

Notions of Rights in the United States and Japan

By Jonathan D. Marshall

COMPETING CONCEPTIONS OF RIGHTS

Japan and the United States share some of the institutional infrastructure for “rights” such as written constitutions and independent judiciaries. Both countries are liberal democracies, and the US played a key role in remaking Japan’s institutions after World War II. Still, what the term “rights” means differs in the two countries. Japan has inherited competing conceptions of rights from the West at different points in its history. The concept of rights continues to develop as the power balance between state and society has shifted in favor of a greater public decision-making role. What constitutes “rights” has also changed substantially in the United States over the past eighty years or so. Nevertheless, Japan still hews to a positivistic (i.e., limited to formal written statements) idea of rights that differs fundamentally from the natural rights conception that animated the framers of the US Constitution and that continues to influence political debate in the United States.

RIGHTS AND LIBERTIES

“Rights” can include claims based upon written law, contracts, or custom against another individual; claims against state interference with liberties such as freedom of speech; or claims for benefits such as social welfare that the state should allegedly provide. Still, a broad division exists among democracies in the political role of rights claims against state interference. Since the seventeenth century, the central Anglo-American approach to liberty rooted in natural law; certain rights are supposed to exist prior to the formation of the political order. John Locke, in 1690, noted that the law of nature forbids a person from harming another in his life, liberty, health, or possessions. The US Constitution incorporates Locke’s thought when the Fifth Amendment prohibits the central government, and the Fourteenth prohibits the states, from depriving people of life, liberty, or property without due process of law. This natural law view shapes American thought about rights, which become veto points against a variety of government policies, including legally mandated racial segregation, coastal wetland protection, and child labor.¹

Japan, strongly influenced by the Continental European legal tradition, provides a “positivist” model for rights. Individual rights formally exist only as state-sanctioned written laws. In practice, both natural and positive law conceptions of rights utilize written constitutions, statutes, and court decisions for rights claims. Despite this convergence and the fact that positive rights are often more persuasive legally, the natural law approach makes rights claims more politically powerful.

IMPORTING AND REIMPORTING RIGHTS

Japan has experienced three major waves of legal change and borrowing. The first occurred during the seventh century, when Japan borrowed a broad set of legal, administrative, and religious ideas from Tang China. The second followed on the heels of the Meiji Restoration. Meiji leaders used European advisors and models to create a written constitution, legal codes, and hierarchical courts to serve a powerful state that could both compete with the West and end the unequal treaties that gave Western countries extraterritorial jurisdiction over their nationals and control over Japan’s tariffs. The German legal system was the dominant model.

The result was a system of statutes and courts that advantaged the state while formally acknowledging individual rights. The Meiji Constitution was liberal in that it created a representative assembly and recognized individual property, speech, press, and due process rights. However, the document was authoritarian in qualifying these rights and leaving the degree of protection

to the discretion of state officials. For example, “within the limits of the law” accompanied freedom of individual expression. Although the court system proved itself willing to rule against the state, no judicial review existed to allow a court to declare a government action unconstitutional. From the Meiji Restoration through the end of World War II, Japan was either a bureaucratic-authoritarian regime or, from 1913 to 1933, a near-democracy with weak rights guarantees.

The idea that one party could make legitimate claims against another with government support existed before the Meiji period, but the Western terminology was new. The Japanese word for “right” coined during Meiji is a combination of the Chinese characters *ken* 權 (“authority”) and *ri* 利 (“interest”); the term is evidence in itself that the new concept differed from the sorts of reciprocal obligations that traditionally existed in Japan.² In addition, the Meiji Constitution followed the German model. Rights did not exist in isolation but as part of the “rights and duties” the individual and the state owed to one another. The Meiji wave of legal institution building established a notion of individual rights balanced by the needs of the political community and, in practice, difficult to invoke against the state.

The third wave of legal institution building occurred during the post-war American Occupation. The Political Section of the Supreme Command

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Allied Powers (SCAP) in effect drew up the 1947 Constitution in dialog with Japanese constitutional scholars.³ SCAP legal experts, mostly liberal New Deal reformers, produced a constitution similar to a US version edited by the American Civil Liberties Union.⁴ The new Constitution reframed rights guarantees in American terms. Gone were “rights and duties”; in their place were guarantees of “eternal and inviolate rights” of the people not to be abridged unless they interfered with public welfare. Even the formula “life, liberty, and the pursuit of happiness” for the rights secured by the Constitution reflected the American roots of the document. The 1947 Constitution guarantees the full range of rights found in the US Constitution as well as additional rights, including a proscription on sex-based discrimination by the state, as well as guarantees of academic freedom, collective bargaining rights, and privacy for means of communication.

The new constitution required changes in the criminal procedure code and created a supreme court that could both review all government actions for conformity with the law and acts of parliament for conformity with the constitution. SCAP thereby saved Japan from having to develop judicial review on its own and prevented subversion of the rule of law by subjecting bureaucrats to the ultimate oversight of an independent judiciary. The Americans, by inserting key features of the US legal system into the new British-style parliamentary regime created by the 1947 Constitution, sought to prevent a reversion to authoritarianism and ensure individual rights and the rule of law.

Yet the new rights, procedural safeguards, and judicial powers rested on existing Meiji-created legal institutions and personnel not trained in adversarial legal processes. Two key features of the postwar legal system—control of legal training and accreditation by the Supreme Court and Ministry of Justice and top-to-bottom bureaucratic ordering of the judiciary—have inhibited the kind of rights expansion the US experienced in the postwar era. The Ministry

of Justice administers bar examinations, and successful candidates must train at a Supreme Court-run institute that identifies potential judges and selects them for advancement up to and including the Supreme Court itself, subject to formal Cabinet approval. This centralization of control in the Supreme Court Secretariat, combined with single-party control of parliament by the Liberal Democratic Party (LDP) for almost the entire period from 1955 until 2009, meant that conservative politicians could prevent the Supreme Court as well as most lower courts from departing from their preferred policies. Recent reforms intended to diversify judicial recruitment have so far had little effect, and legal profession recruitment still follows the process just described.

In the US, party politics has ensured an ideologically diverse federal judiciary, allowing courts to take counter-majoritarian stances in areas such as freedom of expression, religious freedom, and equal protection. In contrast, LDP politicians with conservative policy agendas have overseen the courts and, because of the bureaucratic personnel system, ensured extreme judicial restraint. Japan's Supreme Court has only invalidated four relatively minor statutes in its postwar history and, unlike its US counterpart, has not been a key player in an individual "rights revolution" or even a veto player protecting individual rights against state action.

YET RIGHTS ARE REAL

The fact that Japan's Supreme Court has been passive does not mean no rights exist. The Japanese press publishes without state censorship, political opposition groups organize and speak, government protects people's property rights, and police are required to have a warrant to search property and seize evidence.⁵ Like any contemporary democracy, Japan often fails to protect individual rights, but what distinguishes Japan from the US is that rights contests are rarely solely decided by an up-or-down Supreme Court. Examples of decisions on three types of rights—freedom of speech, freedom of religion, and equal voting protection—show that court decisions do matter for the development of rights, but not to the same extent as in the US.

Since the late 1960s, the US Supreme Court has taken an absolutist approach to political speech; neither the federal government nor the states may regulate expression on matters of public concern. This prohibition extends to advocacy of violence in support of racist policies; incorrect print statements of public officials; burning the national flag as a protest; and even regulating campaign finance for the purpose of controlling overall spending, leveling the playing field, or placing heightened strictures on corporations or unions. Although the ideological composition of the majority has shifted over time, the court has consistently privileged speech over competing interests in a democracy such as civic nationalism, campaign fairness, or protection of disfavored minorities.

By contrast, Japan's Supreme Court has been willing to balance other interests against the liberty to speak on politics; in this, it is like most other constitutional courts. Cases challenging the statutory ban on door-to-door canvassing in Japanese election campaigns as a violation of Article 21 of the Constitution constitute a well-known example of this balancing. Although lower courts declared the canvassing ban unconstitutional several times, the Supreme Court consistently upheld the ban's validity. Scholars of Japanese politics cite the canvassing ban as evidence that the Supreme Court complied with the wishes of the LDP, who worried that leftist politicians would gain at the polls by mobilizing rank-and-file members in door-to-door campaigning, and that the court acted as the governing party's agent in disciplining lower court judges.⁶ The Supreme Court explained in 1950 that the canvassing ban was a "time, place, and manner" restriction whose goal was electoral fairness. In response to a 1980 invalidation of the canvassing ban by the Matsue Branch Court, the Supreme Court again upheld the constitutionality of the canvassing prohibition and noted that the goal of the statute was not to regulate expression of opinion but to prevent the creation of conditions that encourage corruption and vote-buying, prevent an expenditure arms race by

candidates, and keep personal considerations from controlling the vote. The canvassing ban was therefore a reasonable restriction that helped ensure free and fair elections that did not violate the freedom of expression guarantee. Unlike the US Supreme Court, which has said that First Amendment free expression rights trump any interest in regulating campaign spending that Congress might claim other than preventing corruption, the Japanese Supreme Court has balanced speech against other interests in the management of democratic politics.

FREEDOM OF RELIGION AND THE "ESTABLISHMENT CLAUSE"

Article 20 of the 1947 Constitution guarantees freedom of religion, prevents the state from granting privileges to any religious organization, and prevents religious organizations from exercising political authority. It also forbids compelled religious observances and forbids religious education or other religious activity on the part of the state. Article 89 forbids spending of public funds for the benefit of any religious institution.⁷ Japan's Constitution is thus much more specific than that of the US, largely because the victors blamed State Shinto and the cult of the emperor for creating the militarism that led to World War II. While allowing government to have a Shinto priest perform a public building groundbreaking ceremony or provide names of deceased Self-Defense Forces members to private religious organizations, the Court has endeavored to maintain a separation of church and state that stands in marked contrast to the promotion of State Shinto and the suppression of new religions during the prewar era.

One significant example of the court's treatment of separation of church and state, because it was contrary to the LDP preferences, was the 1997 decision that declared official contributions to Shinto shrines a constitutional violation. Ehime Prefecture officials contributed money on a number of occasions to various Shinto shrines as part of religious observances. Many went to Yasukuni Shrine, which enshrines the spirits of Japan's war dead, including convicted World War II war criminals. LDP prime ministers, with some exceptions, had made "unofficial" visits to Yasukuni Shrine for decades, and the party lent its support to Shinto commemorations of Japan's war dead. Claiming that the expenditure of public funds on shrine donations was unconstitutional, plaintiffs brought suit against Ehime officials on the grounds that the expenditures were an improper use of taxpayer funds. The Supreme Court sided with the plaintiffs and rejected the officials' contention that the payments to the shrine were merely a social custom with the secular purpose of commemorating the war dead in support of bereaved family members.

These leading cases are illustrative of similarities in Japan and the US regarding separation of church and state and demonstrate that neither country's constitutional court has been crystal-clear in definitions of what constitutes an establishment of religion. Both the Japanese and the United States Supreme Courts have been willing to accommodate some religious observances but not others, depending upon the degree to which the observance constitutes an official endorsement of religion. From *Engel v. Vitale* in 1962 through the 1980s, the Court had held that classroom prayer was state endorsement of religion and violated the Establishment Clause, although subsequently the Court suggested that some degree of government coercion was also necessary for government-sponsored religious exercises to be an "establishment of religion."

The US Supreme Court has been less clear than Japan's (in the wake of the Ehime case) on what religion-related state activities the Constitution prohibits. Recently, it has been willing to accommodate a school voucher program whose expenditures went almost entirely to Catholic schools and to accept religious displays on the grounds of state buildings but not inside courthouses. Indeed, Japan's relative clarity may be related to the more specific language of Article 20 and to the clear prohibition on spending in Article 89.

EQUAL PROTECTION AND LEGISLATIVE APPORTIONMENT

One right of particular interest in democratic systems is the right to have one vote count the same as any other. The apportioning of legislative districts, and thus the decision about how to “weight” individual votes, has historically been a political decision because it so directly affects the fortunes of legislators and political parties. The US Supreme Court, for example, declined to rule on apportionment decisions on “political question” grounds until 1962, and then quickly declared the “one person, one vote” standard on both the federal and state levels in 1964. The only exceptions to this standard are the ones the Constitution itself creates: the requirement that each state have at least one House member and the Senate requirement that each state has two representatives regardless of population. This means that residents of small states have a greater weight in Senate decisions and may block the will of an electoral majority. Since the “one person, one vote” decisions and the passage of the 1965 Voting Rights Act, the Supreme Court has been quite willing to insert itself into questions of legislative district drawing, equal counting of votes of racial and ethnic groups, and even recount rules.

Japanese courts have also weighed in on the constitutional requirements for equal protection as applied to voting, but the Supreme Court has not come up with a clear rule like the “one person, one vote” standard. Like the US Supreme Court, the Japanese Supreme Court initially considered legislative apportionment to be a political question. A 1964 decision upheld the validity of parliament’s Upper House electoral districts that allowed one vote from rural Shimane Prefecture to be worth four votes from Tokyo. The Court said that—absent any extreme disparities in voter ability to enjoy voting rights—apportionment should be left to the legislature, which may consider factors such as size, history, and administrative boundaries in legislative districting.

In 1976, however, the Court changed positions and said that the 5:1 ratio in the value of a vote between the most rural district and newly suburban Chiba District 1 was unconstitutional. Subsequent decisions reinforced the holding that large disparities between the values of rural and urban votes in House of Representatives elections violated the Constitution, but the Court did not establish a strict equality rule, nor did it hold the House of Councilors to the same standard. In 1994, the coalition government that briefly ousted the LDP established a new electoral system that created a mixed system of single-member and proportional districts for the Lower House. Even though the new system made each vote in the least-populated district worth twice each vote in the most populated, the court found that the disparity did not violate the Constitution.

Unlike its US counterpart, the Japanese Supreme Court was cautious in its application of the equal protection guarantee to voting. There is statistical evidence that the LDP was able to punish judges who found rural overrepresentation unconstitutional; rural voters were the key support base for the LDP until the party remade itself into an urban, middle class party in the 1970s. At this point, the LDP no longer had a strong interest in preserving rural overrepresentation and let constitutional jurisprudence take its course.⁸

RIGHTS, MYTH, AND REALITY

Democracies all face the problem of how to manage rights, and the conception of rights differs over time and across political units. Certainly, the US Supreme Court has constrained the scope of some rights such as equal protection and freedom from search since the “rights revolution” of the 1960s. Nevertheless, Americans still have a sweeping view of what constitutes “rights”—claims against government intrusion that are true for all time and for all claimants—and what role rights play in political discourse. The US may just need rights more, for a couple of reasons. First, inalienable rights legitimate vetoes by political minorities, and compared to Japan’s Westminster-style parliamentary system, the US presidential system is, by design, full of veto points, and the Supreme Court has long asserted its role as a veto player. Second, the discourse of rights has allowed the US to make progress

toward the political resolution of some thorny issues like discrimination based on race, sex, disability, and sexual orientation. Third, groups in the US have self-consciously used rights claims as a political instrument since the last third of the nineteenth century. Framing a political problem as a rights issue, when it is successful, changes norms and opens up space for political responses by the majoritarian branches or occasionally closes off avenues for political response, as did “liberty of contract” around the turn of the twentieth century.

Japan works in a very different way. Despite its formal role, the Supreme Court has not served as a veto player, and while both parliament and bureaucracy have been key decision-makers in the postwar era, the Court has played a decidedly subsidiary role. In that context, policy arguments, not rights claims, make up the political debate. Rights-claiming has been limited as a political tool and is associated with the Japan Communist Party, which many Japanese view negatively. Finally, as described earlier, there are competing conceptions of rights. One, the idea of rights as reciprocal obligations between ruler and subject predates the modern political order. The second, a positivistic idea of rights and obligations specified in writing, accompanied the importation of continental European law during the Meiji period. The third concept of inalienable rights arrived with the US Occupation, and it is enshrined in the 1947 Constitution. The three conceptions of rights coexist in Japanese political life, but Japanese politics over the past fifty years show that all three versions of rights can serve as political resources. ■

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NOTES

1. For respective US Supreme Court decisions, see *Brown v. Board of Education of Topeka* 347 US 483, 74 S. Ct. 686 (1954); *Lucas v. South Carolina Coastal Council* 505 US 1003, 112 S. Ct. 2886 (1992); *Hammer v. Dagenhart* 247 US 251.
2. Contemporary Japanese legal discussion of what Americans call rights (like free speech) typically use the term *jiyū* 自由 (“liberty”).
3. Japan’s National Diet Library has an English language account of the drafting of the postwar constitution at <http://www.ndl.go.jp/constitution/e/shiryō/03shiryō.html>.
4. Eric A. Feldman, “Law, Culture, and Conflict: Dispute Resolution in Postwar Japan” in D.H. Foote, ed., *Law in Japan: A Turning Point* (Seattle: University of Washington Press, 2007), 3.
5. Like the US, though, Japan has often used the power of the state to monitor and intimidate radical and sometimes not so radical opposition movements, particularly those on the political left.
6. J.M. Ramseyer, and F.M. Rosenbluth, *Japan’s Political Marketplace* (Cambridge: Harvard University Press, 1993), 170–72.
7. This prohibition duplicates the test for “establishment of religion” that very liberal Justice William O. Douglas proposed in two key Establishment Clause cases of the 1960s, *Engel v. Vitale* 370 US 421, 82 S.Ct. 1261 and *Abington School District v. Schempp* 374 US 203, 83 S.Ct. 1560.
8. J.M. Ramseyer and E.B. Rasmusen, “Why Are Japanese Judges So Conservative in Politically Charged Cases?” *American Political Science Review* 95 (2001): 331–344.

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