

.....

Review Essay

Transplanting Foreign Norms: Human Rights and Other International Legal Norms in Japan

Philip Alston*

The burgeoning literature of cultural relativism and the lessons derived from comparative law frequently lead us to the conclusion that the prospects of foreign legal transplants succeeding in soil which has not been meticulously prepared over a lengthy period of time are minimal. And yet, if one is to accept the conclusions of a recently published book¹ that 'the impact of international law on Japanese law has indeed been substantial, especially in the field of human rights' (p. 310), post-World War II Japan might be cited as an outstanding example of the viability of the external imposition of a wide-ranging set of political institutions and legal norms, including those dealing with human rights. While the broader question to which such a conclusion would lead goes far beyond the scope of this review, it is well worth posing. If the human rights and other norms imposed upon a defeated Japan by the American occupying power were able to take root in soil which could hardly have been less well suited to them, why are we so pessimistic about the prospects of international human rights norms being followed in a wide range of present-day societies in which a great deal of cultural adaptation will clearly be required?

Japanese legal culture is a popular subject for study among sociologists, legal theorists and others.² But the interest has been less in the functioning of the courts or the effectiveness of the legal system as in the muted reliance of the society upon formal

* Professor of International Law, European University Institute, Florence; member of the *EJIL* Editorial Board.

¹ This essay is a review of Y. Iwasawa, *International Law, Human Rights Law and Japanese Law: The Impact of International Law on Japanese Law* (Oxford, Clarendon Press, 1998) xlii + 355 pp.

² For a recent example see Miyazawa, 'The Enigma of Japan as a Testing Ground for Cross-Cultural Criminological Studies' and Feldman, 'Patients' Rights, Citizens' Movements and Japanese Legal Culture', both in D. Nelken (ed.), *Comparing Legal Cultures* (1997) 195 and 215 respectively.

legal rules and the relative lack of prominence of the judiciary within the overall social construction of the society. Sometimes Japan even seems to be used by Western commentators as a convenient example of what a legal system should not be. Thus one author recently lauded the Canadian approach to law and rights by comparing it with the two extremes of the United States with too much law and Japan with too little: ‘in a society like Japan, the weight of social convention prevents the growth of law’.³ Such a casual assessment does not do justice to the complexity and subtlety of the Japanese system, but it nevertheless seems to be a reasonable reflection of the common, if uninformed, view among Westerners.

In international human rights forums Japan has long been on the defensive in relation both to recent issues such as the treatment of persons in mental institutions, as well as ordinary prisoners,⁴ discrimination against Korean and *burakumin* groups⁵ among others, and its reluctance to adopt a critical stance towards human rights violations committed by its Asian neighbours. Its historical record has also come back to haunt it in a number of contexts. In addition to the long-running saga of the Government’s refusal officially to compensate the ‘comfort women’ who were sexually enslaved during World War II,⁶ a recent best-selling book has done much to draw attention to the ‘Rape of Nanking’, an atrocity for which Japan has yet to accept full responsibility.⁷ An observer of the role played by Japan in debates over international human rights policy in general would also note a marked reluctance in various areas. Japan is a notably conservative participant in international legal and policy debates and is rarely at the forefront of efforts to promote new initiatives in the field of human rights. Its reticence goes not only to its own record, both historically

³ Morissette, ‘Canada as a Post-Modern Kritarchy’, 72 *Australian Law Journal* (1998) 294, at 301.

⁴ In 1999 Amnesty International noted that ‘[r]eports persisted of detainees and prisoners being ill-treated in prisons, detention centres and police custody. Conditions of detention remained harsh, often amounting to cruel, inhuman or degrading treatment.’ ‘Japan’, in *Amnesty International Annual Report 1999*, internet site: <www.amnesty.org/ailib/aireport/ar99/asa22.htm>.

⁵ A recent analysis notes that widespread discrimination against the *burakumin* (often, although inadequately, defined as descendants of outcasts) persists but that ‘no branch of [Japanese] government has moved to afford legal redress to those burakumin who are victims of public or private discrimination . . .’. Su-lan Reber, ‘Buraku Mondai in Japan: Historical and Modern Perspectives and Directions for the Future’, 12 *Harvard Human Rights Journal* (1999) 297, 359.

⁶ See ‘Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict’, Final report submitted by Ms. Gay J. McDougall, Special Rapporteur UN Doc. E/CN.4/Sub.2/1998/13, Appendix: ‘An analysis of the legal liability of the Government of Japan for “comfort women stations” established during the Second World War’. The Special Rapporteur concluded that ‘The Government of Japan has taken some steps to apologize and atone for the rape and enslavement of over 200,000 women and girls who were brutalized in “comfort stations” during the Second World War. However, anything less than full and unqualified acceptance by the Government of Japan of legal liability and the consequences that flow from such liability is wholly inadequate. It must now fall to the Government of Japan to take the necessary final steps to provide adequate redress.’ *Ibid.*, at para. 60.

⁷ I. Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (1997). (The blurb on the dust jacket gives an accurate summary of the author’s indictment: ‘In December 1937, . . . [t]he Japanese army swept into the ancient city of Nanking (Nanjing) and within weeks not only looted and burned the defenseless city but systematically raped, tortured, and murdered more than 300,000 Chinese civilians. Amazingly, the story . . . continues to be denied by the Japanese government.’).

and currently, but also to efforts to develop the system of accountability of governments in general. By the same token, Japan has been very generous in its provision of development assistance (it currently provides some 20 per cent of the total ODA — official development assistance — provided by all developed countries), and in its support for a range of international initiatives such as the UN's Cambodian operations and refugee and disaster relief efforts. It has also strongly supported Asian efforts to achieve economic recovery from the financial crises of the late 1990s through the provision of \$30 billion in credits and loans (the Miyazawa initiative).⁸

Because of Japan's reluctance to engage in human rights discourse generally, its preference for consensual settlement of such disputes, and the relatively low profile assumed by the legal system as a whole, it might reasonably be assumed that international human rights law would be of very little relevance within Japan. This assumption is reinforced by the assessment of various commentators. For example, in his contribution to a recent volume of essays in honour of Barrington Moore Jr., Tony Smith has suggested that 'contemporary commentators worry ceaselessly about Japan's relationship to the international economic order'. He observed that Japan often 'does not play by the rules' and went on to link this to far broader concerns: 'Given the nationalism of the country's conservative leaders (complete with racist pronouncements and unconvincing apologies for past aggressions) it is understandable that so many observers express their scepticism both as to Japan's future and to that of liberalism in the Pacific.'⁹

The inaccessibility of Japanese materials to most Western scholars, combined with the reluctance of most Japanese scholars to be self-critical of their own society, means that there has been remarkably little in-depth scholarly writing on Japan and human rights which would challenge such a negative assessment.

Yuji Iwasawa's new book thus fills a major gap in the literature and serves as an important antidote to some of the assumptions made, often on the basis of only a superficial knowledge of the system, by Western observers. While the volume treats the broad issue of the status of international treaties under Japanese law (they enjoy a privileged status and are superior to statute law), the overriding focus of the analysis is upon human rights treaties. This is an issue which Iwasawa has been studying for some two decades¹⁰ and on which this book is clearly the most authoritative and systematic study yet published in English.

The study focuses on the impact of treaty norms and also traces the influence of international bodies promoting those norms. While much has been written about the important role of different UN human rights bodies — whether those established

⁸ See generally 'Secretary-General Hopes Development Conference will Help Invigorate International Community's Commitment to Progress in Developing Countries', UN Press Release SG/SM/7042 of 23 June 1999.

⁹ Smith, 'The International Origins of Democracy: The American Occupation of Japan and Germany', in T. Skocpol (ed.), *Democracy, Revolution, and History* (1998) 191, at 208.

¹⁰ See, e.g., his 'International Human Rights Adjudication in Japan', in B. Conforti and F. Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (1997) 223, a large part of which has found its way into the volume under review.

under the UN Charter, such as the Commission and Sub-Commission on Human Rights, or those established to monitor compliance with specific treaties such as the Human Rights Committee — there have been all too few attempts to undertake an evaluation of their impact in specific cases. Iwasawa, however, provides such very useful case studies of the impact of these bodies on human rights issues in Japan. He concludes that the focus on the harsh treatment of the mentally ill in Japan by the Sub-Commission is a ‘model case’ of interaction between domestic policy-makers and international human rights bodies (p. 309, and see generally pp. 249–260). He lists a range of legislative and other reforms undertaken in order to bring Japan into conformity with treaty provisions either before or immediately after the ratification of those treaties. In particular, he provides a detailed and informative case study of the impact of the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women, which Japan ratified in 1985 (pp. 205–248). And he gives a balanced and critical assessment of the ambivalence of Japanese judges when confronted with applicable international norms which call domestic law and practice into question.

My only significant criticism of Iwasawa’s otherwise excellent analysis is that it is, in some ways, curiously ahistorical. This is so despite the fact that in most situations it will be difficult to fully appreciate the approach to imported human rights standards in the absence of an understanding of the ways in which domestic assumptions and attitudes have been shaped. This is true as much in relation to the United States, Germany and France, for example, as it is to Japan. An appreciation of the broader historical context within which Japanese attitudes to human rights have evolved also makes this book even more interesting and revealing.

Japan is a case study which holds particular interest in this context, although it yields a rather mixed set of conclusions. The Meiji Constitution of 1889 was far from being a rights-based document and did not provide for judicial review (p. 304). The strongest foreign influences affecting its contents were German and British, with the American approach being relatively unimportant, at least in formal terms.¹¹ The 1946 Japanese Constitution is a very different story, however. Contrary to initial American attempts to portray the outcome as the result of a lengthy process of consultation between Japanese leaders and General MacArthur and his colleagues,¹² the Constitution, which includes an elaborate bill of rights in the form of Chapter III on ‘Rights and Duties of the People’, was essentially a foreign imposition reflecting

¹¹ Although the first Japanese translation of the US Constitution, including most of the Bill of Rights, did not appear until 1866, there followed extensive writing and debate about rights prior to the adoption of the Meiji Constitution. A careful review of these sources shows, however, that the Western concept of individual rights was not well understood by most authors of the time. Almost without exception, they interpreted the concept in light of Confucian assumptions which placed the principal emphasis upon the duty of the ruler to rule in the interests of the nation as a collective entity. K. Inoue, *MacArthur’s Japanese Constitution: A Linguistic and Cultural Study of its Making* (1991), at 51–67.

¹² MacArthur suggested at the time that the Constitution had been drafted by the Japanese, over a period of five months, involving ‘painstaking investigation and frequent conference between the Japanese Government and [his] headquarters’. Quoted by Rapaczynski, ‘Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad’, in L. Henkin and A. Rosenthal (eds), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (1990) 430.

minimal local input.¹³ It was initially drafted in the space of only seven days in February 1946 by a handful of American officials (in the Government Section of the headquarters of the Supreme Commander for the Allied Powers), who had no particularly relevant legal or political expertise, and drew very heavily upon the US Constitution.¹⁴ It was subsequently approved by MacArthur (who made only one significant change), secretly discussed with a few government officials, formally presented to the Diet which held extensive debates but made very little impact on the draft, and promulgated by the Emperor's mandate with no effective opportunity for popular input. Such a provenance did not prevent the Constitution from being enacted in the name of 'We, the Japanese people' or from 'proclaim[ing] that sovereign power resides with the people'.¹⁵

One of the major differences between the Japanese and US Constitutions is the former's inclusion of a significant range of economic, social and cultural rights, which were, of course, notably absent from the eighteenth-century blueprint. But while members of the Japanese diet, especially from the Socialist Party, placed considerable emphasis upon the importance of these rights in support of which they invoked precedents in the Weimar, Soviet and French Constitutions,¹⁶ and succeeded in expanding the scope and detail of the relevant provisions,¹⁷ those articles of the 1946 Constitution were actually first drafted by the group of American officials who were drawing on New Deal values and Roosevelt's own expressed support for an Economic Bill of Rights to supplement the US Constitution.¹⁸

Indeed, in almost every respect, the 1946 Constitution was a classic case of a foreign transplant. Popular sovereignty was asserted, equality rights for women were recognized, US-style separation of church and state was mandated, respect for a full range of individual civil and political rights was mandated, and a comprehensive American-style system of judicial review was enshrined. In such circumstances, the literature on transplants would lead us to expect a dismal failure.¹⁹ Yet, the overwhelming verdict of the commentators is that the Japanese Constitution has been a success story. It has never been amended and even when consideration was given to a far-reaching overhaul in the late 1950s and early 1960s the main imported notions, including the bill of rights and judicial review, were supported by the majority of the

¹³ For a detailed and very recent recounting of this exercise see J. W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (1999), at 346–404.

¹⁴ As Rapaczynski notes, 'the 1946 Japanese Constitution bears so many marks of American influence that it would be pointless to list them'. *Supra* note 12, at 431.

¹⁵ Preamble. See Appendix 1, Inoue, *supra* note 11, at 273.

¹⁶ *Ibid.*, at 91–92.

¹⁷ *Ibid.*, at 93.

¹⁸ *Ibid.*, at 74. Roosevelt's clearest statement is contained in his 1944 State of the Union address. See J. Israel (ed.), *The State of the Union Messages of the Presidents*, vol. 3 (1966), at 2881. Curiously, the very detailed account of the drafting process by Dower, *supra* note 13, omits any reference to this fact and instead reiterates the version according to which these provisions were introduced by the Japanese socialists, 'partly influenced by the Weimar and 1936 Soviet constitutions ...'. (at 392).

¹⁹ See generally A. Watson, *Legal Transplants: An Approach to Comparative Law* (1974).

eminent members of the relevant Commission.²⁰ How then can we account for this paradox?

There are two reasons which go a long way towards explaining it. The first is that the imposed American-style constitution was actually perceived by the Japanese people to be much less of a break with the past and significantly less radical in approach and content than its Western authors assumed. The point is best made in Inoue's excellent linguistic and cultural study of the whole episode. She sums up her findings thus:

In retrospect, the acceptance of the new Japanese Constitution by both the Americans and the Japanese depended heavily on the ambiguities of cross-linguistic and cross-cultural communication between both parties. Had the Japanese really understood the democratic ideas that the Americans had intended, it would have been far more difficult and painful for them to accept them. Likewise, had MacArthur and his staff understood precisely how the Japanese were interpreting American democratic principles, they might have been more reluctant to approve the final version of the Constitution.²¹

Two examples must suffice. The potentially transformative concept of sexual equality and individual dignity was accommodated by being interpreted as akin to the traditional Japanese notion of aristocratic honour in society. This concept accepted a form of equality which was radically different from Western notions and consistent with a hierarchical ordering of social relations. Similarly, religious freedom and separation of church and state, to which the American drafters, in line with their own constitutional values, attached such importance, were seen to be relatively insignificant by the Japanese because of the particular nature of Shintoism.²²

But these aspects of linguistic and cultural misunderstandings should not necessarily be read in a negative light. In important respects they illustrate very well the extent to which language and culture will inevitably limit, or at least channel, the impact of foreign norms upon a society and its legal system. International human rights norms would be far less likely to be effectively received in a society to which they are alien in certain respects were it not for the facilitating power of these constructive ambiguities. However dogmatic the proponents of universalist approaches to human rights might become, the reality is that there always will be, and usually should be, at least some leeway to add a domestic interpretative gloss to the international norm.

The second reason explaining the paradox is that despite the apparently revolutionary changes in the system of government and in relation to human rights instituted by the 1946 Constitution, Japanese society has been able to continue to function in ways that have minimized much of the impact that Western observers would have assumed to follow from such a radical change in constitutional structures. The situation described by Iwasawa in relation to the bill of rights and

²⁰ See Titus, 'Japan's Commission on the Constitution: The Final Report', 14 *New York University Journal of International Law and Politics* (1982) 701.

²¹ Inoue, *supra* note 11, at 269–270.

²² *Ibid.*, chapters 6 and 4 respectively.

international human rights law provides a particularly compelling example in this respect.

Chapter X of the Constitution specifies that the 'fundamental human rights' guaranteed are 'to be held for all time inviolate'. Judicial review is ensured by Chapter VI, and human rights treaties are directly applicable and enjoy a higher status than normal statutes. All of the necessary tools are thus in place to ensure both that the bill of rights will play a major role within the legal system and society at large and that international human rights law will also have a significant impact. And indeed some non-Japanese commentators have discerned just such a 'human rights revolution', to which international norms have made a major contribution.²³ But the most authoritative studies, and Iwasawa's in particular, seem to tell a rather different story. In terms of the bill of rights, Japanese courts are generally deferential to the legislature, they show deep restraint in exercising their functions of judicial review, and they rarely invalidate legislation on constitutional grounds.²⁴ Thus in the space of more than 50 years since the adoption of the 1946 Constitution with its revolutionary provision for judicial review, a finding that a statute is unconstitutional has been rendered on a total of five occasions. Iwasawa demonstrates that the avoidance of such findings has been facilitated in the human rights area by liberal judicial use of the concepts of 'public welfare' or 'legislative discretion' to justify restrictions (p. 304).

An observer might reasonably have expected that such reticence on the part of the courts to uphold human rights would have been challenged, or at least made more difficult, by the impact of international treaty obligations accepted by Japan. But Iwasawa has shown in his thorough and nuanced study of the issue that the Japanese courts consistently reject international human rights-based arguments, are systematically averse to reliance upon international norms which they use at best as a form of icing upon the cake, very rarely find violations of international norms, and consistently assume that those norms provide no greater protection than the bill of rights in the Constitution (pp. 292–296). In other words, neither of the two principal forces for convergence between domestic and international norms which seem to operate in other contexts are at work in the Japanese case. International jurisprudence, whether based on the case law of international bodies or of other national constitutional courts, is rarely invoked and provides few constraints upon the approach adopted by the Japanese judge. And the international norms themselves have assumed almost no independent relevance in the sense of extending constitutionally recognized rights or precluding any particular interpretations that the domestic courts might opt for.

And yet the resulting outcomes have been far from systematically negative and it would be difficult to reach a conclusion that differs significantly from Iwasawa's

²³ Port, 'The Japanese International Law "Revolution": International Human Rights Law and its Impact in Japan', 28 *Stanford Journal of International Law* (1991) 139; and Ramlogan, 'The Human Rights Revolution in Japan: A Story of New Wine in Old Skins?', 8 *Emory International Law Review* (1994) 129.

²⁴ Itoh, 'Judicial Review and Judicial Activism in Japan', 53 *Law and Contemporary Problems* (1990) 169; and Sonobe, 'Human Rights and Constitutional Review in Japan', in D. Beatty (ed.), *Human Rights and Judicial Review: A Comparative Perspective* (1994) 135.

generally optimistic assessment of the positive role of international norms. Some tentative conclusions might then be suggested. One is that the measurement of formal impact in terms of court rulings and other legal acts which openly acknowledge reliance upon international norms is a less useful or accurate indicator in some societies than in others. In the case of Japan the transplanted values seem to have gradually infiltrated the legal and political cultures, despite a deep-seated reluctance to recognize the fact explicitly. Another conclusion is that legal culture is far from irrelevant and that a constitutional provision which does not resonate within a society is unlikely to have a significant practical effect. Thus the provisions of the Japanese Constitution on economic and social rights have had relatively little impact in the courts and the International Covenant on Economic, Social and Cultural Rights has made little difference in this respect. Indeed it is singled out by Iwasawa as the only human rights treaty ratified by Japan the direct applicability of which has been ‘categorically denied’ by the courts (p. 56). Although its provisions were successfully invoked in relation to the rights of aliens, its overall impact appears to have been slight.

The role of the courts as standard-bearers for human rights — a role ‘codified’ in the Bangalore Principles and to which particular attention has been paid in common law countries²⁵ — has not been fulfilled in Japan. Finally, the Japanese case study provides a timely reminder of the importance of language as a factor which can both impede and facilitate the acceptance and digestion of externally promoted norms. In the process of imposing an alien constitution on Japan, the ability of the Japanese Government to insist on the translation of terms signifying potentially radical reforms, such as ‘the people’ and ‘sovereignty’, in ways that made their meaning much less problematic than would have been apparent in the English version, was crucial.²⁶ One wonders, however, at the ways in which the provisions of, for example, the UN Convention on the Rights of the Child have been translated into the many languages other than the English and French in which the vast majority of the drafting took place.

²⁵ See generally M. Hunt, *Using Human Rights Law in English Courts* (1998). The Bangalore Principles are reprinted in an Annex.

²⁶ See Dower, *supra* note 13, at 381–382.