Civil and Political Rights in Japan

The human rights issues in Japan are multifaceted. Over decades, domestic and international human rights organisations have raised concerns, but government obstinacy has meant there has been little progress. Recommendations of UN human rights bodies are routinely ignored, and statements by the government in the Japanese parliament regarding these recommendations have been dismissive. At the review of Japan’s implementation of the International Covenant on Civil and Political Rights in 2014, Professor Nigel Rodley, then chair of the UN Human Rights Committee, lamented the lack of true engagement by Japan and the country’s unwillingness to take any action on the conclusions of UN human rights bodies. Equally worrying is the clear trend over recent years of popular publications bashing neighbouring countries and their nationals living in Japan as well as UN human rights bodies. This book explores the issues surrounding human rights in Japan, and what the future might hold for the country.

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Civil and Political Rights in Japan
A Tribute to Sir Nigel Rodley
Edited by Saul J. Takahashi

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Civil and Political Rights in Japan
A Tribute to Sir Nigel Rodley

Edited by
Saul J. Takahashi
This book is dedicated to Sir Nigel Rodley (1941–2017), professor, colleague, and friend, and to all those who dedicate their lives to advancing the cause of human rights.
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Introduction

This book is first and foremost a tribute to Sir Nigel Rodley, whom many of us knew as a professor, a colleague, and a friend. It is a book about civil and political rights in Japan, because that is a topic that was very close to Nigel’s heart.

It has been popular in Japan since at least the 1990s to talk about a wide-ranging, generalised malaise in society – *bakuzen to shita funan*, or ‘a vague sense of anxiety’. Such narratives have a self-producing quality; the more they are hyped in the mainstream media, the more people start believing in them. Nevertheless, it is clear that the collapse in the ‘bubble’ economy in 1991 and the social processes that started (or became the focus of more attention) then, have had profound effects on Japanese society.

The bubble economy of the 1980s was characterised by cheap money, ostentatious consumption, and what was perhaps the peak of national arrogance. Japan was number one, so many people thought, and there was no need to continue learning from others (as the country had done consistently throughout its history) – rather, it was time that the rest of the world learned from us. Terms such as *yoi-shireru*, or intoxication, are often used to describe the national mood during that period. As with all situations of intoxication, reality the next morning is harsh.

The problems facing the country are legion, and the brittle social systems, made for another era, have proven incapable of addressing them in any meaningful way. The gulf between rich and poor continues to expand, and sizable groups of the population appear doomed to a life of precarious employment and exploitation. In this context, it is not surprising that wide swaths of the populace have lost faith in a corrupt, self-serving elite. Indeed, the problems are existential, in the true meaning of the word – a rapidly ageing society and one of the lowest birth rates in the OECD means that, mathematically speaking, Japan could literally disappear before the end of this century.

The ‘solution’ offered by the right is, in essence, a return to the 1930s. Bullish nationalism, reverence for the Emperor, a strengthened role for the military in both foreign policy and domestically – all of these are elements of a ‘reborn’, ‘strong’ Japan that successive governments and right-wing elements throughout the country have painstakingly promoted. It is difficult to see how a direction that led to WWII, and nearly to national apocalypse, could be anything but a recipe for another disaster, and surveys consistently show that the majority of the populace is
sceptical of most of these policies. It is an attestation to the current state of Japanese democracy that, despite this broad scepticism, the right continues to maintain power after each election. Indeed, with the large number of ‘dead’ votes under the first past the post system, the Liberal Democratic Party and its coalition partners retain the majority with only a little above 20 percent of the popular vote.

Like in most other ‘advanced’ economies, democratic institutions in Japan are under attack, not the least from the very people who have been elected to preserve those institutions. Norms such as transparency, respect for minority opinion, and accepted process are flouted, even sneered at by people in power. Corruption scandals that would have toppled governments before lead to no resignations, and high ranking civil servants who helped cover up for politicians are brazenly given promotions for their loyalty. Oppressive pieces of legislation are rammed through parliament with only a façade of debate, above howls of public protest. Just some examples of this (many of which are examined in this volume) include the Specially Designated Secrecy Act, which gives the executive almost unfettered power to designate information as national secrets and which provides for long imprisonment for not only civil servants, but also journalists and citizens who share secret information; the Conspiracy Act, which can be used to suppress peaceful dissent and can have a potentially chilling effect on civil society; laws allowing the government to dispatch military forces abroad with a minimum of parliamentary scrutiny; and a recent law cynically setting a ‘limit’ on overtime for workers at the officially recognised ‘karoshi’ (death from overwork) line of 100 hours overtime per month (while at the same time creating an entire category of workers exempt from any overtime restrictions). Polls show that all of these bills were opposed by a majority of the populace. And if even minimal parliamentary debate is too contentious, why bother? Longstanding government policy prohibiting weapons exports, a pillar of post-war diplomacy, was simply discarded with one Cabinet decision.

Underpinning these issues is the question of Constitutional reform, and continuing efforts by the Japanese right (in particular the Liberal Democratic Party) to change the post-war Constitution. As noted in some chapters in this volume, if the LDP had its way, human rights would be subject to sweeping restrictions on the basis of ill-defined concepts of ‘public interest’ and ‘public order’, and, indeed, emergency provisions would be created that, if invoked, would reduce human rights protection within the country to a mere aspiration. These debates are particularly crucial since, unlike in Germany or Italy, Japanese fascists were not voted into power – they didn’t have to be, because the pre-war Constitution allowed concentration of power in the hands of the executive and the military, making the elected government effectively irrelevant. In this context, the emergency provisions that the LDP wants to re-introduce are particularly chilling.

Nevertheless, it is important to recognise that, as lawyers, we tend to overestimate the importance of the letter of the law, and overlook (or underestimate) underlying social trends. Besides being a legal document, the Constitution also has immense symbolic value, as the core of the post-war democratic and pacifist regime. In reality the government has had little difficulty in adopting laws and
policies that blatantly violate not only international human rights standards but arguably various Constitutional safeguards as well. Given the time and effort required to institute Constitutional amendments, the right could well do with simply continuing to ignore the document. They do not, indeed cannot, do so precisely because of the perceived importance of destroying the post-war regime once and for all, not just in practice but in a formal sense. In other words, tearing up the current Constitution is crucial for the right not just because of what the Constitution says, but because of what it stands for.

In this regard, the debate surrounding the Constitution, and surrounding human rights in general, is inseparable from issues of responsibility for wartime abuses – in particular the so-called ‘comfort women’ issue, where these debates play out in the most acrimonious fashion. The right has successfully promoted the narrative that the entire ‘comfort women’ story is a fabrication, a scam used by nefarious foreigners (mainly Koreans and Chinese) and leftist, ‘anti Japanese’ elements within the country to smear the upright people of Japan. Since Japan did nothing wrong, there is no question of taking responsibility – and since the entire post-war regime is built on the foundation of Japan’s responsibility for the war, it too is a con designed to suppress the true strength of the Japanese nation.

Nigel was one of the few prominent international human rights personalities to detect these trends in Japan, and the increasing leaning towards authoritarianism. For many years Japan got away with a lot – the country managed to escape sustained scrutiny from international human rights actors, partially because of the elephants next door, partially thanks to effective branding of Japan as a ‘soft’ country. Human rights actors had bigger fish to fry in the region, and were generally not overly interested in a country that did not appear to have serious problems.

Nigel understood where Japan was heading, and always remained concerned about human rights in the country. On many occasions, he mentioned that he wanted to visit Japan in whatever official capacity he held at the time – unfortunately this was not to happen, but it was a country close to his heart. As Chairperson of the Human Rights Committee, he had very harsh words for the delegation at the review of Japan’s state report in 2014: while recognising that human rights were respected ‘overall’ in the country, he insisted on pointing to the glaring deficiencies in Japan’s record, and on the government’s longstanding intransigence in refusing to address them.

As he always was, Nigel was persistent at this session, and did not tolerate the usual prevarications. He was near the limit of his patience with the government, but on a more fundamental level it was because, like all true activists, Nigel understood that ‘overall’ situations count for very little in human rights. On a macro, ‘overall’ level, Japan may compare favourably with China, North Korea, or others, it is true. However, to the criminal suspect tortured in a police lock-up, a refugee refused protection, or a war time ‘sex slave’ refused adequate recognition or compensation, ‘overall’ is meaningless. Nigel understood that, and used every opportunity to impart that perspective to his students and colleagues, not the least through example. He will be sorely missed.
This book is largely the brainchild of Ai Kihara-Hunt. Besides contributing two very important chapters, Ai had the initial idea of the project, and we worked closely on formulating the concept, finding contributors, and many of the other time consuming (and somewhat mundane) tasks that come with bringing together a volume of this nature.

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The wide range of human rights issues in Japan means that no one book could possibly be comprehensive. We set out to provide an overview of some (certainly not all) of the most prominent civil and political rights in the country, mainly because those were the issues Nigel focused on for most of his adult life. However, limiting the subjects to civil and political rights naturally meant that we were unable to cover the wide spectrum of economic, social, and cultural rights issues, the situation of which is becoming increasingly problematic in Japan. In recent years poverty – rather, sheer deprivation – and the increasing gap between rich and poor have increasingly become a topic of contentious public debate. In May 2018, the Special Rapporteur of Poverty and Human Rights and other UN human rights experts issued a statement calling on the government to refrain from planned cuts in income support, stating that the ‘minimum living costs determined on this basis do not embody an adequate standard of living as required by international human rights law’.

As in every country in the world, there is of course a strong nexus between the enjoyment of economic, social, and cultural rights on the one hand, and civil and political rights on the other, in Japan. Just one result of the discrimination against women that is prevalent in nearly all areas of life in the country is the shocking poverty rate of 50.9 of households led by single mothers – nearly two and a half times the OECD average of 20.9 percent. In one of the largest and most advanced economies in the world, the average income of single mother led households is a pitiful JPY 1,790,000, not even USD 17,000 – even though 80 percent of single mothers work full time. According to one government survey, nearly one in three Japanese working women have been subjected to sexual harassment in the workplace, and until a supreme court case in 2014, it was common practice for women returning from maternity leave to be demoted, effectively penalised for having children.

Discrimination against Korean residents of Japan also takes place in a wide range of areas affecting economic, social, and cultural rights. In a blatant violation of the right to education, in 2016, the government instructed municipalities to ‘consider’ cutting subsidies given to Korean schools (attended mainly by North Korean children), citing recent nuclear tests by North Korea. Most Koreans still go by their unofficial ‘Japanese’ names to obtain employment.

Another nexus, one that has received very little attention, is that of criminal justice and poverty (or social class in a broad sense). As noted by Kana Sasakura in a chapter in this volume, and by this author elsewhere, criminal suspects in Japan are as a general rule detained in police lock-ups (daiyou kangoku: ‘substitute
prisons’) for up to 23 days. During this period suspects have only limited access to lawyers or to anybody in the outside world, and are subjected to excessively long interrogation sessions, sleep deprivation, and even physical beatings in an effort to extract ‘confessions’. Unsurprisingly, wrongful convictions are not uncommon, and daiyou kangoku has been the subject of longstanding opprobrium by international and domestic human rights actors. Nigel, when he was chair of the Human Rights Committee, criticised the government for maintaining the system ‘despite its manifest incompatibility’ with the ICCPR.

A recent effort at reform failed to produce results. However, what is noteworthy is that the momentum for reform was sparked by the case of a career civil servant, an elite in the social hierarchy. It is difficult to envision such public outcry regarding criminal justice, had the wrongly convicted person been just another down and out.

Even with regard to civil and political rights, there are numerous issues that could not be given adequate coverage in a volume of this nature. For example, government obstinacy in the face of recent ‘revelations’ that over 15,000 people had been forcibly sterilised under Japan’s eugenics law is reminiscent of the official refusal to accept responsibility for the sexual slavery during the war. Many politicians appear to want schools to be fora for indoctrination into nationalistic thought – already teachers are punished for refusing to stand for and sing the national anthem at graduation ceremonies. The exploitation of foreign labour, in particular labourers working in Japan under the Technical Intern Trainee Programme, is a longstanding issue that has been the subject of much international criticism. And while Naoko Hashimoto has contributed a thought provoking chapter on the differing treatment afforded to different categories of forced migrants in Japan, we have not been able to give sufficient examination to the problem of refugee status determination, and the general unwillingness of the government to fulfil its obligations under the 1951 Refugee Convention.

Nevertheless, this volume provides a valuable overview of many of the main civil and political rights issues that Japan faces at this moment, and the measures – if any – taken by the government to address them. It is our sincere hope that it will be a useful tool for scholars, advocates, and students of human rights.

In his chapter on freedom of expression, Saul Takahashi elaborates on the official and unofficial structures that prevent the Japanese media from fulfilling their role as the fourth estate of democracy. In particular, the ‘kisha club’ system institutionalises access to journalism, and forces media outlets to sanction journalists that do not abide by ‘the rules’.

Sasakura focuses on recent reform of criminal justice procedure in Japan, in particularly the introduction of a system similar to plea bargaining. She notes several deficiencies in the new system, and argues that, contrary to its initial intent, the reform has strengthened the hand of the prosecution even further.

Kihara-Hunt explores another area of law enforcement, namely the policing of demonstrations. Examining the actions of riot police and other agencies in response to recent sit-ins against American military bases in Okinawa, she finds a multitude of issues to be raised, including potential excessive use of force.
Fumie Saito shows in her chapter how Japan still lags far behind other OECD countries in measures of gender equality. Efforts by the government, spurred mainly by civil society, have brought about progress in some areas over the years. However, it has also led to a backlash by conservative actors, who continue to argue for a subservient role for women.

Gender equality is also the focus of a chapter by Kihara-Hunt, who examines discrimination against women in various areas of Japanese family law. Though the subject of public debate within the country, some of the issues have not received sustained international attention. As with other areas of women’s rights, the little progress that has been made has been extremely slow.

Hate speech in Japan has been the subject of increased attention in recent years. In his chapter on the subject, Takahashi shows how government measures have been inadequate. He also argues that the hate speech issue fits neatly into the dominant human rights narrative in Japan, namely that human rights are only violated by private actors, not by the state.

Ian Neary examines government measures to ensure the rights of the burakumin, and whether those measures can be said to fulfill Japan’s positive obligations to combat discrimination against that minority group. He notes that official efforts have fallen short in several key areas, and that discrimination remains pervasive even after 30 years of government action.

A chapter by Takahashi on police surveillance of Muslims in Japan shows how ethno-religious profiling has become official policy, with every individual belonging to that religious minority ipso facto deemed a national security risk. This narrative has been adopted not only by the police and the mainstream media, but by the Japanese judiciary as well.

Tara Van Ho and Theodora Valkanou examine an often overlooked aspect of the Fukushima disaster, namely the procedures available to provide compensation to persons who were forced to evacuate the vicinity of the nuclear reactor. Examining their compatibility with Japan’s obligations under human rights norms, they find the procedure wanting in several respects.

Hashimoto writes on the differing rights and entitlements afforded to forced migrants in Japan, depending on their legal status and the manner in which they came to the country. She concludes that this stratification derives from a perceived overriding imperative on the part of the government to control the country’s borders, even though the policies adopted to that end may violate the country’s obligations under the 1951 Refugee Convention.

Mina Watanabe examines the ongoing government refusal to admit responsibility for the wartime sexual slavery of the so called ‘comfort women’, and notes how international human rights bodies have increasingly focused on the issue. Noting that the continuing failure to provide a remedy means that the rights of the victims continue to be violated, she argues, inter alia, for a gender sensitive approach to Japan’s human rights obligations.

In a chapter on Japan and the international human rights mechanisms, Takahashi shows how the ‘comfort women’ issue has acted as a catalyst for Japan to adopt an increasingly recalcitrant, uncompromising stance towards human rights
bodies. Takahashi argues that a narrative is being propagated whereby ban-nichi (anti Japanese) actors, including the UN and ‘leftists’ in Japan, are spreading falsehoods against the country, and notes that this narrative could have potentially disastrous implications for human rights.
The loss of the human rights champion Sir Nigel Rodley was a shock to human rights defenders, people in UN human rights circles, students, victims and survivors of human rights violations, people who are struggling to claim their human rights, and all those who are standing together with marginalised people, trying to make the world a fairer place. The loss is felt by the world.

This, I believe, is a correct statement. However, it does not feel completely right. It is because what urged me to initiate this book project is not to commemorate this person described. It is not Sir Rodley that I wished to dedicate a book for, but Nigel, who came to the presentation of my Ph.D. research, sat in the very front row, nodding and frowning at each sentence I delivered, who patted my shoulder and commended how incredibly astonished he was at my findings, that made me want to do something to commemorate his departure. It is Nigel, who, even after having spent all his life for human rights, was always curious at new findings and still angry at serious human rights violations, who moved us. It is Nigel, who was apparently telling some students at the University of Essex to come look for me at the UN Office of the High Commissioner for Human Rights (UN-OHCHR) if they were visiting Geneva (so I was told by those students), whom I wished to show my utmost respect for. At that time I was a junior officer at the OHCHR, and the University of Essex has dozens of graduates at the office, so, why would he recommend that they look for me?

It was that human touch, his care for other people, and his openness and ability to connect to people as people that moves people. There are not too many people who can be a world leader of something and still connect to everyone individually. I feel privileged to have been one of those thousands, or maybe tens of thousands, around him.

This particular idea of having human rights issues in Japan compiled in English and dedicating it to him occurred to me largely because of his statement as the chairperson of the Human Rights Committee, after the Committee’s review of the situation in Japan in 2014. He showed dismay, very politely and gracefully, that the delegation may have sensed that the Committee’s recommendations are ‘simply not taken into account, they are not acted on’, and the process of Japan’s reporting and the Committee’s recommendations ‘becomes a very repetitive process, which may not be, to put it mildly, the best use of resources.’\footnote{1} There are
contributions to be made, I thought, to move past that repetition. Experts at human rights mechanisms, like Nigel, might benefit from a compilation on the human rights situation in Japan. Human rights defenders may be able to use a handy compilation of human rights issues in Japan. There is work to be done from where Nigel left. That is what triggered this project.

To me, Nigel was always a model of the ‘civil and political rights’ person. I loved the times Nigel would pop by the office of Françoise Hampson, my former Ph.D. supervisor and Emeritus Professor at the University of Essex, for what was supposed to be a quick administrative conversation but quickly developed into a discussion of new cases at regional human rights courts or on engagement with civil society groups in many corners of the world. I loved their analysis and criticism, blunt but aimed at finding a solution, or even at constructing a solution.

I wish for us to also remain constructive in our work, in this book and beyond. I would be honoured if this book could contribute to the analysis on some of the issues that Nigel wished to work on further. To Nigel, to our friend.

Note

1 Hate speech and the false human rights narrative in Japan

*Saul J. Takahashi*

**Introduction: hate speech as a new phenomenon**

Starting in the early 2000s, Japan witnessed a sudden and dramatic increase in hate speech, in particular demonstrations aimed at propagating and promoting racial discrimination. Seemingly out of nowhere, right wing extremists organised numerous processions in public spaces spewing racial and violent epithets, with the clear aim of inciting racial hatred. In a society where overt expressions of discontent are generally frowned upon, many Japanese were shocked at the repeated scenes of masked groups numbering in the hundreds openly threatening violence, mainly towards resident Koreans and Chinese. A compilation of recorded scenes from these demonstrations viewed by the Committee on the Elimination of Racial Discrimination (CERD) upon review of Japan report in 2014 show marchers with megaphones in Korean neighbourhoods screaming ‘roaches go home’, ‘kill all the roaches’, and that they would ‘do a Nanjing massacre to [Koreans] again’ if they did not leave the country (Committee on the Elimination of Racial Discrimination 2014b). Anti racist organisations held counter demonstrations, with ensuing scuffles and arrests (see e.g. Network for the Elimination of Racial Discrimination in Japan (ERD-Net) 2013).

Japan is hardly a stranger to shows of force by right wing extremists: for decades, right wing organisations have roamed the streets with large black trucks and oversized speakers, blaring militaristic songs and oration with impunity. With heavies in military style uniforms and mobster style haircuts, such organisations can be threatening, which is presumably their goal: however, they generally steer clear of openly advocating violence.

The hate demonstrations of the 2000s, however, are a new breed. Unlike the organised, relatively disciplined groups of before, they stem from a scattered and disparate grass roots conservative movement in the country. Connected mainly through the internet, this movement has achieved strong momentum in recent years, and has been successful in advancing some of its views into the mainstream. The practically countless number of books and other publications bordering on hate speech towards Koreans and Chinese (though not necessarily nationals of those countries resident in Japan) accelerated efforts by the government to deny its human rights abuses during the war, and the overall rise in political power of
Nippon Kaigi and other extremist organisations are evidence to this effect. There can be little doubt that this overall climate has worked towards emboldening organisations with more inclination towards ‘direct action’ to take their hateful views to the streets. Government data suggests that there have been fewer marches in recent years (Jinken Kyouiku Keihatsu Suishin Senta 2017: 33). However, it is notable that such actions were unheard of until relatively recently. Even at its current reduced level, on average at least one hate speech demonstration takes place somewhere in the country every day (Jinken Kyouiku Keihatsu Suishin Senta 2017: 33).

Hate speech in Japan is directed mainly towards Koreans in the country, predominantly those with permanent residency status. Japan forcibly annexed Korea in 1910, and, though subject to wide ranging discrimination and abuse, Koreans were automatically afforded Japanese citizenship, and with authorisation could reside in Japan. As many as two million Koreans had migrated to Japan by the end of WW2 in 1945, some of whom were forced to work in Japan’s military industry complex or as sex slaves. In 1952, immediately upon the end of American occupation, Japan unilaterally revoked the citizenship of all Koreans residing in the country, forcing them to either ‘return’ to a newly independent Korea or live in Japan as foreign nationals, with no special dispensation for their historical circumstances. Widespread international condemnation of this policy over decades finally led to the adoption of new legislation in 1991, which affords special permanent residency status to Koreans who migrated to Japan before the end of WW2 and their descendants. Though almost 700,000 Koreans obtained permanent residency pursuant to this new policy, the number has been steadily declining, largely due to the increasing number of Koreans who choose to obtain Japanese citizenship: government statistics show that, as of the end of 2017, only just under 330,000 persons held the special status (Houmushou 2018). Despite the large number of at least legally assimilated Koreans, 600,000 is the generally cited figure of Korean residents, and discrimination against Korean residents remains widespread, in particular in the area of employment.

Hate speech in Japan, therefore, is inextricably linked with the public debate surrounding Japan’s human rights violations during the War, in particular with increasing efforts on the part of the right wing (including many conservative politicians) to deny outright that violations even took place. Put simply, recognition of past injustices logically leads to the conclusion that Korean residents in Japan must be treated in accordance with their historical circumstances. Denial of those injustices, on the other hand, leads to suspicion and hostility.

The most prominent organisation propagating hate speech targeting Korean residents is the Zaitoku-kai, short for Zai-nichi tokken wo yurusanai shimin no kai, or ‘citizens who will not allow special privileges of Koreans’. Formed in 2007, the Zaitoku-kai propagates a narrative of victimhood similar to that of racist organisations in other countries: it claims that Koreans cheat the welfare system, do not pay taxes, and that crime committed by Koreans against Japanese is rampant yet goes unreported in the mainstream media (see e.g. Zaitoku-kai 2007). Naturally, none of these claims has any basis in reality, but prominent figures connected with
Prime Minister Abe have made similarly outlandish assertions, in particular accusing the media of avoiding the publication of the names of criminal suspects when they are Koreans (Huffington Post 2016). After natural disasters, wild stories on social media of Koreans ransacking empty homes and committing other crimes have gone viral (Mainichi Shimbun 2014). These are reminiscent of unfounded rumours of Koreans poisoning wells that spread after the great Tokyo earthquake in 1923, and which led to mass vigilante killings of Koreans throughout the city – atrocities which, like those committed during the War, prominent right wing politicians appear to be moving towards denying as well (Yoshikawa 2017).

In addition, security related concerns regarding North Korea’s abduction of Japanese and the country’s nuclear programme has added fuel to the fire, legitimising in the eyes of many the notion that North Koreans in Japan are a fifth column in the country. Zaitoku-kai regularly targets Korean schools (which are predominantly attended by North Koreans) in the country, demonstrating in front of school gates and hurling racial insults at the students (though, as discussed later, the courts in some jurisdictions have been relatively open to restricting such activities). In March 2016, the government requested local authorities to terminate educational subsidies for Korean schools, stating openly that the measure was in response to nuclear activities by North Korea and that the loyalty of the schools to Japan was in question (Yomiuri Shimbun 2016). In February 2018, Ruriko Miura, a right wing scholar with ties to the government, made the unsubstantiated claim that there were North Korean ‘sleeper cells’ throughout the country (Sankei Shimbun 2018).

**International standards and Japan’s inadequate legal framework**

International human rights law is clear that states must prohibit hate speech. ICPPR Article 20(2) states that ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’ ICERD Article 4 goes further, requiring in 4(2) that state parties:

> declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

Under Article 4(3), state parties must also ‘prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law’. The treaty body charged with monitoring ICERD, the Committee on the Elimination of Racial Discrimination (CERD), has published several general comments on this Article and the nature of state obligations under it. In the most recent one, in 2013, CERD ‘[recalled] the mandatory
nature’ of Article 4, noting that it was recognised as ‘central to the struggle against racial discrimination’ during adoption of the Convention (Committee on the Elimination of Racial Discrimination 2013: 4). Nevertheless, Japan lodged a reservation to Articles 4(2) and 4(3) upon ratification of ICERD, stating it would ‘[fulfill] the obligations under those provisions to the extent that fulfillment of the obligations is compatible with the guarantee of the rights to freedom of assembly, association and expression and other rights under the Constitution of Japan’.

Relevant in this regard is the lack in Japan of comprehensive anti discrimination legislation. Both CERD and the Human Rights Committee, which monitors application of the ICCPR, have been consistent in calling on state parties to adopt comprehensive legislation prohibiting all forms of racial and other discrimination. Despite being state party to both of the above conventions, Japan shows no sign of doing so – a stance subject to persistent criticism at successive reviews by these and other human rights treaty bodies (see e.g. Committee on the Elimination of Racial Discrimination 2014a: 2–3; Human Rights Committee 2014: 3–4).

The government’s argument has long been that there is no need for such laws, since the Constitution guarantees equality before the law. However, though the relevant Article in the Constitution, Article 14, states ‘All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin,’ the Japanese text says ‘Subete kokumin ha’, more properly translated as ‘nationals’ or ‘citizens’. In other words, the Article applies only to Japanese citizens, not foreign nationals – a deficiency conveniently glossed over by the government (see e.g. Government of Japan 2012: 4). Japan became state party to ICERD in 1995, 30 years after adoption of the convention by the UN General Assembly. Yasuko Moro’oka notes that this long time span is in sharp contrast to most other human rights conventions, which Japan ratified much quicker after adoption, and argues that this is indicative of the government’s passive attitude towards the eradication of racial discrimination. She also points out that, contrary to the other conventions, where significant legislative changes were made upon ratification, no new legal provisions were prepared upon ratification of CERD (Moro’oka 2013: 71–73). As mentioned earlier, far from legislating proactively, Japan lodged a reservation to Article 4. On the occasion of the first review of Japan’s implementation of the Convention, CERD already:

[expressed] concern that [the] interpretation [in Japan’s reservation] is in conflict with the State party’s obligations ... article 4 is of mandatory nature ... and the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the rights to freedom of opinion and expression.

(Committee on the Elimination of Racial Discrimination 2001: 3)

The McLean case of 1978 is often cited as the leading precedent regarding the rights of foreign nationals in Japan. Ronald McLean, an American national teaching in the country, had been refused an extension of his visa because of his
participation in an anti Vietnam war demonstration. The Supreme Court found in favour of McLean, stating that constitutional rights that are not explicitly or, by their substance, implicitly limited to Japanese nationals can also be exercised by foreign nationals in the country (Saiko Saiban-sho 1978). Nevertheless, as pointed out by Moro’oka, the court also stated that the rights of foreign nationals are guaranteed ‘only within the framework of immigration controls’, restricting this seemingly liberal view (Moro’oka 2013: 196). The courts have subsequently found no issue with the fingerprinting of foreign nationals (Saiko Saiban-sho 1995), the exclusion of Korean permanent residents from managerial positions in the civil service (Saiko Saiban-sho 2005), and other openly discriminatory practices. Hebon Shin argues forcefully that the McLean precedent has for all practical terms been superseded by Japan’s 1979 ratification of ICCPR (Shin 2013: 58–60). However, the Japanese judiciary has yet to subscribe to this view, and is in general reticent of arguments based on international standards.

The government initially attempted to shirk off the rising tide of domestic and international criticism of its inaction on hate speech. In Japan’s state report to CERD in 2013, the government argued that it ‘[did] not believe that, in present-day Japan, racist thoughts are disseminated and racial discrimination is incited’ to the extent that new legislation was necessary (Government of Japan 2013: 15). Nevertheless, the government was finally forced to take action, and in May 2016, parliament adopted legislation against hate speech (titled ‘Act on the Promotion of Efforts to Eliminate Unfair Discriminatory Speech and Behavior against Persons Originating from Outside Japan’ – see Government of Japan 2017: 11). This law aims at eradicating ‘unfair discriminatory speech and behaviour to incite the exclusion of persons originating exclusively from a country or region other than Japan or their descendants and who are lawfully residing in Japan from the local community’ (Article 2).

This law has received criticism for being inadequate in several areas (see e.g. Nihon Bengoshi Rengo-kai 2016). The definition of prohibited speech contained in Article 2 of the law is restricted only to speech directed at lawful residents of the country, thereby excluding persons in Japan without legal status. In addition, the law only attempts to address discrimination based on nationality, and not any of the other prohibited grounds enumerated in CERD, i.e. ‘race, colour, descent, or national or ethnic origin’ (Article 1). However, perhaps the most glaring flaw with the law is that there are no penalties – as noted by Koji Higashikawa, it is mainly a ‘general statement’ (Higashikawa 2018: 4) against hate speech, encouraging the government and local authorities to take what the law states to be ‘appropriate’ measures. The government is open about this in its 2017 report to CERD, citing the preamble of the law in stating that the purpose of the law is to ‘spread awareness among the general public and to promote their understanding and cooperation through further human rights education and awareness-raising activities’ (Government of Japan 2017: 26). The August 2018 CERD session is noteworthy in that it will be the first treaty body review of Japan since the hate speech law came into force.

Even with hate speech itself not prohibited, the authorities can restrict hate demonstrations on other grounds, though they have generally been reticent to do
so. In one particularly egregious case in 2009, four Zaitoku-kai members (including the head of the organisation) burst into a Korean school in Kyoto, causing damage to the premises. These four were prosecuted on charges related to forcibly obstructing business and exhibiting threatening behaviour, and received sentences ranging from one to two years – though the sentences were suspended (see Kyoto Chiho Saiban-sho 2013: 13). The court also ordered the Zaitoku-kai to refrain from demonstrating within 200 metres of the school. The government mentions this case in its report to CERD, presenting it as ‘one example of a successfully prosecuted case’ (Government of Japan 2017: 32). As further evidence of progress, the government then lists two other court judgments on hate speech cases: one in Osaka in 2014, and another in Takamatsu in 2016, noting that specific references were made in both of these court judgments to the provisions of ICERD (Government of Japan 2017: 33, 34). This is arguably misleading: the other cases are civil suits, where the victims brought cases demanding damages (in fact the Osaka judgment is simply a civil suit brought forward by the victims of the Kyoto school attack: see Osaka Koutou Saiban-sho 2014). It is obviously positive that those cases have resulted in favourable outcomes for the plaintiffs, and that, in a departure from prevailing practice, the judiciary has started to be proactive in citing standards of international human rights law. Nevertheless, the fact remains that, in the absence of any criminal legislation prohibiting hate speech, it is incumbent upon the victims of hate speech to bring forward cases using their own means. The considerable resources involved in terms of time and finances dissuade all but the most dedicated (or wealthy) victims from resorting to legal recourse.

In the absence of strong action from the government, some local authorities have taken their own steps. Notable is the local ordinance of the city of Osaka, which was adopted in early 2016 and which defines hate speech for the first time in Japanese legislation. The definition is considerably narrower than Article 1 of ICERD, in particular in its sole focus on discrimination on the basis of ‘race or ethnic origin’ at the exclusion of other forms of discrimination. Nevertheless, it avoids the other obvious failings of the national law, and establishes a system whereby the city publishes, in a ‘name and shame’ fashion, perpetrators of hate speech (Osaka-shi 2017). In November 2017, the city of Kawasaki announced it was planning to adopt a policy prohibiting the use of public spaces for hate speech. The policy, which came into force in June 2018, uses the definition in national law (Kawasaki-shi 2017: 2).

Human rights violations by private actors: the narrative

With regard to hate speech in Japan, therefore, the glass is perhaps half full. National legislation remains inadequate, but the government has recognised hate speech as a problem, and has taken some steps in that regard. Some local authorities, in particular in locales particularly affected by hate speech demonstrations, have adopted measures that go beyond the national framework. However insufficient, it would be unfair to say that nothing is being done.
At the same time, it should be noted that the issue of hate speech fits perfectly the dominant narrative in Japan surrounding human rights, namely that human rights violations are committed by private actors, i.e. citizens vis-a-vis other citizens. In the minds of most Japanese, the term ‘human rights’ refers to issues such as discrimination in hiring and promotion, abuse of elderly people in retirement homes, violations of privacy by journalists, and bullying at schools. Those are no doubt serious issues, but human rights is first and foremost a legal framework that exists to protect persons from arbitrary actions of the state. The state also has an obligation to ensure that human rights are respected by private actors within its jurisdiction, but this too is a matter of state responsibility.

These fundamental principles of human rights law are completely absent in the Japanese narrative, where it is private actors who are to blame, and the state is but a benevolent, paternal figure that gently scolds wayward children where necessary and redirects them to the correct path. Indeed, a case in point is the Hate Speech Act itself, which, before stating any actions to be taken by the central government or by local authorities, demands that the people must ‘further their understanding of the need to eliminate unfair discriminatory speech and behavior against persons originating from outside Japan and shall endeavor to contribute to the realization of a society free from unfair discriminatory speech’ (Article 3, translation in Government of Japan 2017: 26).

In 2016, the Ministry of Justice commissioned the ‘Foreign Residents Survey’. The first official survey of its kind, the survey is notable in that it states clearly that its objective is to gauge the human rights issues faced by foreign residents in the country (Centre for Human Rights Education and Training 2017: 2). Nevertheless, the questions asked in the survey focus solely on discriminatory actions by private actors, such as discrimination in employment and housing, or being refused entry into restaurants (as well as hate speech). Utterly absent from the survey is any mention of the countless reports of arbitrary stop and search practices on the part of the police (Japan Times 2017), ill treatment in immigration detention centres (Reuters 2017), overly restrictive policies towards refugees (Tokyo Shimbun 2017), or any other violation for which the government bears direct responsibility. In addition, similar to the hate speech law, the survey was directed only towards lawful residents of the country (there is even a question asking respondents to list their immigration status), and therefore incomplete from the outset.

It is not clear whether any concrete action is planned on the basis of this survey. Of course, all of the issues of discriminatory treatment by private actors could be addressed by the kind of strong and comprehensive anti-discrimination legislation that the treaty bodies have successively requested Japan to adopt.

Unsurprisingly, the notion that human rights violations are committed only by private actors is promoted heavily by the government, together with the belittling of human rights protection as being constituted of problems that can be solved easily by persons merely being considerate of others. Human rights is reduced from a shield to protect against arbitrary state actions and trivialised as simple misunderstandings or a lack of compassion.
One only need to look at the promotional material of the Human Rights Bureau (HRB) of the Ministry of Justice to see this narrative at work. For years, international human rights bodies have urged Japan to establish an independent human rights institution, and the country’s reticence to take any meaningful action on this point has been the subject of longstanding criticism. The main rebuttal of the government for many years was that the country already had an institution dedicated to the protection of human rights – namely the HRB. However, the HRB is not an independent body: it is under the direction of the Minister and staffed completely with career civil servants, and is therefore clearly not compliant with the 1993 Principles relating to the Status of National Institutions (the Paris Principles). In 2012, the Democratic Party government submitted a bill to create an independent human rights institution in compliance with the Paris Principles; however, the Liberal Democratic Party (LDP) returned to power almost immediately afterwards, and the bill was for all practical purposes abandoned. Since then, at treaty body sessions the government has revised the argument that the HRB operates as a human rights institution, instead outlining the 2012 developments and stating that government consideration of a ‘desirable framework [for a human rights institution] is being appropriately discussed’ (Government of Japan 2017: 27). Interestingly, these statements would seem to indicate a recognition that the HRB cannot be said to be a national human rights institution in accordance with international standards.

The HRB conducts individual counseling sessions for aggrieved persons, and attempts to mediate a solution. Counselors, most of whom are volunteers, are placed nationwide, and cases counseled number more than 21,000 annually (Government of Japan 2012: 3). At least judging from the information published by the HRB, though, none of these cases involve official action – highlighted issues include domestic violence, child abuse, bullying in schools, workplace harassment, and ‘disputes among neighbors concerning noise’ (Houmusho 2017; Government of Japan 2012: 3).

What little information the HRB has published (mainly in an English report in 2014) regarding its cases is indicative of the approach. One highlighted case involved a disabled person in a wheelchair who was refused entry into a beauty salon. HRB states that:

> having heard the explanations of both sides, [it] worked out resolutions that fit individual situations such as depending on the degree of disability of the victim and proposed to the salon that measures to avoid risks such as support from an attendant and rescheduling of the appointment time might be best. Since the salon showed an understanding of this proposal by the Bureau and the victim also accepted it, under this measure, the victim came to be able to go to the salon. (Ministry of Justice Human Rights Bureau 2014: 59)

Another case was brought by a parent of a student who had suffered bullying at school. This parent was unhappy with the measures taken by the school, but, after the intervention of HRB,
the parent showed understanding over the manner in which the school had handled the bullying and the school also decided to handle the case taking the parent’s requests into account. And as a result, trust was redeemed between both sides. 

(Ministry of Justice Human Rights Bureau 2014: 61)

Perhaps the most serious case in the report is one of abuse in a care facility for disabled elderly persons. HRB ascertained that one staff member had indeed ‘committed abusive behavior against a partially paralyzed resident with dementia such as by hitting the resident’s face and raising the resident’s body by grabbing hold of that resident’s hair when changing the diapers’. Questions of criminal prosecution would seem to be raised by this conduct, but apparently HRB simply ‘instructed the worker of the facility to understand the seriousness of this abusive behavior and not to repeat similar behavior’ (Ministry of Justice Human Rights Bureau 2014: 60). HRB also provides services to foreign residents (though presumably only those with legal status), and the government’s 2017 report to CERD lists some examples of the Bureau’s work on cases of foreign tourists being refused accommodation at hotels, as well as foreign residents being refused rental accommodation. There is also one example of a video of a hate demonstration posted on the internet by a ‘rightist group’. BHR ‘recommended said rightist group representative to reconsider his/her acts and never to commit similar acts again’, and also requested the internet service provider to delete the videos. There is no information as to any subsequent developments in that case (Government of Japan 2017: 44).

Nowhere is there any suggestion of the increasingly grave human rights situation in Japan: by and large, the cases are the result of simple misunderstandings, and have amicable conclusions. Human rights violations are therefore downplayed, reduced to insignificant squabbles between otherwise well meaning citizens. BHR promotional material is rife with statements that human rights can be ensured by people ‘being considerate for the feelings of others’ (Houmushou Jinken Yougokyoku 2017), with posters on trains calling on people to respect human rights by giving their seats to elderly people.

Problematic in itself, this narrative plays out in particularly insidious ways in Japan, where social pressure to conform, and in particular to bend to the wish of powerful actors, can be intense. Put succinctly, the person claiming their rights – i.e., the victim – is all too often branded as a troublemaker, for destroying the harmony of the group. In 2015 HRB put a statement on its website that the ‘recent trend to only demand your own rights and not to be considerate to others … is the cause of a wide range of human rights violations’ (Houmushou Jinken Yougokyoku 2015). This language was later changed on the Bureau’s website, but, as noted in another chapter in this volume, the notion that claiming one’s rights is a selfish, ‘inconsiderate’ action is a familiar one in the material of right wing organisations, and, indeed, of the ruling LDP. One LDP publication argues that the human rights provisions of the current Constitution are overly ‘individualistic’, and that ‘just because you have fundamental human rights doesn’t mean you can do whatever you want … if everybody acted selfishly, society would
fall apart’ (Jiyuuminshu-tou 2015: 22). Indeed, one survey on human rights conducted in Ehime prefecture found that 84 percent of respondents agree with the statement that ‘nowadays more people lack endurance and are always claiming their rights’, and 68 percent agree that ‘there would be no human rights problems if everybody would be considerate’ (Ehime-shi 2016: 3).

Conclusion

The Japanese government has been making efforts to counter the rise in racist hate speech in the country, but the efforts are lacking. National legislation adopted in 2016 has numerous deficiencies, and it is largely up to the efforts of local authorities to adopt local ordinances that may prove to be marginally more effective. In particular, the Kawasaki ordinance that would prohibit public space from being used for hate demonstrations would at least make a difference in ensuring that extremist demonstrations do not take place. Nevertheless, efforts are hampered by the obstinacy of the government in refusing to consider comprehensive anti-discrimination legislation, as recommended consistently by treaty bodies and other human rights organisations.

Hate speech in Japan is a serious human rights issue, and increased efforts against it are warranted. At the same time, it must be stressed that it is the government that bears the responsibility for complying with Japan’s human rights obligations – not the citizenry, or any other private actor. The narrative promoted in Japan, that human rights are violated by other citizens, not the government, is dangerous, and arguably serves as an attempt to deflect attention from the deteriorating human rights situation in the country.

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