-judicial authority, and in fact prosecutors in Japan are considered equal to judges in most respects.”\(^{154}\)

Japanese criminal defense lawyers have tried to redress the inequities of the criminal justice system. In Japan, criminal appeals based on insufficient access to counsel usually fail.\(^{155}\) In addition, although many instances of prosecutorial cruelty have been documented,\(^{156}\) the state brought no prosecutions against police or prosecutors for acts of violence or cruelty against criminal defendants between 1983 and 1987.\(^{157}\) Criminal defense lawyers have responded to the lack of access to their clients in a creative way: they have brought suits under the State Redress Law\(^{158}\) in tort actions pleading that the state denies them the constitutional right to seek employment.\(^{159}\) These suits have succeeded in winning money damage awards for criminal defense lawyers at the trial level, but higher courts have overturned such judgments,\(^{160}\) and the suits have “had no effect on the standard practices of the prosecutors and police.”\(^{161}\)

Japanese criminal law norms and procedures stand in tension with the country's international human rights commitments. Article 14(1) of the Civil Rights Covenant states that the determination of a defendant’s guilt or innocence shall take place during a fair and public trial.\(^{162}\) When judicial deference to prosecutorial discretion reaches so far that prosecutors are deciding the guilt of the defendant, the system violates the Civil Rights Covenant. Similarly, denials of access to legal counsel violate Article 14(3) of the Civil Rights Covenant which guarantees the right to com-

\(^{154}\) Castberg, supra note 35, at 72-73.

\(^{155}\) Repeta, supra note 80, at 21.

\(^{156}\) See supra notes 139-144 and accompanying text.

\(^{157}\) See Second Report, supra note 28, at 144.

\(^{158}\) Kokka baisho ho [State Redress Law], Law No. 125 of 1947.

\(^{159}\) Kenpō [Constitution] art. 27.


\(^{161}\) Repeta, supra note 80, at 22.

\(^{162}\) Civil Rights Covenant, supra note 17, art. 14(1).
municate with counsel in order to prepare a defense and provides protection against being compelled to confess guilt. As indicated above, all scholars agree, and the Japanese government has confirmed in communications with the Human Rights Committee, that the Civil Rights Covenant is self-executing and has the force of law in Japan. In criminal cases, however, Japanese prosecutors and judges overlook or misconstrue its substantive provisions.

VI. SOCIAL WELFARE RIGHTS OVER CIVIL RIGHTS?

Over the last decade, the Japanese have made many efforts to implement the social welfare rights embodied in treaties such as the Social Rights Covenant through domestic legislation. At the same time, the Japanese government has largely ignored the provisions of the Civil Rights Covenant, such as Article 14's protections for criminal defendants. This outcome is clearly counterintuitive: the Civil Rights Covenant instantly became the law of the land in 1982, whereas the Social Rights Covenant requires implementing legislation and was intended to be “progressively realized.” Nonetheless, social welfare rights continue to gain acceptance while the criminal defendant's rights worsen.

One explanation for the disparity in the effectiveness of these two covenants is rooted in the nature of the rights involved.

163 Id. art. 14(3)(b).
164 Id. art. 14(3)(g).
165 See supra notes 86-89 and accompanying text.
166 Note that many other changes based on the Civil Rights Covenant have been implemented slowly or not at all. A report released by the Japan Civil Liberties Union in February of 1991 finds that the Japanese government regularly deprives foreigners coming to Japan from developing countries of their rights as articulated in the Civil Rights Covenant. The report concludes that the Japanese courts' practice of charging defendants for interpretation services violates the Civil Rights Covenant. Legal System Deals Injustice for Foreigners, JCLU Says, KYODO NEWS SERVICE, Feb. 16, 1991, available in LEXIS, Nexus Library, Wires File.

The Japanese government is, however, slowly showing signs of an awareness of the civil rights of minorities. The Japanese government's first report to the United Nations stated that minorities of the kind contemplated by the Civil Rights Covenant did not exist in Japan. First Report, supra note 27, at 11. However, under criticism, the Japanese government amended its report to read that in Japan no person is denied the right to enjoy her own culture, to practice her own religion, or to use her own language. Id.

167 The Japanese attorneys with whom I spoke almost unanimously believe that the criminal justice system in Japan operates in an acceptable manner. Many feel that criminal defendants will say anything to improve their situations. One suggested that only if prosecutors treated an innocent Japanese housewife poorly and coerced a confession from her or held her improperly for a long time would Japanese begin to believe that defendants are mistreated. Author's interviews.
Most Americans would agree that the word “right” implies the protection of some legal interest. In contrast, substantial debate exists in Japanese legal academic circles over the meaning of “rights,” not on a substantive level, but rather on a metaphysical one. In Japan, “rights” are contextual—that is, the circumstances surrounding the right are as important as the right itself; and, therefore, the idea of a right can change with time and circumstances. As explained below, the flexibility allowed by contextualizing rights is extremely important for Japanese culture.

Writers on the subject of rights point out that the word “right” (henri) did not exist in Japan prior to the 1870’s and was invented to represent the French word droit by Rinsho Mitsukuri when he translated the French Civil Code into Japanese. Before Mitsukuri’s translation, the character for hen in henri meant “strength” and “might,” not connoting the humanistic morality Westerners expect from rights theory. Contrary to the arguments of many commentators, this history does not

168 But see Mark Tushnet, An Essay on Rights, 62 Tex. L. Rev. 1363, 1363 (1984) (because rights are inherently unstable, “significant but relatively small changes in the social setting can make it difficult to sustain the claim that a right remains implicated”).

169 See, e.g., Takeyoshi Kawashima, Ninonjin no Hoishiki [Japanese Legal Consciousness] (1967) (Japanese reluctance to enforce rights and duties is attributable to Japan’s “backward society”); Hideo Tanaka & Akio Takeuchi, The Role of Private Persons in the Enforcement of Law: A Comparative Study of Japanese and American Law, in The Japanese Legal System, supra note 6, at 351, 359-41 (1982) (Japanese are less assertive of their rights through litigation because of the bureaucratic and institutional disincentives); Oki, supra note 34; Frank Upham, Law and Social Change in Postwar Japan 218, 220 (1987) (criticizing the conventional and “easy assumption that the particularism and informality of Japanese law are the result of the continued strength of traditional values,” and suggesting that the “characteristics of Japanese law thought to be traditional are in fact the consequence of recent and conscious human choice”—that law is being used as a tool for transformative social change); Yosiyuki Noda, Ninonjin no Seikaku to sono Hakomen [The Character of the Japanese People and Their Conception of Law], in The Japanese Legal System, supra note 6, at 295-310; John O. Haley, The Myth of the Reluctant Litigant, 4 J. Japanese Stud. 359 (1978) (relying on statistics regarding the litigation rate of Japan compared to the West is misleading because of social and institutional disincentives to bring suit); Dan F. Henderson, Conciliation and Japanese Law, Tokugawa and Modern (1965).


171 Historically, many rights have been contextual. For example, the so-called “imperial way” (kodo), representing the imperial orthodoxy of the Meiji Constitution in 1889, had little substantive content, allowing it to be applied flexibly with changing times to preserve its longevity. See Takeshi Ishida, Japanese Political Culture 75 (1985).

172 See infra notes 178-196 and accompanying text.

173 See Noda, supra note 169, at 305.

174 See id. at 305; see, e.g., Beer & Weeramantry, supra note 17, at 4.

not suggest that the Japanese people had no broad metaphysical notion of “rights” prior to the 1870’s. In fact, throughout recorded Japanese history, events reveal Japanese actions that indicate assertions of abstract “rights.”¹⁷⁶ For example, the samurai class of the Tokugawa Period (1603-1868) asserted what they perceived as their “rights” vis-a-vis the Tokugawa government when they petitioned the government for lands promised them in return for peace.¹⁷⁷ A better explanation for the acts of the Japanese jurists who translated the French Code is that they looked abroad and found a foreign term, “right,” to explain a uniquely Japanese concept.

Even though the current Japanese words and legal frameworks for “rights” (henri) and “law” (horitsu) were imported from the West, the Japanese do not share the Western concept of these terms. These words, though translated as equivalents of Western terms, mean something distinct to the Japanese because of their contextual view of rights. Rather than being rigid, the Japanese perceive rights as vague concepts which gain meaning only in a given situation. The Japanese govern by setting social norms for society rather than by mandating rules that will apply in advance to any situation.

The history of an incident that occurred in the early 1950’s in fishing villages outside of Minamata City provides an example of the Japanese contextual view of rights. Japanese fishermen and their families became stricken with what is now known as Minamata Disease, a vicious form of mercury poisoning caused by industrial pollution.¹⁷⁸ At first, the victims had little chance of receiving compensation through tort suits because they could not produce the pathological evidence required to show causation.¹⁷⁹ However, during the course of many years of litigation, the plaintiffs’ attorneys conducted an intense educational campaign about the evils of industrial pollution. By the mid-1970’s, tort doctrine had evolved to the point where most pollution victims could easily win cases against industry.¹⁸⁰ Thus, although the first victims were not perceived as having a right to compensation because

¹⁷⁶ See generally Authority and The Individual in Japan (J. Victor Kosehmann ed., 1978).
¹⁷⁷ See Okt, supra note 34, at 159; Pyle, supra note 36, at 35-45 (1978); see generally Hideo Tanaka, Role of Law in Japan, 19 U. Brit. Colum. L. Rev. 375 (1985).
¹⁷⁹ Upham, supra note 169, at 31.
¹⁸⁰ Id. at 28-77.
they could not show causation, public as well as judicial opinion gradually changed to allow Minamata victims to receive compensation despite the lack of traditional proof of causation.\footnote{Id.} Public sentiment required the recognition of Minamata victims' rights, and the law evolved to fit this new context.

The Japanese contextual view of rights is further captured by the legal concept of "rules" versus "standards." Rules are strictly applied and do not evolve over time unless direct changes to the rule are made. Standards, on the other hand, create different rights or obligations depending on their context and can evolve as societal or judicial perceptions change.\footnote{The difference between rules and standards is articulated in Kennedy, supra note 49; Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976).} Japanese society is essentially standard-oriented. Social obligations, for instance, often strongly affect the perception and impact of laws.\footnote{See Takeyoshi Kawashima, Dispute Resolution in Contemporary Japan, in Law in Japan, supra note 42, at 59; American Perspectives, supra note 148, at 3.} Further, the use of broad social standards allows them to be immediately codified while still leaving time for the society to adapt to the change. In contrast, the strict and specific rules of the Civil Rights Covenant demand that its provisions immediately change society in a substantive way.

The fact that most administrative agencies in Japan lack statutory enforcement powers confirms Japan's emphasis on a standard-oriented approach to legal obligations, yet large multinational Japanese companies, as well as individuals, strictly adhere to their "administrative guidances."\footnote{Much literature exists regarding "administrative guidance" (gyosei shido) in Japan. See, e.g., Russell A. Yeomans, Administrative Guidance: A Peregrine View, 19 Law in Japan 125 (1986); Young, supra note 56.} The Japanese do not follow administrative guidances because they are the law, nor because they are legally enforceable; rather, administrative guidances set standards that allow for contextualization. They have proved quite effective in controlling and producing the desired conduct.\footnote{For example, I conducted an interview in 1984 with an official from the Ministry of International Trade and Industry (MITI). The official (who requested to remain anonymous) said that MITI was encouraging Toyota Motors to increase its direct investment in the United States. MITI officials had met with Toyota executives to explain this administrative guidance. Apparently, the Toyota executives denied having any plans for direct investment and stated they would refuse to cooperate. However, during the quarter after this meeting and every subsequent quarter, Toyota reported significant increases in direct investment in the United States.}
The Japanese Equal Employment Opportunity Law (EEOL)\textsuperscript{186} provides another example of a gradual, non-coercive approach to the issue of social change.\textsuperscript{187} The EEOL called for voluntary changes in employer decision making. A voluntary law may sound like an oxymoron in the English language, and it would probably have been largely ignored in the United States. However, the goal-oriented EEOL has won great acceptance in Japan and appears to have substantively improved women's employment conditions.\textsuperscript{188} Because of the EEOL's widespread influence, employers' help-wanted advertisements have become less gender-oriented, opportunities for female university graduates have increased, and the gap in starting salaries between men and women has narrowed.\textsuperscript{189}

Thus, because the Social Rights Covenant envisions social welfare rights as standard-oriented concepts to be progressively realized, such as equal employment opportunities, Japanese society can more easily assimilate its provisions. The Civil Rights Covenant, on the other hand, is theoretically self-executing; it sets up rule-oriented requirements. This legal imposition leaves no room for contextualization of the rights it creates, thus reducing its likelihood of assimilation into Japanese society.

Another factor which may contribute to the disparity between the success of the Social Rights Covenant and the Civil Rights Covenant lies in the nature of the rights involved in each. According to some theorists, social, economic, and cultural rights are not really "rights" in the traditional Western sense.\textsuperscript{190} Vierdag, for example, contends that implementation of social welfare rights is a political concern and therefore not a matter of law or rights.\textsuperscript{191} Though widely criticized,\textsuperscript{192} this conclusion may shed some light on why the Social Rights Covenant has proven more successful in Japan than the Civil Rights Covenant. The Japanese may intuitively agree that the Social Rights Covenant embodies not legal rules, but standards for social conduct. This

\textsuperscript{186} Amendment to Working Women's Welfare Law No. 113 of 1972, Law No. 45 of 1985 [hereinafter EEOL].
\textsuperscript{187} See Parkinson, supra note 127.
\textsuperscript{188} Id. at 544–49.
\textsuperscript{189} Id.
\textsuperscript{191} Id. at 103.
characteristic may make the Social Rights Covenant more adaptable to a society, such as Japan, that is not as rule-oriented as the United States.\textsuperscript{193}

Many scholars have compared the Civil Rights Covenant and the Social Rights Covenant to explain the parallel, but often inconsistent, effects of the two covenants.\textsuperscript{194} An abbreviated comparison is as follows:\textsuperscript{195}

<table>
<thead>
<tr>
<th>Economic, Social and Cultural Rights</th>
<th>Civil and Political Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Positive</td>
<td>vs. Negative</td>
</tr>
<tr>
<td>2. Resource-Intensive</td>
<td>vs. Cost-Free</td>
</tr>
<tr>
<td>3. Progressive</td>
<td>vs. Immediate</td>
</tr>
<tr>
<td>4. Vague</td>
<td>vs. Precise</td>
</tr>
<tr>
<td>5. Unmanageably Complex</td>
<td>vs. Manageable</td>
</tr>
<tr>
<td>6. Ideologically Divisive/Political</td>
<td>vs. Non-Ideological/Non-Political</td>
</tr>
<tr>
<td>7. Non-Justiciable</td>
<td>vs. Justiciable</td>
</tr>
<tr>
<td>8. Aspirations or Goals</td>
<td>vs. &quot;Real&quot; or &quot;Legal&quot; Rights</td>
</tr>
</tbody>
</table>

That is, where the Social Rights Covenant embodies aspirations or goals, the Civil Rights Covenant is rule-oriented; where the Social Rights Covenant creates positive entitlements, the Civil Rights Covenant states negative restrictions on government action; and most importantly, where the Social Rights Covenant is vague, the Civil Rights Covenant is precise. This vagueness helps explain the success of the Social Rights Covenant in Japan. The Social Rights Covenant's non-coercive, goal-oriented approach resembles Japan's administrative guidances and the EEOL; it is the kind of law which the Japanese are most comfortable accepting and most likely to fully implement.\textsuperscript{196}

\textsuperscript{195} Scott, supra note 18, at 833.
\textsuperscript{196} Japan's behavior concerning international human rights obligations may even provide a specific example of what some theorists have labeled "situational permeability." See, e.g., Scott, supra note 18. Proponents of this theory argue that the vagueness of a covenant often allows room for greater realization of certain specific elements within
VII. Conclusion

International human rights law has had a much greater impact on Japanese domestic law than Japan's history of insensitivity to minorities and reputation for race-consciousness would suggest.\textsuperscript{197} Unfortunately, legal changes have focused on social welfare rights—via the Social Rights Covenant—to the exclusion of needed civil rights reforms contained in the Civil Rights Covenant. The disparity between the effectiveness of the two covenants has resulted from a combination of factors including how the Japanese perceive rights and the nature of the Covenants themselves. The Social Rights Covenant's gradual and vague approach allows room for Japanese contextualization, whereas the Civil Rights Covenant is specific and rigid and does not leave room for societally necessary contextualization.

In the future, if international human rights law is to have a significant impact on Japan and other countries with contextual views of rights, drafters will have to consider carefully the likely reception of their presentation of concepts. Standard-oriented agreements followed by a convincing showing of international consensus\textsuperscript{198} will have a far better chance of success than rule-oriented approaches demanding immediate change.\textsuperscript{199} Although


\textsuperscript{198} The Japanese have shown particular energy in upholding and enforcing rights when they rise to the level of societal consensus. See Kawashima, supra note 183, at 59; Upham, supra note 169, at 28-76 (Minamata environmental tragedy only gained "legal" consequence when society in general came to recognize that the victims were socially, if not yet legally, wronged).

\textsuperscript{199} An interesting contemporary example of the consequences of not correctly understanding the Japanese approach to law, rules, and negotiation occurred following President Bush's recent trade mission to Japan. President Bush had the express goal of opening Japanese markets to American goods. Upon return, President Bush called the trip a "success," claiming that the Japanese had gotten the message. Bush Calls Trip to Japan a Success; Agreement Reached on Cars, Auto Parts, Int'l Trade Daily (BNA) (Jan. 13, 1992), available in LEXIS, BNA Library, BNAITD File. President Bush even stated that his "agreements" with the Japanese would amount to 200,000 new jobs in the United States. President Bush Says Japan Trip Will Result in 200,000 New U.S. Jobs, 9 Int'l Trade Rep. (BNA) No. 3, at 101 (Jan. 15, 1992). However, a few days after Bush made these political, "get tough" statements, the Prime Minister of Japan, Kiichi Miyazawa, countered that the deal for increased sale of U.S. auto parts in Japan constituted "targets" and not quotas. This difference in perception draws into question exactly what was achieved in the negotiations. Merrill Goozner, Japan Applies Brakes to U.S. Auto Hopes, Chi. Trib., Jan. 21, 1992, at A1. Even though Bush's attempt at "opening" Japan
Japan should not be allowed to hide behind its "unique culture" to avoid implementing rigid, rule-based agreements, the international community cannot remain ignorant of contextual conceptions of law and rights if it desires universal compliance with international human rights agreements.

Finally, the Japanese are actively utilizing international legal norms as transformative tools of social change. Japan appears to be entering a stage in which it adopts these concepts and norms from international law rather than looking to specific countries' laws as it has in the past. Awareness of this tendency could be significant in stimulating positive social change in Japan as it becomes a world leader, and recent successes in Japan indicate the impact that international law could have in transforming other societies as well.

sounds similar to Admiral Perry's attempt in 1853, one should not expect Japan to be strong-armed into opening its markets by a rigid agreement, just as Japan will not be strong-armed into adopting the rigid, rule-oriented Civil Rights Covenant. Trade negotiators could benefit from studying the success of the Social Rights Covenant in effectuating change in Japan.