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978-0-521-77040-8 - The Ritual of Rights in Japan: Law, Society, and Health Policy

Eric A. Feldman

Excerpt

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## CHAPTER ONE

RECONSIDERING RIGHTS IN JAPANESE  
LAW AND SOCIETY

This book challenges the belief that the assertion of rights is fundamentally incompatible with Japanese legal, political, and social norms. In doing so, it explores evidence in a variety of sociolegal arenas: in linguistic and conceptual predecessors to the Japanese word for “rights,” *kenri*; in Japan’s tradition of protest; in the growth during the late nineteenth century of the Movement for Freedom and Popular Rights; in the “new rights” movements of the 1960s and 1970s; and in contemporary policy disputes over AIDS and the definition of death. Analysis of each of these domains points to the same conclusion; rights in Japan have been, and continue to be, asserted and fought over, if not always secured.

Many of the most erudite and influential commentators on Japan have reached very different conclusions. They argue that the persistence of premodern legal and political values in Japanese society has inhibited the articulation and emergence of rights.<sup>1</sup> Political analyst Karel van Wolferen writes that “[t]raditional attitudes, reinforced by contemporary practice, obstruct the establishment of an unambiguous concept of ‘rights,’” and he dismisses the seriousness of groups that frame their arguments in the language of rights.<sup>2</sup> Susan Pharr, Harvard’s Reischauer Professor of Japanese Studies, claims that “most Japanese continue to view the official ideology [postwar democracy and egalitarianism], with its linkage to a notion of individual rights, as basically ‘Western,’” and goes on to argue that Japanese political culture is antithetical to an idea of rights.<sup>3</sup> Traditional Japanese scholarship has supported these views, emphasizing the disjuncture between

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Japanese culture and rights,<sup>4</sup> sometimes dwelling on Marxist theories about the state control of rights.<sup>5</sup> Abe Haruo says that in the postwar era rights were “suddenly handed down from above,” indicating that Japan was rights-less for most of its 2,000 year history.<sup>6</sup> Takayanagi Kenzō identifies a Japanese preference for mediation, and argues that it is in part the result of “the Japanese national character, that the Japanese people are less assertive of their rights than Anglo-Saxons or Germans . . .”<sup>7</sup>

Hyperbolic descriptions of a rights-laden United States have influenced scholars of Japanese law to describe a radical disjuncture between rights assertion in the United States and Japan. The University of Chicago’s Leon Kass, for example, opines:

It has been fashionable for some time now and in many aspects of American public life for people to demand what they want or need as a matter of rights. During the past few decades we have heard claims of a right to health or health care, a right to education or employment, a right to privacy (embracing also a right to abort or to enjoy pornography, or to commit suicide or sodomy), a right to clean air, a right to dance naked, a right to be born, and a right not to have been born. Most recently we have been presented with the ultimate new rights claim, a “right to die.”<sup>8</sup>

Kass’s critique of what he perceives of as an overindulgence in “the liberal – that is, rights-based – political philosophy and jurisprudence to which we Americans are wedded” coincides with the theme of Harvard Law School Professor Mary Ann Glendon’s *Rights Talk: The Impoverishment of Political Discourse*. Glendon describes an America gorged on rights, with individuals unable or unwilling to control their rights assertions, and who are unburdened by a conception of a common good. Even worse, the people who inhabit Glendon’s America have the most limited and crass understanding of rights:

American rights talk is set apart by the way that rights, in our standard formulations, tend to be presented as absolute, individual, and independent of any necessary relation to responsibilities . . . we have observed a tendency to formulate important issues in terms of rights; a bent for stating rights claims in a stark, simple, and absolute fashion; an image of the rights-bearer as radically free, self-determining, and self-sufficient; and the absence of well-developed responsibility talk . . . and a consequent carelessness regarding the environments that human beings and societies require in order to flourish.<sup>9</sup>

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While Kass and Glendon are harsh in their condemnation of American rights talk, they are not alone in considering the United States unique with regard to the frequency and vigor of rights assertion. Political scientists Stewart Scheingold and Michael McCann, for example, in their separate studies of rights, mobilization, and social change in the United States, both remark on the exceptional way in which rights function in American society.<sup>10</sup> R. Shep Melnick, discussing special education policy, cites a “peculiarly American” reliance on the orientation to and language of rights.<sup>11</sup> Starting with de Tocqueville, who observed that in America most public men were lawyers and legal discourse pervaded the culture, the so-called American obsession with law and rights has become an almost conventional wisdom.

Japanese scholars like University of Tokyo legal philosopher Inoue Tatsuo, and other prominent Japanese intellectuals, can hardly be faulted for accepting the views of their American colleagues and using them to construct a similarly unidimensional analysis of rights in Japan. Inoue, summing up the work of Glendon and others, bluntly states that “[T]he American people are well known for stressing the role of individual rights within society.”<sup>12</sup> He offers a critique of Japan that explicitly builds on Glendon’s view of the United States. In contrast to America’s rights saturation, he sees Japan as barren:

individual rights are an endangered moral species in our Land of Community. They are chronically endangered . . . We have an urgent need to save them because our human lives are now impoverished, devastated and even destroyed by the same moral environment that has been causing, and is caused by, their atrophy and suffocation.<sup>13</sup>

Glendon pleads for a greater sense of community in America; Inoue cautions about the tyranny of community. Inoue implores Japan to strengthen its commitment to individual rights; Glendon condemns the American infatuation with rights as a “caricature of our culture.”

Conventional accounts of rights in the United States and Japan are similarly flawed. Recent sociolegal scholarship in the United States points to both qualitative and quantitative data indicating that the American obsession with litigation and rights has been vastly overstated.<sup>14</sup> In the United States, it turns out, there are surely people who are vigorous rights asserters, but so too many conflicts are settled without resort to rights. There has been little comparable rethinking of rights in Japan. Instead, without looking to countries in Europe or

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Asia, where the frequency and tenor of rights assertion may be much like Japan, analysts of Japan have fixated on the perceived clamor of rights assertion in the United States. Against the artificially constructed landscape of a rights-obsessed America, they have constructed a myth that there is no rights assertion in Japan.

To better understand the contours of the alleged contrast between the United States and Japan, it is critical to distinguish between jurisprudential rights, cultural myths about rights,<sup>15</sup> and the strategic assertion of rights. Jurisprudentially, for something to be a right in the most fundamental legal meaning of the term, it must be guaranteed by a code or constitution and/or protected by a court – that is, it must be legally enforceable. In both the United States and Japan, there is much jurisprudential literature on precisely what claims should be treated as “rights,” and how rights should be distinguished from a range of other legally protected interests. In neither country is there widespread agreement on the precise meaning of rights, nor on which rights should be protected.

Cultural myths about rights concern the relative importance attributed to rights in a particular society by popular and academic writers, as well as by laypersons. The power rights are imagined to possess, the frequency with which they are supposedly invoked, and how they are thought to define the identity of a people are the key components that fuel the creation of a myth about rights. In examining litigiousness in the United States, for example, an issue closely related to rights, Carol Greenhouse writes not about litigation itself, but about the interest Americans have in it. What animates her work is “the observation that many Americans are ready to believe in, almost to the point of insistence, their own allegedly litigious national character, even when evidence for this characterization is absent, ambiguous, or contradictory.”<sup>16</sup> Just as Greenhouse notices a gap between Americans’ perceptions of litigiousness and the actual amount of litigation in the United States, there is also a gap between the perception and reality of rights assertion in the United States, Japan, and elsewhere.

The strategic assertion of rights refers to what Stewart Scheingold calls “the politics of rights.” It requires an analysis of how social actors use rights to frame, discuss, and debate issues relevant to social policy; paying attention to the language of such actors engaged in social movements, particularly the context and timing of rights assertion; determining the efficacy of invoking rights for mobilizing like-minded individuals; and evaluating the success of those who use rights in

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pursuit of particular social ends. Concern with the strategic assertion of rights often supersedes questions about the jurisprudential nature of rights; even if an asserted “right” is not (yet) protected by courts or constitution, it may generate a fierce political struggle. The right to die, for example, was widely discussed and contested in the United States well before it was recognized, in part, by the courts.

In emphasizing sociolegal rather than jurisprudential aspects of rights in contemporary Japan, this book focuses on the interplay between cultural myths about rights and the strategic assertion of rights. Like the gap identified by Greenhouse between unspectacular litigation rates in the United States and beliefs among Americans that they are inherently litigious, the gap in Japan with regard to rights separates the cultural myths about rights – that rights are incompatible with Japanese culture, so that Japanese people will go to great lengths to avoid asserting a right to anything – from a more empirical or case approach that examines who asserts rights, why, and with what effect. Because the interplay between the myths about rights, the strategic use of rights assertion, and the legal and political outcomes of rights-related conflict varies over time and place, I refer to it as a ritual. It is the ritual of rights in Japan, illustrated in the battles over AIDS and the definition of death, that this book seeks to illuminate.

Rights in Japan do matter, but they exhibit differences from, and matter in different ways than, rights in the United States. Living in Japan and in daily contact with Japanese, one is aware of how rarely the word *kenri* (right) is used in daily conversation, even when there is an overt dispute that from an American perspective seems to involve rights. When individuals are angry, or feel cheated, or abused, they are likely to walk away, or to change the subject, or to act extraordinarily polite, rather than to claim that their rights have been aggrieved. Such behavior is not an indication that the parties fail to understand rights, but that rights are not an acceptable tool of one-on-one argument. It is a bad strategy to start talking about rights, because the other party will recoil, the relationship will be severely damaged, and the possibility of a fast or advantageous solution will vanish. Thus, the public, aggressive assertion of rights is reserved for particular types of conflicts, generally those in which the hope of continuing a superficially harmonious relationship between the parties has been abandoned, and the possibility for informal agreement is stalled.

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I can support this observation with an array of anecdotal material, some from my own experience. Several weeks after I had (at the lessor's insistence) read every clause of an apartment rental contract, signed it, paid a deposit, and received the key, and only five days before moving in, the landlord appeared at my apartment with a large box of cookies and a formal apology because her cousin wanted to live in the space I had rented. Neither of us referred to the contract, nor the laws governing landlord–tenant relationships and rights. Both of us appealed for sympathy and understanding. We knew that the worst course of action would be to assert our rights and go to court. She offered me a different, less expensive apartment; I saved a substantial amount of rent.

On another occasion, I had an accident in a rental van. Unfortunately, the car that I hit was waiting at a red light, immobile. The other driver worked at an auto body repair shop, which explained his ability to immediately estimate the cost of repairing his company car at \$700. Cash on the spot, he demanded, or we would have to call the police. If the police came, it would mean three or four hours making chalk marks on the street to determine the exact angle of my turn and estimate speed. There would be endless paperwork. In the end all would conclude that I had hit a stationary vehicle and had to pay. But the other driver also had better things to do. So we went to his shop, I apologized to his boss and gave him a ceremonial basket of fruit, and we settled on \$200.

Neither of these incidents, had they occurred in the United States, would have led to court. Nor would the outcomes have been significantly different. But the choice of a strategy for engaging in the interaction – the repertoire of rituals and rhetoric – would have been distinctive. In the United States, I would have asserted my rights as a tenant, the landlord would have countered with the rights of property owners, and in the end we would have settled. Similarly, after hearing the sound of metal on metal, I would have gotten out of the car, but may not have apologized. He would have acted enraged and demanded my insurance information. I would have offered him \$200. One important difference between rights assertion in Japan and the United States, therefore, is the selection of occasions to, or not to, assert them. There are many more occasions in Japan when it is better to be silent, or polite, or apologize, not because one is unaware of the legal rules, though

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in some cases that too is true, but because one is more likely to reach a satisfactory solution.

How can one sensibly approach the study of rights in Japan when the definition of “rights” and the occasions for rights assertion in the United States and Japan may be so different? Take an example from an entirely different area. The meaning of dance to Webster and others is “to move with rhythmical steps or movement, usually to music.” There is a good fit between that definition and the waltz, the polka, and even the monkey. It can reasonably be applied to jazz and modern dance, though experts may insist that the definition needs some fine-tuning. But what of Japanese *butoh*? There is often no music, movement is rarely rhythmical, and artists sometimes remain with their feet planted for long periods of time. Look in a Japanese dictionary, however, and the word “*butoh*” is translated as dance. Ask a Japanese performing artist, and they will tell you that *butoh* is dance. Go to a performance, and you will see an art form that looks like dance. It is neither sensible nor interesting to conclude that since *butoh* does not conform to Mr. Webster’s definition of dance, there is no dance in Japan. For those who are interested in the art form called “dance,” it would be much more illuminating to observe Japanese *butoh* and think about how it challenges and complexifies their idea of dance.

Like *butoh*, examining rights in Japan provides an opportunity to look beyond the familiar (though contested) Western terrain of jurisprudential approaches to rights, cultural myths about rights, and the strategic assertion of rights. By setting one’s gaze upon Japan, one discovers that far from a nation barren in rights and rights assertion, both have a long history and a rich present. The sensible question about rights in Japan is not whether or not there are any. Rather, as with dance, the challenge is to critically examine the historical background of rights, and to look at contemporary instances of rights assertion to learn by whom rights are asserted, when, and with what impact.

Kawashima Takeyoshi, the godfather of the view that contemporary Japanese are unusually reticent about asserting their rights, discussed the values animating legal behavior in Japan and the West as part of a theory of Japanese modernization. In contrast to rights-based Western legal systems, where individuals assert rights without fear of social condemnation, Kawashima claimed that the Japanese legal system was

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based on duties and lacked a concept of rights. Although in postwar Japan people continued to avoid courts and rights assertion, in Kawashima's view the gap between rights assertion and litigation in Japan and the West would narrow as the Japanese legal system became more modern. Kawashima presented his theory about Japanese law and legal behavior in *Nihonjin no Hō Ishiki* [The Legal Consciousness of the Japanese], widely acknowledged to be a masterpiece of postwar sociolegal scholarship.

Kawashima identified cultural factors as the most important cause of Japanese legal behavior. An orientation toward groups rather than individuals, a preference for consensus over conflict, and a propensity to feelings of shame and indirect communication in situations of tension were among his explanations for why rights assertion and legal conflict were limited. In short, according to Kawashima, Japanese culture, more specifically legal culture, accounts for the infrequency of rights assertion.

John Haley, a University of Washington law professor and Japanese legal expert, offered a powerful critique of Kawashima's ideas.<sup>17</sup> Haley presented a contrasting position that emphasized the power of structural factors in containing legal struggles. Strict controls on the number of people permitted to pass the bar examination, high filing fees when going to court, and a long, cumbersome legal process are just a few of the many structural features of the Japanese legal system that he said discouraged the use of the courts.

Despite their disagreement about the relative importance of culture and structure, however, Kawashima and Haley share a common framework; both accept that there is a fundamental difference between rights assertion in Japan and the West, and seek to explain *why*. Attempts to answer that question have consumed more energy and resulted in a greater range of publications than any other single issue on the agenda of sociolegal scholarship about Japan. With few exceptions, observers and laypersons interested in contemporary Japan have accepted the view that Japanese rarely assert rights, use courts, or engage in other law-related behavior.<sup>18</sup>

In fact, Japan already exhibits certain characteristics of rights talk that would agitate critics of rights in the United States. An article on subway renovations in Tokyo, for example, reported claims that "not providing bathrooms or making males and females share the same lavatories at public lavatories are violations of human rights."<sup>19</sup> A Korean resident of Japan, engaged in a long-standing battle regarding



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the family registration system, contended that “a person’s name is an important matter involving human rights, so it should be registered correctly . . . not to be correctly called by one’s name is a violation of those rights.”<sup>20</sup> A dispute over the decibel level of public address systems is portrayed as “the rights to free speech pitched against appeals to the right to peace and quiet.”<sup>21</sup> Measured by a jurisprudential yardstick, the interests being asserted would probably not be considered legal “rights” by Japanese courts. Viewed as examples of how people in Japan articulate their grievances, however, they defy the conventional wisdom by illustrating an unexpectedly broad use of rights rhetoric in Japan.

This book rejects the sharp contrast between rights assertion in Japan and the United States. The contrast is revealing for what it suggests about the creation and reproduction of cultural norms and beliefs, but it fails to provide an accurate picture of the role of rights in either society. Borrowing insights from writing on the legal, historical, sociological, and political dimensions of rights, this analysis examines the function and power of rights in Japan, treating the invocation of rights as one important strategy that groups use to publicize their concerns, to mobilize supporters, and to seek policy change. Although the book is primarily concerned with an analysis of rights in Japan, it also contains an implicit critique of the tendency of scholars in the United States to treat American rights talk as singular. Without diminishing the importance of differences between rights talk in the United States and Japan, I suggest that there are intriguing similarities that have been consistently overlooked by observers in both nations.

Stuart Scheingold, with reference to civil rights struggles and other social movements in the United States, describes how rights are used to galvanize support by those seeking political change, and of the role played by courts in affirming the symbolic power of rights.<sup>22</sup> In Scheingold’s account, it is a “myth” to treat rights as entitlements that are secured by litigation. Instead, in his view, rights are better suited to manipulation than realization – asserting rights is a way to influence the balance of political forces, which in turn may affect public policy.

Writing about the history of bioethics in the United States, for example, David Rothman describes a clash between the authority of the medical profession and the demands of patients.<sup>23</sup> In the climate of the 1960s and early 1970s, with the civil rights movement in full

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bloom, patients were the oppressed. Rothman likens them to tenants in a housing project, to women, to the poor on welfare, powerless in the shadow of physician power. The movement toward patient empowerment, accompanied by great distrust and hostility, expressed itself through rights assertion and litigation. Indeed, it was sometimes criticized for overly exalting individual rights and infringing on the proper domain of medicine. Rothman understands the power of the rights-based approach, remarking on “the extraordinary power that the movement drew from the fact that it was building on this sense of patient as minority and then scaffolding onto it autonomy and all the ancillary issues of consent that go with it.”<sup>24</sup>

In his study of the pay equity movement in the United States, Michael McCann elaborates Scheingold’s approach to the politics of rights.<sup>25</sup> McCann argues that litigation and its attendant rights discourse may not lead directly to the implementation of new policies that recognize and protect rights, and he alludes to the ways in which rights may inhibit or constrain political action. But he does underscore their symbolic power in providing pay equity activists with a vocabulary and strategy around which to organize their movement, advertise their goals, and broadcast their victories. My study of Japan adopts a similar perspective; it is the use of rights as symbols and resources, in both litigation and in debates over public policy, that makes them an important element of change in Japanese law and society. The move from the jurisprudential to the socio-political context of rights, highlighting the myriad ways that rights are interwoven with the cultural and institutional characteristics of conflict, is the defining characteristic of the ritual of rights in Japan.

In exploring law and rights in Japan, it would be unwise to ignore the view that there is something inherent in Japanese culture that minimizes the importance of rights and the resonance of rights assertion. That claim, similar to but significantly more overstated than assertions about the American propensity for rights assertion, is part of a general tendency to think of the Japanese nation and people as singularly unique. Such beliefs fail, Miyoshi Masao writes, because “exclusivism and essentialism are ethnocentric and fantastic, and as such both dangerous and groundless.”<sup>26</sup> Yet there is a persistence to the claim that Japan is “uniquely” unique, a circular argument that Japan is unique because Japanese culture is unique, and Japanese culture is unique because Japan is