

Human Rights in Japan, South Korea and Taiwan

Ian Neary

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The question of human rights in Asia is a topical and controversial issue. The United Nations Charter commits its members to contradictory principles; on the one hand it forbids interference in another country's affairs and, on the other, aims to guarantee rights and freedoms irrespective of race, sex, language and religion.

This conflict is nowhere more apparent than in Asia, where the debate about 'Asian Values' has intensified following the economic slump. Some Asian countries have resisted the development of international human rights standards as an imposition of western ideals onto non-western political and social systems, a move which they are keen to resist, partly because of the exposure to external criticism which results from such involvements.

Debate about the relevance of human rights to Asian societies has thus far focused on either evidence from single country studies or dealt with the issues at a very broad, abstract level. This book looks in detail at the history of the introduction of human rights ideas into Japan, South Korea and Taiwan, and examines how and to what effect state and society, have incorporated the specific international standards on children's and patients' rights into legal systems and social practice.

This comprehensively researched, accessible book will be a valuable resource for students and scholars of Asian Studies, Human Rights, Sociology and Politics.

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For Rose and Tomas

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Ian Neary
St Osyth
2 July 2001

Abbreviations and glossary

<i>Ainu</i>	Indigenous people now found mainly in Hokkaidô
APEC	Asia Pacific Economic Co-operation
BLL	Buraku Liberation League (Japan)
CAHR	Chinese Association for Human Rights (Taiwan)
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
<i>Ch'ondogyo</i>	Egalitarian religion which emerged in nineteenth century Korea as a social movement, <i>Tonghak</i>
<i>Chongryun</i>	General Federation of Korean Residents in Japan, affiliated to North Korea, DPRK
<i>Choson</i>	Period in Korean history 1329–1910, also referred to as the <i>Yi</i> period
CHR	Commission on Human Rights
CLB	Civil Liberties Bureau, Ministry of Justice (Japan)
CLC	Civil Liberties Commissioner (Japan)
CRC	Convention on the Rights of the Child
CWLF	Child Welfare League Foundation (Taiwan)
DoH	Department of Health (Taiwan)
DPP	Democratic Progressive Party (Taiwan)
DPRK	Democratic People's Republic of Korea, North Korea
FDA	Food and Drug Administration (USA)
GCP	Good Clinical Practice
GHQ	Allied Powers General Headquarters, source of US policy for Japan throughout the Occupation, 1945–52
HEF	Humanistic Education Foundation (Taiwan)
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists

IMADR	International Movement Against all Forms of Discrimination and Racism
<i>Inkwon Sarangbang</i>	Human rights NGO, South Korea
JCLU	Japan Civil Liberties Union
JCP	Japan Communist Party
JFBA	Japan Federation of Bar Associations (<i>Nichibenren</i>)
<i>Jiyu Minken Undō</i>	Freedom and People's Rights Movement, advocate of democratic ideas in 1870s and 1880s (Japan)
JMA	Japan Medical Association
JSP	Japan Socialist Party
JTU	Japan Teachers Union
KAPCAN	Korean Association for the Prevention of Child Abuse and Neglect
KBA	Korea Bar Association
KCIA	Korean Central Intelligence Agency
KIHSA	Korean Institute for Health and Social Affairs
KMT	<i>Kuomintang</i> , Nationalist Party (Taiwan)
KOHRNET	Korea Human Rights Network
<i>koseki</i>	Family register (Japan)
KTU	Korean Teachers Union
LDP	Liberal Democratic Party
MDRC	Medical Disputes Review Committee (Taiwan)
<i>Meiji</i>	Posthumous name of the emperor <i>Mutsuhito</i> (1852–1912), also the name given to the period of his rule 1868–1912
MFA	Ministry of Foreign Affairs
MHA	Mental Health Association (Taiwan)
MHA	Ministry of Home Affairs
MHRT	Mental Health Review Tribunal (South Korea)
MHW	Ministry of Health and Welfare
<i>Minbyun</i>	Lawyers for a Democratic Society (Korea)
<i>Mindan</i>	Korean Residents Union in Japan, South Korea affiliated
MoE	Ministry of Education
MoJ	Ministry of Justice
MoL	Ministry of Labour
MRB	Medical Review Boards (Taiwan)
NCCCK	National Council of Churches in Korea (Protestant)
NCDC	National Coalition for the Democratic Constitution (South Korea)
NCU	National Conference for Unification (South Korea)
NGO	Non-Governmental Organisation
NHRC	National Human Rights Commission
NSL	National Security Law (Korea)

NSPD	National Security Planning Board (formerly KCIA, Korea)
ODA	Overseas Development Assistance
PRB	Patients' Review Board (Japan)
PRC	People's Republic of China
PSPD	People's Solidarity for Participatory Democracy (Korea)
RoC	Republic of China (Taiwan)
RoK	Republic of Korea (South Korea)
SCAP	Supreme Commander for the Allied Powers (Japan)
SML	Special Measures Law (Japan)
<i>Suiheisha</i>	Organisation formed by Burakumin 1922–41
TAHR	Taiwan Association for Human Rights
<i>Taishô</i>	Posthumous name of the emperor <i>Yoshihito</i> (1879–1926), also the name given to the period of his rule 1912–26
<i>Tôhoku</i>	Name given to six prefectures at the northern end of the main island of Japan
<i>Tokugawa</i>	Name given to the period 1603–1868 when Japan was under the political structure controlled by the head of the <i>Tokugawa</i> family
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNICEF	United Nations International Children's Emergency Fund
WHO	World Health Organisation
WMC	World Medical Conference
<i>Yushin</i>	'Revitalising reform', as in <i>Yushin</i> constitution (Korea)



Map of East Asia

1 Introduction

At the start of the twenty-first century human rights issues permeate most dimensions of political discussion. The foreign policies of many states are judged by their contribution to human rights promotion and aspects of domestic policy are assessed by reference to human rights standards created by international organisations. In the last quarter of the twentieth century international organisations brokered general agreements on human rights, conceived as minimum standards below which we should not allow ourselves to fall, about which there is a growing consensus, if not yet unanimity. However these developments have been accompanied by a degree of dissent from political theorists: ‘human rights are just ... what *we* in Western liberal democracies believe. They are not, as they purport to be, universal or timeless nor do they justify intervention in the practices of others’ (Mendus 1995: 16).

Meanwhile some practising politicians most notably, though not exclusively, in China, Singapore and Malaysia have argued that human rights are not compatible with ‘Asian values’ and that human rights diplomacy is an extension of colonial policy by other means.

Attempts to rebut the ‘Asian values’ case have largely proceeded at a high level of generalisation. The aim here is to contribute to the discussion on the role of human rights in Asian societies by delving a little more deeply into the argument. If the discussion so far has proceeded largely at the ‘macro’ level, asking such questions as what is so ‘Asian’ about ‘Asian values’? in what follows we will seek to focus on the ‘meso’ levels, the impact of international standard setting on human rights policies in particular East Asian states and the ‘micro’ level of the understanding and implementation of the rights of children and patients.

Asia itself is a slippery concept, by some definitions stretching from Cyprus to the Cook Islands, and a comparative study which uses qualitative data needs to restrict its focus to a small number of these states to be manageable. Here we will confine ourselves to considering the development and implementation of human rights ideas in Japan, the Republic of Korea (RoK, aka South Korea) and the Republic of China (RoC, aka Taiwan). We will begin with a series of country studies which look at the origins and early

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reception given to human rights in these societies – our ‘meso’ level – and then consider the impact of the idea that children and patients have rights.

However before moving on to that main exercise we need to sketch in the bigger picture. In this first, introductory section we will describe the main contours of the international human rights regime and the ‘Asian values’ discourse that has emerged in opposition to it. Then we will review some aspects of the theory about human rights to indicate how the questions to which this study is seeking answers are rooted in the broader human rights literature. Finally, we will explain the reasons for choosing children’s and patients’ rights as case studies and the potential significance of any conclusions we may be able to draw.

The United Nations and human rights standard setting

The UN Charter commits its members to contradictory principles relating to human rights violations. On the one hand it endorses the principle of absolute national sovereignty and forbids interference in another country’s internal affairs. On the other hand it declares that one of its major purposes is to ensure rights and basic freedoms are guaranteed irrespective of race, sex, language and religion (Par. 1.3). At first the UN and even the Commission on Human Rights (CHR) placed most emphasis on sovereignty but they soon started to elaborate their view of human rights. In 1946–47 the CHR drafted a Universal Declaration of Human Rights (UDHR) which was adopted by the General Assembly in 1947. This, however, was only a declaration and it had no binding force on states, so the CHR decided to develop these ideas into covenants, multi-lateral treaties which when ratified by states would give them the force of law within their domestic legal systems. Even at this stage the UN organisation and thinking had to embrace both the liberal tradition supported by the USA and allies and the socialist approach associated with the Soviet Union and supporters. As a result it was decided to draw up two statements of rights, one focused on ‘positive’ social and economic rights, the other on the largely ‘negative’ civil and political rights.

It took somewhat longer to draft the International Covenants on Civil and Political Rights (ICCPR) and Economic, Cultural and Social Rights (ICECSR) which were not completed and ready to present to the UNGA until 1954. Even then, there was no desire to push ahead with the rights agenda and the Commission sought no role other than to deal with relatively uncontroversial topics such as genocide, slavery, refugees and stateless persons. Between 1946–66 its official position was that it had ‘no power to take any action in regard to any complaints concerning human rights’ (quoted by Alston 1992: 139).

In the 1960s many newly independent Asian and African nations joined the UN. This introduced a third force in the UN which undercut the control of the US and SU blocs, neither of which, for different reasons, were interested in developing the UN’s human rights machinery. In 1965 the UNGA

adopted the Convention on the Elimination of all forms of Racial Discrimination (CERD), which included provision for the submission of complaints against states which accepted the procedure. This prepared the ground for the adoption of the optional protocol proposed for the International Covenant on Civil and Political Rights which would permit appeals from individuals who had had their rights violated by states. Most important though was that between 1966–71 a series of resolutions was adopted by the UN against colonialist and racist policies, particularly those of South Africa. Indeed to describe the situation the other way round it was only in the case of South Africa that the Commission on Human Rights played anything like an effective role. It was criticised for having a complex and cumbersome structure that offered numerous opportunities for reports of rights violations to be suppressed, with the result that it protected not the victims but the oppressors (Alston 1992: 145).

Cold War rivalries and the USA's lack of enthusiasm for human rights treaty making meant that the two draft treaties, the ICCPR and ICESCR, ready since 1954, were not adopted by the General Assembly until December 1966. However even then they did not come into force until they had been ratified by thirty-five countries and this did not happen until March 1976. The Human Rights Committee was set up in 1977 to consider reports from and complaints against the states party to the ICCPR: all states which ratify the covenant have an obligation to produce periodic reports though only those states which have ratified the first optional protocol are subject to the complaints procedure. After an initial report submitted within a year of ratification, subsequent reports are due every five years. Between 1977 and 1991 the number of states party to the ICCPR increased from thirty-five to ninety-six. This had gone up to 140 by 1998 with ninety-two countries having ratified the first optional protocol.

The changes of the late 1970s were in part due to the greater awareness of rights issues in international elite public opinion and partly due to the higher profile given to human rights issues by the Carter administration. This provided a supportive context in which the Commission on Human Rights began to play a more proactive role both using existing procedures and devising new ones to allow it both to respond to information received and to seek out information using, for example, special rapporteurs.

Parallel to the Human Rights Committee which supervised the complaints and reporting system under the ICCPR, in 1979 the UN Economic and Social Council established its own arrangements to monitor states' compliance with the ICESCR. After 'eight years of thoroughly ineffectual monitoring' (Alston 1992: 473) a Committee on Economic, Social and Cultural Rights was created and held its first session in 1987. The following year a reporting system was devised obliging each state to present a report at five-yearly intervals. Since then the committee has endeavoured to work out ways to develop an effective monitoring system that maintains dialogue between the committee and the states.

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Other major UN conventions on human rights have also incorporated reporting obligations and set up committees to consider the reports and supervise the implementation by states of the rights listed in the conventions. The Convention on the Elimination of all forms of Racial Discrimination (CERD), adopted in 1965, now requires submission of a report one year after the convention comes into effect and every two years thereafter. The Convention on the Elimination of Discrimination Against Women (CEDAW), which entered into force in 1981, requires reports within a year of coming into effect and every four years thereafter. The Committee Against Torture was set up in accordance with Article 17 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which entered into force in 1987. It too expects to receive a report within a year of ratification and then every four years. Two years later the Convention on the Rights of the Child (CRC) was passed incorporating similar reporting procedures.

Thus in a period of just over thirty years a series of rights conventions has been drawn up by the UN and a complex committee structure created to attempt to supervise this. It is a weak system which has little or no power to enforce the standards set out in the treaties. At best it tries to enter into a constructive dialogue with the states that have ratified the covenants and encourage the incorporation of the international standards into domestic jurisprudence. It can exert no control at all over those states which do not subscribe to the treaties and impose only the mildest of sanctions on those states that have ratified the particular covenant but which refuse to endorse the letter or the spirit of the UN standards. Some question whether the system has any merit at all and see it as serving just the interests of the remaining super power – the USA – (for example, Evans 1998) but overall there is a consensus that, however imperfect, it is contributing to the dissemination of human rights ideas.

The rise of the Asian values argument

Discussion of human rights at the international level was framed by the parameters of the Cold War. Neither the Soviet Union nor the USA were enthusiastic about human rights promotion but, to the extent that they took an interest in these issues, the USA and its allies insisted on the primacy of political and civil rights while the SU and its allies argued the need for prior guarantees of economic and social provision. While the US and the ‘west’ could demonstrate a better (if flawed) record on civil and political rights, until the 1980s the ‘socialist’ countries seemed better able to ensure adequate economic and social rights were provided for in their countries. With the end of the Cold War in Europe this East versus West debate ceased to be relevant. No sooner did it disappear in Europe than it re-emerged in Asia with the Capitalism versus Communism debate being transposed into the Asian values versus Western values argument.

Rapid economic growth in several South East and East Asian societies suggested there was a third way that led to economic development, an Asian model that was neither based on the values of liberal democracy nor communism. Broadly put, the argument was that state intervention in the economy plus social control (i.e. restrictions on rights), plus 'Asian' culture was capable of generating economic and social development. In terms of the debate about rights it was either argued that it was worth the sacrifice of civil and political rights in order to ensure economic and social rights were delivered by economic growth, or that because of their 'culture' Asians did not mind or notice restrictions on rights that might have been bothersome to westerners. This was explained by the way Asian culture has generated a much less vigorous sense of individuality than in the west and a greater willingness to subordinate individual desire to the needs of the wider community. Moreover Asians were encouraged to resist the imposition of alien ideas by such mechanisms as the UN conventions both because they were, in themselves, inappropriate for their cultural context and because they were regarded as a deliberate attempt to disrupt the rapid economic growth of the region (Mahbubani 1999).

The economic crisis which swept through South East and East Asia in 1997–98 was attributed by some to flaws in the socio-economic structure created by the 'Asian' features of the economic growth process and political structure. The persuasive power of the 'Asian values' argument was thus weakened. On the other hand some have claimed to detect evidence that the ultimate responsibility for the crisis lay with those in the west who were not happy to see Asians prosper (for an elaboration of this argument see Milner 2000: 60–1).

There have been a number of rebuttals of the Asian values thesis. Some have sought to show that Asia itself is so vast and contains so many belief systems, many of them mutually incompatible, that it does not make sense to claim that there is any common denominator of 'Asian-ness'. Others have shown how the preferred 'Asian' solution to the individual/society dichotomy, which gives priority to the good of the community over the desires of the individual, is not one that is unique to Asia. I do not propose here to explore this debate any further as it has been done so much better by others already (see, for example, the essays in Bauer and Bell 1999). The important question here is: where does this leave us? Is there any more to be said in the discussion about rights, whether in Asia or anywhere else, that goes beyond the parameters set by universalism on one hand and relativism on the other? Either rights are universal and should be the basis for the common conditions of human existence, not contingent on culture, tradition or history. Or, human rights are normative standards internal to the western cultural tradition, which cannot be assumed to be relevant to the traditions of non-western societies. Or some kind of compromise weak cultural relativism that sees rights as 'relatively universal' (Donnelly 1989: 110).

Recent writing on rights – of which there has been a great deal – does

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suggest different ways to approach the problem of human rights in Asian societies and I want next to review a small part of it to indicate the roots of some of the questions to which this book seeks answers.

Central questions

Inoue Tatsuo seeks first to demonstrate the inauthenticity of Asian values and then to show that liberal democracy is not alien to, but quite appropriate for, Asia. The first stage in this exercise need not detain us except to note that his main concern is to demonstrate the specious nature of the 'Asian values' anti-west-centric stance. In the second half of the argument he asserts that there is an 'endogenous potential' for the development of human rights and democracy in Asia. His main concern is to go beyond the approach which falsely dichotomises the west and Asia to suggest that liberal democracy – 'democracy with due respect not only for economic freedoms but also for civil and political liberties and minority rights' (Inoue 1999: 42) – is capable of dealing with the tensions and disunity of Asian societies. Here he is arguing not only against the 'Asian values' theorists who suggest liberal democracy is being imposed on them by the west but also western writers such as Ernest Gellner, John Gray and John Rawls who, in work published in the 1990s, seem to presume that non-western political cultures are unsusceptible to liberal democracy (Inoue 1999: 47–9). On the contrary, he argues, the 'pluralist sensibility of liberalism' can work within Asia and can bridge the exaggerated gap between the west and Asia.

He is no less critical of the supposed dichotomy between the individualist west and communitarian Asia, showing that there is abundant evidence of communitarian thought in the USA, the epitome of rugged individualism, and that conversely even within the Confucian, Buddhist and Islamic traditions there are liberal, individualist tendencies. This individualist–communitarian tension exists in the west as in Asia and the pattern of that tension varies historically and locally. This is not to say that there are no differences. Democratic practice is not as developed in Asia as in the west and this is in part due to the lack of intermediary communities that can foster democracy. Indeed, he suggests that for the communitarian aspects of Asian society to develop requires a willingness to undertake responsibility for the common good in a social context larger than that of the family. This would require the development of 'intermediary communities' to create a vigorous 'civil society'. A foundation of individual rights is essential for the development of communitarian feeling, as only through individual rights are people enabled or entitled to decide between competing forms of communal responsibility. On the other hand this is not just an Asian phenomenon, there are no pure individualists or pure communitarians in the west or Asia.

Inoue stands as a direct successor to the intellectual tradition of Japanese liberals that can be traced back to the 1870s and 1880s. There have been no

lack of individuals in pre- and post-war Japan who have had as little difficulty as Inoue in seeing a role for liberal democracy in providing legitimacy for the societies of Asia or resolving the individual–communitarian tension in a way consistent with Japanese or Asian conditions. However if there is no doubt about Inoue’s confidence that Asian voices will contribute to the unfinished project of liberal democracy he is not too specific about what that contribution might be. The question, then, that is generated by Inoue is: following consideration of the human rights record in South Korea, Taiwan and Japan over the last fifty years, what has been or will be the contribution of Asian voices to the unfinished project of liberal democracy?

Neil Stammers is unimpressed by the liberal defence of human rights and indeed argues that there are serious deficiencies in all three of the approaches to human rights that derive from the western intellectual tradition: liberal, Marxist and social democratic. In their place he wants to suggest a ‘social constructionist’ perspective in which ‘the individual is an autonomous subject perpetually reconstituted through social practices’ (Stammers 1993: 73) and rights ‘created, recreated and instantiated by human actors in particular socio-historical settings and conditions’ in order to provide minimum protection for the weak against the strong (Stammers 1999b: 981).

Central to his argument is the notion of power which he defines as: ‘being held, developed and exercised consciously by individual or collective actors but also recognises that it manifests itself structurally through the patterning of the social systems regardless of consciousness or intent’ (Stammers 1999b: 983). Starting from this position he shows how each ‘set’ of rights theories begin by challenging power relations but end up by sustaining them. Thus although human rights based on liberal theories have recognised the threat of state power they have in practice supported prevailing economic relations. Marxists have often been at the forefront of struggles for the extensions of rights, particularly social and economic rights, while socialists in power have, at best, regarded rights as benefits conferred by the state and usually tied to obligations or duties that individuals have towards it. Struggles against colonial regimes have often used rights ideas in support of their demands for independence and national self-determination. Frequently, however, once leaders of the anti-colonial movement are themselves in power, they have resisted challenges to the state on the basis of individual self-determination using the argument that the newly created state embodies a greater or higher good than the individual or individuals claiming the rights. In each case concepts of rights cease to challenge power relations and instead begin to sustain them.

What Stammers calls the ‘social democratic’ concept of human rights, unlike the others reviewed above, both recognises the importance of social context and the way in which unregulated capitalism creates severe inequalities of wealth. However it, too, ultimately ‘fails to effectively interrogate the behaviour of powerful economic actors in the private realm’ (Stammers

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1995: 507) and retains an ‘embedded statism’. Just like the other two principal positions it does not sufficiently appreciate the extent to which the state and private economic power pose standard threats to human rights and needs to be directly challenged as such. Rather he proposes that what is needed is a ‘strategy for the establishment and protection of human rights ... rooted in ... political and social demands generated in popular struggles and social movements that directly challenge the legitimacy of existing relations of power’ (1995: 508). The problem is that once human rights become established within states or other social structures they may be used to legitimate and defend the new social structure. Taking cues from this innovative approach to human rights ideas we will seek to identify how social movements have constructed claims for human rights, note how successful they have been in getting these rights institutionalised and examine what use they have been put to when institutionalised – both at the meso and micro levels.

Part of the struggle has been about who, once the texts have been created, should interpret the texts on human rights. The state, which will seek to minimise their critical potential, or those in the social movements. Both Stammers and Gaete focus our attention on the question of who controls the interpretation of a text for,

the truth of a text does not lie in the text itself or in the intentions of its author but depends on the conventions and practices of competent readers, that is readers with authority and a right to appropriate the text ...

Interpretations count as valid when they are seen as valid by competent members of the legal community.

(Gaete 1993: 31)

This suggests the related questions of: what role have rights ideas played in our three Asian societies, to challenge or sustain power relations? and, how successful have groups outside government been in finding acceptance as ‘competent readers’ able to appropriate and interpret the human rights texts?

While adopting quite a different approach, Woodiwiss provides us with a study of the kind Stammers suggests, an examination of how human rights are created within particular socio-historical settings, except that Woodiwiss is largely uninterested in the individuals and social groups (in his case trade unions) which bear and act out ideas, preferring rather to ‘look behind’ at the social and legal conditions in which they exist. His main concern is with the development of labour law in Malaysia, the Philippines, Hong Kong and Singapore, although his model derives from observations on the development of labour law in Japan and he suggests the broad outline of his argument should be applicable to all the countries of Pacific Asia, which would include South Korea and Taiwan.

What these countries have in common is ‘Pacific Capitalism’ whose ‘silhouette’ includes:

- a centralised sometimes authoritarian interventionist state,
- an enterprise structure with state supported co-ordination,
- a patriarchalist legal/ideological foundation which on the one hand justifies the owner’s retention of the surplus and includes an expectation of loyalty from the employees but which also includes an expectation of benevolence.

(Woodiwiss 1998: 56–7)

Woodiwiss’ account starts from Weber’s classic description of patriarchy as a political referent where there is an assumption of natural inequality justified by respect given to a father figure. The ideas that support this could be Christian or Islamic but in most of East Asia, and certainly in Taiwan, Korea and Japan, they are Confucian. In traditional social structures what ensures that the patriarch does not appropriate all the benefits to himself, that which ensures benevolence, are the kinship systems and relationships which embrace him (only rarely her). These are not effective in the complex societies of the late twentieth century but in their place are new sets of mutual dependencies and responsibilities institutionalised in the ‘new patriarchy’ in the forms and practices of ‘liberal democracy’ and the ‘rule of law’, which create the same possibility for individuals located lower within the hierarchy to be able to ensure or enforce benevolence. He summarises this ‘neo-patriarchy’ as ‘a mode of governance where, whilst social relations remain distinctly hierarchical, the content of benevolence is democratically decided and its delivery legally enforced’ (Woodiwiss 1998: 3).

Nowhere is this system perfect yet but were one to emerge it would be just as capable of ensuring human rights protection as the (equally imperfect) liberal or social democratic systems of governance. In other words, contrary to the conservative supporters of the Asian values argument he wants to argue that ‘there is nothing about patriarchy as a discourse or Pacific capitalism as a set of institutions that is intrinsically antipathetic to the maintenance of respect for human rights’ (Woodiwiss 1998: 261).

Rights are usually more important for the weak and within patriarchal systems the weak/inferior have claims on the benevolence of those higher in the hierarchy. In the west labour rights have usually been requested, or supplied, in the form of immunities or liberties. In a patriarchal context however it is more effective, he argues, to pursue them in the form of claims on one’s superiors, so as to enforce the practice of benevolence. Indeed he goes further to suggest that human rights groups of all kinds in Asia would be advised to emphasise the claims dimensions of their demands as any strategy emphasising liberties or immunities based on individualism is likely

to encounter resistance as these are subordinate or alien values even among the middle classes and to insist on them will provoke chauvinistic reaction.

One suspects that Inoue would find this equivalent to the notions of Gellner and Gray, as a 'retelling of the Orientalist narrative' (Inoue 1999: 48–9). This would be unfair as Woodiwiss makes clear that patriarchy is not confined to Asia, there are many 'western' examples, and that it could find ideological justification from Christianity as easily as from Confucian or Islamic thought.

More pertinent perhaps is to ask what have been the tactics taken by the human rights groups and their leaders in East Asia over the past ten years and will they change over the next? Is there any evidence that they prefer to make claims on authority, prefer to try to 'enforce benevolence' than to have the state or authority figures guarantee liberties or immunities or empower those located lower in the hierarchies?

Mushakoji Kinhide, like Woodiwiss is interested in Japan as a part of Asia and explaining the problems and prospects for the development of human rights. Looking at East Asia, he sees the last century and a half in terms of 'a process of disorganisation and re-organisation of Pax Cinica [sic] under the regional hegemony of Japan' (Mushakoji 1997a: 297). However whereas China had usually been tolerant of regional difference and local culture, Japan was not. In 1945 Japan was removed from its hegemonic position which was based on military power. Since then it has slowly regained that position, although this time it is based on economic strength.

In post-war Japan the insistence on Emperor worship was replaced by the expectation that individuals would dedicate themselves to their company. This is true not only in Japan and those parts of Asia whose growth has depended on Japanese capital but also in the RoC and RoK whose development strategies have been modelled on those observed working in Japan. A new set of hierarchical principles has been introduced which are no more supportive of human rights principles than the Emperor-centred ones.

But if human rights ideas have difficulties at the moment, what of the future for rights in the region and in Japan? Mushakoji suggests that Europe was the birthplace of modern human rights thinking not because of the superiority of European civilisation, but because of its weaknesses. Europeans have been responsible for some horrific violations of human rights both within Europe and in their empires. However out of the recognition of the evil they had done came the possibility of developing and internalising an understanding of rights. This he contrasts with Japan's seeming inability to confront its past as the first stage in creating a human rights culture (Mushakoji 1997b: 22). Is there any sign that the regimes in Taipei or Seoul are any more prepared to re-examine their human rights record since 1945?

Thinking more broadly about the future for rights in Asia, he points out that within the Sinic tradition there is not only the Confucian pole but also a Daoist pole – if Confucianism provides support for centralisation and hier-

archy, the Daoist/Buddhist/shamanistic traditions could support trends towards decentralisation, informality and playfulness. These latter provide sets of ideas that could counter those of existing ruling groups and become the basis of an 'eco-democratic humanism' (Mushakoji 1997a: 307). He sees a situation in which the anti-system domestic movements in the US and Europe are taking up ideas of human rights, democracy, peace and ecologically sustainable development. Meanwhile in Asia authoritarian governments use anti-western and Confucian policies to resist change and counter the demands of the human rights groups. But he predicts this increased stress on endogenous values will reveal that they too have a critical potential and in the long term the Daoist trend will win out over the Confucian. Within Asia the Japanese hegemony will decline and there will be a diversification of human values based on sub-regional cultures plus the Daoist self-organising style. Within these developments an Asian human rights culture can be built but, 'only if the universality of human rights can be enriched by the different local traditions which have built their legitimacy by fighting against hierarchical universal values' (Mushakoji 1997a: 311). What evidence can we find of local traditions informing or reinforcing the human rights movements at the meso and micro levels in Japan Taiwan and South Korea?

To summarise, our review of these authors has suggested a series of questions which will provide themes that will be taken up at various points in the main text.

- what contribution are 'Asian voices' making to the 'unfinished project of liberal democracy'?
- how have social movements in these three societies constructed human rights ideas and, once accepted, have these rights ideas worked to sustain or challenge power?
- what evidence is there that human rights demands have sought to make claims to 'enforce benevolence' of those higher in the hierarchy rather than demand guarantees of liberties or immunities based on assertions of equality?
- are these Asian states seeking to confront their past as the first stage in creating a human rights culture that will be enriched by local traditions?

These are big questions to which we will return in our conclusion. Although there will be no unambiguous answers the partial answers to these questions will be illustrated by reference to developments in the understanding and implementation of children's and patients' rights. But, why children? why patients?

One working definition of human rights is rights people possess simply as human beings. But some classes of human beings are systematically denied these rights. Some societies still do not automatically accord women full human rights although they are becoming rarer. Women apart, the largest

single group which is systematically excluded from full protection of human rights is children. Their special position is highlighted by the fact that they form one of the few groups who can be accused of 'status crimes'; that is activities that would be acceptable if not done by children, for example the purchase of alcohol in many western societies. Of course many of these restrictions are justified in terms of protecting the interests of children and, indeed, as we will see, there is a powerful argument that children can best be protected if we focus on the obligations that the adult community has towards children rather than seek to promote their rights as such. Nevertheless during the twentieth century there was a steady drive toward the codification of the rights of children which culminated in the Convention on the Rights of the Child (CRC) which was adopted by the UNGA in 1989 and had been ratified by nearly all the countries in the world within ten years.

There has been criticism of this process. Lewis suggests that the CRC is based on two fallacies: the fallacy of children's rights and the fallacy of a universal childhood. The first fallacy is that in practice the covenant does not so much entitle the child to exercise rights but rather authorises the state to do so on behalf of children as they are formally and practically unable to do so on their own behalf (Lewis 1998: 93). Second, he argues that the system is based on the notion of a universal childhood which is in fact a western conception of childhood. This ignores the socially constructed nature of childhood which appears in a variety of forms related to specific cultures and socio-economic relations. Thus, the assertion of children's rights amounts, he argues, to 'a fundamental intrusion into the domestic affairs of these [non-western] states, effectively destroying their sovereign status' (Lewis 1998: 96). Lewis presents his argument in terms of the 'West' and the 'South' but the argument that 'advocating children's rights in this context is giving up the rights to self determination' is quite clearly equivalent to the 'Asian values' argument. Moreover it is evident that the social construction of childhood which occurred in East Asia has been quite different to that in the 'west'. So, what does an examination of the development of childhood in the twentieth century in East Asia and a study of the introduction of ideas about rights of children into Taiwan, Korea and Japan contribute to this debate? Has the introduction of the CRC enabled more or less protection of this group of weak and vulnerable human beings?

Self-determination, autonomy, and protection of dignity are all concepts key to the discussion of rights but they are often considered as secondary, if at all, in the context of the treatment of the ill, particularly the mentally ill. Paternalism of the medical profession and the voluntary surrender of the patient's right to self-determination typified doctor-patient encounters in most parts of the world before 1970. The long-term forced hospitalisation of those considered to be mentally disordered has usually been accompanied by less protection of the rights of patients than has the imprisonment of convicted criminals. Partly in recognition of the major changes in the nature

of medical science since 1950, there have been major changes in patients' attitudes that occurred along with the development of a broader rights consciousness.

Meanwhile the medical profession organised on a global level in the form of the World Medical Association, developed statements on the rights of patients that physicians were urged 'to assure or restore' even when government or legislation denied them (Rights of Patients, quoted in BMA 1984: 72–3). Meanwhile at the UN the Commission on Human Rights developed a set of principles for the protection of people suffering mental disorders which was adopted by the UNGA in 1991. Thus in two distinct, but overlapping, ways rights standards were set by groups outside the state, which were intended to exercise some kind of binding power over those within states irrespective of whether they were part of that state's legal system. But, are these standards, like children's rights, derived from western models of behaviour wholly inappropriate to the medical cultures of East Asia? Has the institutionalisation of these rights standards sustained or challenged power relations in the medical arena? What has been the impact of these international standards on domestic practice? The second section of this book will consider the emergence of the discourse on patients' rights and examine how it has been introduced into Japan, the RoK and RoC. We will suggest that part of any riposte to the charges made by Lewis and the questions asked by Stammers needs to take into consideration the roles played by what Inoue calls the 'intermediary communities', the non-governmental organisations (NGOs), whether or not explicitly concerned with human rights, that take an interest in the welfare of children or patients.

The importance of family and community within Asian societies is often contrasted by supporters of Asian values to the 'breakdown' in family and community values in the excessively individualist west. There is abundant evidence that shows divorce rates are much lower in East Asia than in North America or Europe. However one would want to point out the great variation between the 'western' states and the very different family systems of pre-modern China, Korea and Japan. In pre-modern societies care of children and the sick mostly occurs within the family. Critics of human rights fear that their implementation will destroy the social structures that support dignified life. On the other hand some feminists, in Asia and the west, argue that the reluctance of the state to intervene in 'family matters' in practice amounts to a refusal to do anything about male violence against women. Similar issues arise when we think about the rights of patients or children. Taking their rights seriously will mean, among other things, defining the situation when state or society should intervene, enforce action by relatives or protect them from other family members. An examination of the contemporary experience of children and patients goes to the heart of the debate on Asian values.

The discussion of the importance or otherwise of human rights within Asian societies has hitherto proceeded at a high level of generalisation,

informed by a relatively small number of English language sources. In the chapters that follow we will seek to contribute to this widening debate by considering the emergence of human rights within the context of the history and culture of these three societies using wherever possible Japanese, and, to a lesser extent, Korean or Chinese sources. Of key interest is the impact of international standards on the development of indigenous ideas. If the examination of the impact of children's rights suggests greater, rather than less, care and protection is provided them following ratification of the CRC, at least some of Lewis' concerns can be set aside. If there is evidence that notions of patients' rights can be absorbed into East Asian medical practice and improve the quality of medical encounters, it will validate the efforts of national and international patients' rights advocacy groups. Not all change will amount to progress, something may be lost with the adoption of these ideas. But I think that it will be possible to show through an examination of these specific examples of human rights practices, that human rights are not *just* what we in western liberal democracies believe and that they do have a relevance to and a resonance within the everyday lives of people in East Asia and, of course, elsewhere in the world.

2 Human rights in Japan

In Japan during the nineteenth and early twentieth centuries a powerful state structure had been created. Meanwhile liberal and social democratic ideas had influenced intellectuals, social movements and even some within state institutions so as to have acquired a degree of legitimacy by the 1920s. They were attacked in the 1930s but this did not eliminate them so much as force them underground. The decisive defeat at the hands of the Allies discredited the nationalist authoritarian ideas that had been developed by the civil and military bureaucracy and its apologists during wartime. Liberals, socialists and communists who had been critical of government before 1930 were now free to suggest how the state might be restructured and the mass of the Japanese population were receptive to suggestions of how their lives might be reorganised and the military disasters of the previous fifteen years avoided in the future.

Japan's post-war legal structure and human rights under American occupation

This restructuring of Japan was not a process that the Japanese controlled. The Allied powers blamed the Japanese ruling class for leading the country into war and resolved in the Potsdam Declaration to demilitarise and democratise Japan so it would never again pose a threat to international peace. It was the USA however that took upon itself the main task of ruling Japan during the occupation that lasted from 1945–52. Although there was a contingent of Commonwealth soldiers among the army of occupation and some of the supervisory institutions included representatives of all the wartime Allies, control of the reform of Japan was monopolised by Americans. Their planning for the occupation had begun not long after the outbreak of the war in the Pacific and there were many policies that were enthusiastically promoted and implemented in the first months and years of the occupation with minimal consultation with the Japanese beneficiaries of these policies. This did not mean that they were therefore imposed on an unco-operative population. It was decided early in the process of planning for the occupation that they would work through the existing state structures

both at central and local levels so there was plenty of opportunity to influence (and indeed obstruct) implementation of reform policy. Second, there were large sections of the Japanese population who were enthusiastic about the reforms, union membership by December 1946 was over five million, up from almost zero in September 1945, and many wanted the reforms to go further, for example the 10 per cent of those who voted for the Communist Party in the 1949 election. (On the ambiguities and contradictions of occupation policy see Dower 1999.)

Having said that, the process of reform did not lead to the promotion of clear notions of civil society, clear definitions of a boundary between state and society. Indeed the US occupation government acted with as much 'benevolence' as any Confucian state, confident that its actions would benefit the wellbeing of the ruled. The bureaucracy was largely unaffected by the reforms. Its authority was undiminished and may even have been enhanced by its association with the changes, as it was the channel through which reform was transmitted.

A liberal democratic rationale was placed at the heart of the state structure but it was not one that was put there as a result of a struggle which set boundaries on state power. Indeed, as descriptions of post-war economic and industrial policy recognise, the senior officials in the bureaucracy sought to develop their role to encourage and direct economic growth in ways which went well beyond the boundaries of the state as conceived in classic liberal theory (see, for example, Chalmers Johnson 1982). Moreover in the immediate post-war period those in power had been educated and socialised in the predominantly authoritarian system and were not going to change their attitudes overnight. Neither those in senior positions in Tokyo nor the leaders of local communities had much familiarity with ideas of rights. Far more familiar was the idea that individuals and groups should set aside their selfish desires and work for the good of the community and the state. So although the liberal tradition received support and encouragement from the occupiers and their policies, this did not mean that liberal ideas were unopposed after 1945 or 1952. On the contrary, the authority of the state was as high in the 1950s as it had been in the 1930s, even though there were some aspects of policy which it was now possible to contest. A strong state that could resist subversion, that could deliver economic and social welfare to its people fulfilling its benevolent role, remained the ideal for most state actors and it was resisted by few in society.

Internationally the late 1940s was a time of contradictory trends. On the one hand there was the idealist drive to define human rights and commit the emergent structure of the United Nations to the promotion of these ideas. On the other hand the onset of the Cold War led realists to prefer security and economic growth to the practice of democratic values. The same set of ideas and idealism that produced the Universal Declaration of Human Rights (UDHR) also informed the Japanese constitution of 1947. Meanwhile, US interpretations of its own strategic interests led it to ban a

general strike called that same year by the Japanese labour union movement that it had encouraged to grow. For most of the post-war period Japan has tended to follow the US lead in foreign policy, at the same time domestic policy making has been strongly influenced by Cold War considerations. Thus Japan, like the USA, has been a reluctant participant in the process which led to the creation of an international human rights regime. Meanwhile successive conservative governments have resisted demands from the socialist opposition parties and their allies for the implementation of human rights-based policies. However, from the early 1990s, partly as a result of the end of the Cold War system, a change has taken place as human rights start to be taken more seriously both internationally and within Japan.

This chapter, like the ones which follow on South Korea and Taiwan, will begin by outlining the legal apparatus that developed after 1945 which has been used to promote and protect human rights. Then, in recognition of their important role in the social movement and the intellectual discussion of rights in Japan, we will consider the formation of movements by and for Burakumin and Koreans resident in Japan. Following that we will review the overall impact of the UN human rights system on Japan. Unlike later chapters on Korea and Taiwan we will separate our discussion of the Cold War era and argue in a final section that there is a distinct policy change in the 1990s and there we will discuss the most recent developments. However any discussion of human rights in post-war Japan must begin with the constitution which has been the primary source informing the debate.

The Constitution

The occupying US army, under the command of General MacArthur, considered it had a mandate to revise the constitution which came from the terms of the Potsdam Declaration: 'The Japanese government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established' (quoted by Beer 1984: 72). A member of Cabinet, Dr Matsumoto Jôji, produced a draft revision of the constitution in late January 1946 but it was rejected by SCAP as insufficiently democratic. Therefore the Government section of the GHQ produced a more radical set of proposals which were presented to a shocked Cabinet on 13 February 1946. The official line is that the Japanese government then used this draft as a guide in their preparation of the new constitution which turned out substantially similar to that prepared by GHQ (Hata and Nakagawa 1997: 18–19; Stockwin 1999: 163–4).

The central thrust of the reforms was to refocus the centre of political attention away from the person and institution of the Emperor and on to the people of Japan. The authority of government is, in the words of the

preamble to the constitution, 'derived from the people, the powers of which are exercised by representatives of the people, and the benefits of which are enjoyed by the people'. Popular sovereignty is one of three ideas central to the post-war structure. Second, there is 'Pacifism' to which Japan apparently commits itself in article 9 where the 'Japanese people forever renounce war as the sovereign right of the nation and the threat or use of war in international disputes.' Third, there is the commitment to human rights which is present in three places in the Constitution. There is indirect reference in the preamble:

We recognise that all peoples of the world have the right to live in peace, free from fear and want. We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relations with other nations.

Chapter 3 of the Constitution lists those rights in some detail in articles 10–40. Finally, article 97 states that 'the fundamental human rights granted by this Constitution are fruits of the age old struggle of men to be free ... and are conferred upon this and future generations in trust, to be held for all time inviolate'.

In terms of the debate between the relativist and the universalist approach to human rights Japan seems to be firmly committed to universalism. But it could be argued that this is a perfect example of 'cultural imperialism' in that the draft constitution was written by members of the US army, translated into Japanese and forced on a reluctant Japanese cabinet and prime minister. In outline this is correct. It was thought important to act quickly before the influence of the USSR and Australia increased as they wanted to remove the emperor from the political structure and have him tried as a war criminal. Moreover a Far Eastern Commission was due to be established later in the year and it was feared that once that was in operation it would not be possible for the US to control the content of the new constitution. There were reasons for both the Americans and the Japanese to act quickly.

The Japanese people as a whole were not involved in the adoption of the constitution. The complete text had not been released by the time of the general election on 10 April 1946 and therefore one cannot regard the assembly returned by that election as having any kind of mandate to adopt it. Neither MacArthur nor the Japanese government were persuaded of the case for creating a Constitutional Assembly solely to discuss the constitutional proposals, so they were debated in the Lower House of the Diet as an amendment to the 1889 Constitution on the recommendation of the Privy Council (which did not survive the reform). The resulting constitution was not subsequently approved by the Japanese people in a referendum. And yet the constitution was not simply imposed on Japan. The US administrators

recognised that to have done so would have resulted in it being quickly repudiated when they withdrew. As Koseki shows, 'the process that gave birth to the Japanese constitution was ... complicated, varied, and rich, going well beyond the actions of any state' (Koseki 1997: 3).

In the 1880s, at the time when the Meiji government was developing its thoughts about a constitution many people took up the task of constitution writing: 68 private proposals have been discovered (Koseki 1997: 26). Not as many constitutional proposals came from the public in the immediate post-war period but several organisations did devise drafts, some of which were submitted to the occupation authorities. A draft constitution modelled on the Weimar constitution and which included reference to unfettered human rights was presented to MacArthur's HQ on 26 December 1945. The Socialist Party published its 'Outline of a New Constitution' on 23 February 1946 which retained the Emperor in a ceremonial role. The Communist Party issued its 'Constitution of the People's Republic of Japan' in June 1946, strongly influenced by Stalin's constitution in which there was no place for the emperor (Koseki 1997: 42–3). Even the anarchist league, which in the 1920s had had more supporters than the Communist Party, produced a 'Declaration of Human Rights' as its contribution to the debate (Koseki 1997: 36).

This is not to suggest that these various drafts were known to those who wrote the draft proposals or that later Japanese involvement 'Japanised' it, although there is evidence that some were indeed influential. Rather it is to argue that there was considerable debate, for example, about the role of the emperor in political life and widespread appreciation of human rights issues within Japanese society and to point out that several of the proposals that came from Japanese people were more radical than the finally agreed draft. Thus, it does not make sense to regard the final document as the imposition of a set of ideas quite alien to Japan. Moreover a public opinion poll published on 27 May 1946 in the *Mainichi Shimbun* newspaper showed that 85 per cent supported the draft of the new constitution with only 13 per cent opposed (Tsuneoka *et al.* 1993: 126).

When the first official drafts were published, the centre-right progressive and liberal parties expressed their 'approval in principle'. On the main points of this draft – preservation of the emperor system, respect for basic rights and renunciation of war – the Liberal Party declared, it 'coincide(s) precisely with the principles of the draft of a revised constitution which our party published' (quoted in Koseki 1997: 131). Socialists, Communists and others on the left were critical that it did not go further to implement democratic ideas.

Thirty-one of the ninety-two articles in the draft (thirty-two of 103 in the final version) pertain to rights. The draft of this section was put together by a sub-committee of three, two men and a woman, all of whom had lived outside the USA before the war and two of whom had lived in Japan (Koseki 1997: 86–7). They insisted on two points: that non-Japanese were

entitled to equal protection before the law and that specific provision be made for the rights of women. While the latter survived in article 24, article 16 of the original, 'Aliens shall be entitled to equal protection of the law' did not. The people of Japan are referred to as *kokumin* throughout the document, whose definition was later determined (rather narrowly) by law, creating the impression that some legislators and bureaucrats sought to exclude human rights guarantees for foreigners resident in Japan, the overwhelming majority of whom were Korean.

Thus the Japanese were able to influence the final constitution to create a document that, though not without flaws, managed to balance the tensions between the conservatives who wanted to preserve as much as possible of the Meiji constitution and their critics who sought firm commitment to democratic values and the protection and promotion of civil and political, economic, social and cultural rights within an unarmed state. Formal supervision of occupation policy lay with the Far Eastern Commission, which in October 1946 provided for a review of the constitution two years after it was introduced. Coming up to this deadline in early 1949 the Japanese government, now led by the conservative Yoshida Shigeru, made no attempt to use this opportunity. Most public opinion supported the new constitution and it is unlikely they would have tolerated any revision. Although much of the drive to create the new constitution may have come from Americans in the early stage of the occupation, the energy which has sustained it through and after the occupation has come from Japanese society.

The constitution is now one of the twenty oldest national constitutions in the world and it remains completely unrevised. Its most controversial section is the 'Peace Clause', article 9, about which there has been extensive discussion. (For a summary of this see, for example, Stockwin 1999: 163–72.) This debate need not concern us except that argument about revising other aspects of the constitution has often been intense because it is feared that change to some other part of the constitution will set a precedent for revision that will later permit the removal of the 'Peace Clause'.

Chapter 3 on the Rights and Duties of the People contains a catalogue of civil liberties and social rights. In the former category it lists rights and freedoms for political, economic and social activities, rights of claim on the government (for example, to choose and dismiss public officials) and rights related to criminal justice. As for social rights the Constitution contains the right to minimum standards of wholesome and cultural living, the right to an education corresponding to ability, the right to work and the rights of workers to organise, bargain and act collectively. By the 1990s a considerable body of judicial case law had accumulated on rights as described in the constitution.

Debate on the constitution was at its height in the late 1950s and early 1960s. A Commission on the Constitution was set up in 1957 and reported in 1964, however its proposals were not acted upon. Interest in constitutional revision arose again in the 1980s but no concrete proposals came

forth. After 1996 the decline in the influence of the Socialist Party, which was the most fervent opponent of constitutional revision, created the possibility that some changes could be made. The ending of Cold War polarity within Japanese domestic politics and the ascent to power of a generation of politicians who seek revision to make the constitution more attuned to contemporary needs rather than to re-create pre-war structures may well enable debate over constitutional reform to re-appear on the political agenda. However the unstable multi-party politics of the late 1990s have not been conducive to measured discussion of such fundamental issues and there would have to be greater political stability before change of the constitution could occur. At the start of 2000 each legislative house created a committee on the constitution which would produce a report within five years. This is only the first stage of a process that is unlikely to result in constitutional reform before 2010 and even if this were to happen it would not reduce any of the constitutional commitments to rights. The overall trend is toward greater development of rights ideas, as we shall see in the final section of this chapter.

The legal system

Closely reflecting the modern history of Japan since the Meiji restoration, there are fused within Japan's legal system four main elements: customary law; European civil law, mainly from Germany but with some French elements; Anglo-American legal practices; and the Japanese legal practices that have developed in the process of integrating these traditions (Beer 1984: 129). Up to 1945 the code-based, non-common law tradition observed in France and Germany were the main foreign elements but since the end of the occupation judges have looked to the USA for inspiration in their jurisprudence.

There are six codes (*Roppô*) of which the Constitution itself is superior to five quasi-constitutional codes: Civil Code, Code of Civil Procedure, Criminal Code, Code of Criminal Procedure and the Commercial Code. Next in the legal hierarchy are the laws which created the structures of government described in the constitution and then the Basic Laws which set out the basic policy objectives in such areas as education, pollution control or labour. Detail is filled in by statute law which may be delegated to governmental structures subsidiary to the Diet including the ability to create Cabinet orders, administrative rules and, in the case of local government, local ordinances. As a unitary state most political and budgetary control is exercised by central government but local government does have a degree of autonomy including the power to raise local taxes.

In the words of the Constitution, 'The whole judicial power is vested in a Supreme Court', thus establishing a degree of judicial independence from the other branches of government which had not existed under the Meiji constitution. One rank lower is the eight high courts, then fifty district

courts (with 242 branches and 575 summary courts). Parallel to the district courts are the family courts and their branches. A jury system was introduced in 1923 for a small number of offences with only limited success. Use of the jury system was unusual in the 1930s and was formally suspended in 1943. It has not been re-introduced and there are no demands that it should.

The Supreme Court is the final court of appeal and judges on such questions as alleged unconstitutionality, error of, or problem with, the construction of the law, and incompatibility with Supreme Court precedent. It may quash a conviction if the original judgement is considered incompatible with justice. Precedent does not bind courts in subsequent cases on the same issue. So, although courts have favoured consistency, it is possible for judicial opinion to shift over the course of years. The Supreme Court itself is composed of fifteen justices appointed by the Cabinet from people recommended by the Supreme Court but not all of them need to have been judges or even members of the legal profession (Hattori 1963: 133). Appointment is for a ten year renewable term although in practice most Supreme Court judges are appointed in their sixties and serve until mandatory retirement at the age of seventy. Each appointment must be 'reviewed by the people' at the next general election to the House of Representatives (Article 79).

Those who are keen to stress the unique features of Japanese society argue there is a cultural preference for less formal means of conciliation of disputes than the law courts. On the other hand Beer suggests that, at least among parties of similar social standing, there is 'a very ordinary level of litigiousness in civil cases'. However there are usually semi-formal procedures that provide a faster and therefore cheaper method of dispute resolution. It is nevertheless one which will usually produce 'a result similar to what would have resulted from formal trial proceedings' (Beer 1984: 139). Some suggest that the number of judges is kept deliberately low as part of a strategy to deter litigation and more generally to inhibit the development of a 'rights consciousness' that would be inimical to a social structure that can facilitate rapid economic growth.

The Bar Association

The Meiji constitution of 1889 and the Court Organisation Law of 1890 established a trend towards the political independence of the judiciary. Standards of professional training for judges were created and judicial autonomy was ensured through the introduction of a tenure system. Although the Ministry of Justice (MoJ) retained considerable influence over the judicial system, the reforms of 1890 established an administrative separation of judicial and executive power at least as clear as that in the UK, and judges demonstrated an ability and willingness not to give in to government pressure from the 1890s through into the 1930s.

Meanwhile a modern legal profession developed slowly from the 1870s as the first institutions were created which carried out judicial functions sepa-

rate from the rest of government administration. Recognition was reluctantly granted to legal advocates, *daigenmin*, to represent their clients in civil and criminal proceedings. Then in 1890 an attempt was made to revise the regulation of advocates in a bill presented to the first Diet in 1890. It spoke of the human rights described in the Constitution which,

cannot be fully protected without the activity of lawyers with knowledge, experience and high ethical standards. ... The purpose of this bill is to establish strict qualifications for the lawyer, protect his rights, respect his position and supervise his professional conduct.

(Hattori 1963: 126)

This first bill did not become law due to opposition from the association of *daigenmin*. Some of their points were taken into account and a revised bill presented and passed in 1893. This created a new title for the lawyer – *bengoshi* – and established the demonstration of professional knowledge as being the prerequisite for becoming one. A thoroughly revised Attorney Law was passed in 1933 which expanded the scope of an attorney's practice, set out a new examination and training system and permitted women to practise for the first time. However the status of lawyers remained lower than that of judges and procurators and both lawyers and their associations were under close MoJ control. The MoJ had the power to approve by-laws of the attorney's associations, to order the suspension of proceedings of the associations and to nullify resolutions passed by them (Hattori 1963: 128).

Post-war reform under the new constitution granted complete autonomy to the courts. Judges were freed from the supervisory power of the MoJ and placed in a structure at the pinnacle of which was the Supreme Court. Legislation implementing the new constitutional status of judges and public prosecutors was introduced in 1947 but reform of the control of the legal profession was not introduced until 1949. The reason for the delay was that there was a dispute between the bar associations, the Attorney General and the Supreme Court about how much independence the bar associations should have. The occupation forces favoured an independent bar but did not want to interfere 'since the bar associations themselves shared a gratifying zeal to achieve the greatest possible degree of independence' (Oppler 1976: 108). In the end the bar associations' views were adopted with some very minor additions.

Direct control over the legal profession was transferred from the state to the bar association and the role of the lawyer was redefined to emphasise the protection of human rights. Indeed the first paragraph of the Practising Attorney Act states that it is the primary duty of lawyers 'to protect fundamental human rights and to ensure social justice'.

A national association was created in 1949 – the *Nihon Bengoshi Rengokai* (Japan Federation of Bar Associations, JFBA) – composed of bar associations within the area of each district court which are themselves

organised into eight regional blocs. Very soon the JFBA had its Human Rights Committee and launched initiatives in human rights protection, expressed opinions on legal and judicial administration and promoted legal aid to the poor.

Each year there are over 100,000 law faculty graduates only a tiny proportion of whom go on to become practising lawyers. To become a judge, procurator or to practise law in Japan one must have graduated from the Legal Training and Research Institute (*Shihôkenshûsho*) which is run by the Supreme Court (except that a professor of law becomes eligible to be a judge after ten years of teaching law). Entry to this institute is by highly competitive examination: in 1949, 265 out of 2,512 passed (10.5 per cent); in 1978, 485 of 29,390 (1.7 per cent). In the late 1990s the number of people admitted to the institute has increased to 800 in 1998 and to 1,000 in 2000. The course comprises eight-months' study of case law followed by eighteen months (fourteen months until 1999) as an intern in a court, law office or procurator's office. Most of the graduates from here go on to become lawyers but about fifty enter the career judiciary. In 1991 there were 14,953 attorneys in Japan. This rose to 16,406 by 1997 and with growth in the intake of the institute this is set to increase substantially over the next few years. At any one time about one half of the lawyers in Japan will be based in Tokyo and one half of the rest in Osaka. The remainder are spread across Japan with the main concentrations to be found in the cities where a high court is located.

Compared to most other industrialised countries Japan has relatively few lawyers, as is demonstrated in Table 2.1. However if the current rate of expansion of the profession continues it is estimated that it will have as many per head of population as France within thirty years.

Lawyers played an active role in the formation of the Japan Civil Liberties Union and most local bar associations have created human rights committees which often are served by more specialist sub-committees which concentrate on such issues as the rights of children. These committees

Table 2.1 Size of the legal profession in selected countries

	<i>Population</i> (million)	<i>Attorneys</i>
<i>Japan</i> (1997)	126	16,403
<i>England and Wales</i> (1993)	48	66,837 (Barristers 7,271, Solicitors 59,566)
<i>France</i> (1992)	58	25,353
<i>Germany</i> (1991)	79	59,446
<i>USA</i> (1992)	256	744,579

Source: Ikenaga 1998: 5

respond to, and may take up, individual cases of human rights violations which are brought to their attention, and may do so free of charge.

The JFBA is far more than just a professional association. It devises plans and puts forward its ideas for reform of the Japanese legal system and has been able to resist the imposition of changes by the MoJ. For example in November 1998 it set out its 'Vision for Judicial Reform' which argues for fundamental change in the judicial system based on international principles of respect for human rights (*Nichibenren Shimbun*, 1 December 1998). The JFBA has been very active promoting the protection of human rights since its formation and currently has a Human Rights Committee which has two main activities:

- Investigation of alleged violations or threatened violations of human rights;
- Issuance of warnings or requests against state agencies or other organisations which the committee believes have engaged in violations of human rights so that such violations will cease or be mitigated.

(JFBA 1997a: 12)

It has conducted its own research and published reports on such topics as the Mental Health Law, the human rights of foreigners in Japan and the rights of those in the news. Apart from its concern with the improvement of criminal procedure, it has been actively involved in campaigns to provide remedies for those whose health has been damaged by pollution and to demand protection of the environment. It has taken up the cause of consumer protection and was prominent in the campaign for a manufacturers liability law. There are two specialist committees on the rights of children and gender discrimination, and an international committee that promotes attendance at international conferences and enables the international exchange of professional information. Within Japan it organises conferences (there is an annual conference on human rights), it publishes journals, pamphlets and books and provides a variety of legal aid services.

The regional associations have a great degree of autonomy in terms of both organisation and the issues they campaign about. The Fukuoka Bar Association has an international strategy which has led it to develop close links with the Pusan Bar Association. It was lawyers in the Fukuoka area who first devised a duty attorney system (based on the English system), which gives people free access to a lawyer when first arrested by the police. This scheme was adopted nationally in 1990. More recently a patients rights' committee has campaigned for compensation to sufferers of Hansen's Disease (leprosy), who until 1996 were subject to legal discrimination (*Kyûshû Bengoshi Rengôkai* 1996). Moreover, as we shall see in later chapters, lawyers in Fukuoka have been active in developing strategies to protect and promote the rights of both children and mental patients.

Bar associations, both national and local, have been at the core of the post-war human rights movement in Japan. Indeed lawyers seem to be active in practically every human rights-related group. They have the skills and confidence to challenge the authorities. They have played the key role in negotiating with the state, attempting to set limits on its actions and thus establishing the boundaries of civil society.

Japan Civil Liberties Union

The Japan Civil Liberties Union (JCLU) has probably been the single most important human rights NGO in Japan since its foundation in 1947. General MacArthur personally invited Roger Baldwin to create a Japanese equivalent of the American Civil Liberties Union. Its first director was Unno Shinshiki, a democratic socialist, and it was he who presided over the founding meeting when the JCLU pledged itself,

to promote the democratisation of the Japanese people by securing fundamental human rights and contribute to the peace of all mankind conducting all-out struggle against all infringements upon freedom and civil liberties by feudalistic, bureaucratic, and all other undemocratic systems and elements.

(Oppler 1976: 179)

Another leading figure in the formation of the group was Matsumoto Jiichiro, at the time deputy speaker of the House of Councillors and prominent Burakumin activist.

At first it targeted, in particular, 'Mysticism, Feudalism, Bureaucratisation and Deformed Capitalism' and engaged in activities to oppose abuse of power by officials, use of violence by police, arrogant attitudes of tax officials. Its priorities in the 1950s were to oppose the activities of gangsters, to participate in the process of the revision of codes and laws, to help organise the legal defence of those in legal and social difficulty and to co-operate with international organisations. It has generally contributed to the development of human rights awareness throughout the post-war period tackling many difficult and controversial issues. When Japan became involved in the UN treaty system it was the first group to put forward a comprehensive 'counter report' on the occasion of the Japanese second report on civil and political rights in 1989.

The JCLU in 1998 had a membership of about 800, 60 per cent of whom were lawyers. During the 1990s it led a campaign demanding more information disclosure by the government and it produced its own model law for consideration by government. It has run campaigns and co-ordinated lecture series on such issues as the rights of foreigners and refugees. More generally it has taken on a 'human rights watch' role on a wide variety of topics as they have arisen in post-war Japan.

Civil Liberties Commissioners

The ideas of human rights as described in the constitution were scarcely unknown in Japan, but appreciation of them was not widespread among the majority of Japanese people. A survey taken in 1950 found that 13 per cent of respondents in Tokyo and 45 per cent in rural communities thought *jinken* was a reference to rayon, a homophone of the word for human rights in Japanese (Ushiommi 1968: 238). Extensive efforts were made to ensure popular understanding of the constitution: twenty million copies of a thirty-page booklet, 'The New Constitution: A Bright Light', were distributed, one to each household (Koseki 1997: 218–19). Movies were made, songs, puppet shows and picture shows were devised to spread the basic ideas.

As part of this process in February 1948 a Civil Liberties Bureau (*Jinken Yôgôkyoku* – CLB) was created in the MoJ and in July a system of Civil Liberties Commissioners (CLCs) was created to inform citizens about their rights and assist them to assert them. Initially there were to have been only 150 of them, three in each prefecture, eleven in Tokyo and five each in Osaka and Hokkaido. At this time the CLB only had an office in Tokyo and these CLCs were intended to be volunteers who would promote human rights ideas across the country – sixty-seven had been appointed by the end of 1948. However the MoJ was restructured and the plans for the creation of the CLC system were greatly expanded. The new target was to create 20,000 CLCs, one for every 5,000 Japanese with the whole system being based within the local government apparatus, which was being re-created at the time. By 1950 around 2,165 had been appointed. The system grew steadily over the next fifty years but still had only 13,735 CLCs in post in 1996, some way short of the initial target. Most years it gives advice on around 500,000 occasions and is empowered to investigate cases of human rights infringements. This is a rare and early example of a government supported human rights organisation. We need to review its record in the promotion of human rights in Japan, if indeed that was its primary function. (For a more detailed discussion of the CLC system see Neary 1997a.)

Japanese accounts of the origin of this system point to the existence of a Civil Liberties section within the US Department of Justice and say that the CLB, at least at first, was an American attempt to create a Japanese equivalent of this bureau. However in one of the few English-language references to the origin of the CLB, Alfred C. Oppler who was in the Government Section suggests that the CLB was 'the initiative of the first attorney-general Suzuki Yoshio' (Oppler 1976: 10). There was no equivalent to the 'volunteer' system in the USA and this model derived directly from experience in Japanese society. During the 1920s local government in Osaka had developed a system of 'district commissioners' (*hōmeniin*) who functioned as unpaid intermediaries between the poor and the social services. The system was developed in other prefectures across Japan. They were mainly middle-class people of 'benevolence' (*tokushi*) who were genuinely concerned about poverty and/or sought a public post to elevate their status in

the neighbourhood. There were 10,545 in 1925 but the number had grown to 74,650 by 1942 (Garon 1997: 52). After the war they were renamed 'welfare commissioners' (*minsei iin*) by the occupation authorities and there were reported to have been 127,000 by the end of 1946. The use of 'welfare commissioners' by the post-war Ministry of Health and Welfare resulted in social welfare programmes being carried out 'by a pre-surrender generation of local notables which had little inclination to abandon the moralistic and restrictive approaches of the past' (Garon 1997: 219). It would seem that the MoJ sought to create a body of volunteers to take a similar interest in human rights issues.

Mayors of each city, town and village nominate CLCs from among the electors in their area who are knowledgeable in local affairs and understand human rights protection. The local assembly must then approve these nominations before they are forwarded to the MoJ. They serve for periods of three years but they may be re-appointed any number of times. If, as seems likely, the CLCs were recruited from a similar pool of talent as the 'welfare commissioners' this did not bode well for the incorporation of human rights ideas into daily life in Japan. The question is, if this was the case, was this the unintended consequence of the implementation of a quite radical idea or was it expected all along that these CLCs would tend to deter rather than encourage the assertion of rights by Japanese citizens?

The system is at the same time under strong central control but also highly devolved. Although the appointments are made at the instigation of local government units, commissioners work closely with MoJ officials. They cannot undertake an investigation without an accompanying official and may not take up cases outside their local government unit. The local MoJ office also seems to exert strong influence over who is invited to serve for further periods in office.

Most commissioners are men; in 1994 76.8 per cent compared to 89 per cent in 1967 (Ushiomu 1968: 259; *Jinken Tsûshin* 174, 1994: 43). Many are quite elderly; the average age is 64, most (82.2 per cent) are over 60. The fact that they are past retiring age makes the data on employment misleading; 37.5 per cent are listed as being without paid work, which presumably means retired, 20 per cent as being engaged in farming or fishing, 8.3 per cent as having religious employment. However, as we know that many people take up full- or part-time religious or farm work after retirement, this tells us little about the background of the commissioners. Lawyers play a prominent role within the system, particularly in Tokyo where eighteen of the 105 CLCs are lawyers. However this probably only reflects the high concentration of lawyers in Tokyo. Overall only 3.1 per cent of CLCs are practising lawyers although they do seem to fill the key roles in the CLC organisation all over Japan.

Beer aptly describes the work of the CLCs as being to 'lend a hand with human rights problems in the neighbourhood or town' (Beer 1984: 142). The stated aim of establishing the CLC structure was to create a system which could swiftly resolve instances of human rights infringements and promote a

broad appreciation of human rights in Japan. These duties are defined as follows:

- to carry out public information and education functions, to diffuse ideas of respect for freedom and human rights,
- to promote campaigns for the protection of human rights,
- to investigate and collect information on cases involving infringement of human rights and take pertinent action such as reporting to the MoJ or giving advice or warning to the agencies involved,
- to provide aid in litigation and take other relief measures for the protection of the poor and to protect their rights,
- to make other efforts to protect human rights.

(Civil Liberties Bureau 1991: 15)

In practice, what they do can be divided into three categories: they give advice, they investigate cases of alleged human rights violations and they take part in human rights publicity campaigns.

Human rights advice (Jinken Sôdan)

The semi-formal handbook on the CLC system defines *Jinken Sôdan* as 'discussing human rights issues with citizens and assisting the resolution of the problem by the person who initiates the complaint' (Jinken Yôgo Kyoku 1988: 48). In 1994 the CLB provided advice on 541,776 occasions, of which 170,130 cases were handled by the commissioners (the others were dealt with by MoJ officials). Some of this advice was provided over the telephone, some in personal interviews. In the vast majority of cases, about 96 per cent, the matter was dealt with there and then; less than 4 per cent of cases were considered serious enough to merit further investigation. In fact there is some doubt about how many of these pieces of advice concerned rights issues narrowly defined: in 1994 about 62 per cent of the total were civil law issues and a further 22 per cent family law matters; little changed from figures of 59 per cent and 27 per cent recorded for 1967 (Ushiomu 1968: 256; *Jinken Tsûshin* 172: 64).

Human rights investigations

Where an issue is considered to involve allegations of a serious human rights infringement an investigation will begin. The decision to launch an investigation is taken by the branch bureau chief and the CLCs must always be accompanied in their investigation by a member of the local Civil Liberties Bureau. The CLCs have no powers to compel attendance at these sessions and no ability to request the provision of evidence from public or private sources. It has no police agency at its disposal and cannot use the courts to ensure compliance with its decisions. At most the CLC can issue a formal, written 'warning' if it considers that a serious violation of human rights has

taken place. Less serious infringements may merit an oral ‘admonition’. Neither of these have any legal weight in themselves but they may lead to disciplinary action if the person accused is a public official. Normally the investigation will seek to reconcile the two parties involved.

During the early 1990s the number of incidents investigated each year by the CLB usually ranged between 15,000–16,000 (though it dropped to 13,194 in 1994). This compares with a range of 6,000–7,000 in the first half of the 1960s. Whereas between 8–9 per cent (500–600 cases each year) of investigations in the 1960s involved state employees (in 1965, 236 complaints against the police, 136 about teachers) in the 1990s this has dropped to less than 2 per cent in 1994 (280 cases, of which 211 involved teachers) (Ushiomu 1968: 255–7; MoJ 1995: 134). On average a CLC might be directly involved in one investigation each year.

Trends in both the advice sessions and the investigations suggest a change in the pattern of CLC activity as follows:

- 1952–60 drop in number of complaints about public servants though most such complaints still concerned police and teachers. Surveys of the 1950s show a steady increase in the understanding of human rights ideas and evidence that as many as 60 per cent of respondents came across human rights ideas at school.
- 1961–85 continued drop in the number of complaints about public servants but the overall number of complaints increases. Particularly evident is the increase in incidents that involve pollution (environmental rights), the right to privacy, and the rights of workers.
- 1985–2000 a period when the CLCs take on board two new sets of issues relating to the rights of children and foreigners in Japan. Special sessions are held in most major cities to counsel foreign workers, sometimes with the CLC accompanied by an English or Chinese interpreter. Normally there is an obligation on all Japanese civil servants to report the existence of a crime when it comes to their attention. However this obligation does not apply to CLCs or those full-time bureaucrats working within the CLB. Thus even ‘illegal’ foreign workers in Japan are free to ask advice from the Civil Liberties Bureau safe in the knowledge that the information will not be passed on to other parts of the MoJ and lead to their expulsion.

Publicity for human rights ideas

Human rights promotion activities have been encouraged since 1966. The week 1–7 May is often designated Constitution Week (3 May is Constitution Day) and CLCs will organise meetings to discuss Japan’s constitutional

commitment to human rights. A chance to publicise the work of the CLB is 1 June, *Jinken Yôgo Iin* day. Law Week is 1–7 October, another opportunity to hold meetings on rights issues. But most important is the first week in December including United Nations Human Rights Day, 10 December. Much effort is spent organising meetings, putting up posters and handing out packs of leaflets and tissues.

Competitions are held in schools to promote human rights ideas. A calligraphy competition for primary school pupils in 1994 attracted 445,013 entries from 7,000 schools. An essay writing competition for junior high school pupils, which was first run in 1981, generated over 800,000 essays in 1994 with over a third of all junior high schools taking part (*Jinken Tsûshin* 172: 63).

Assessment

There can be no doubting the commitment of at least some of the CLCs to human rights promotion and their actions are not completely without significance. It is not possible, for example, to imagine a similar organisation being created in Taiwan or South Korea, at least until the late 1990s. However, there is an obvious sense in which this organisation has created a large number of what Gaete (1993: 31) calls ‘competent readers’ – ‘readers with authority and the right to appropriate the text’ – in this case of human rights in Japan, in a way that has enabled the state to control the human rights agenda and indeed to control the extent to which rights issues are appreciated by the bulk of the citizenry in Japan.

If we consider for a moment what the CLCs do not do. One of the human rights topics that has concerned the legal profession for many years is the use made of ‘substitute prisons’ for remand prisoners. This, they allege, enables police to exert pressure on suspects and force false confessions out of them. Reports of the CLCs and the books produced by them are silent on this issue which presumably reflects guidance from MoJ officials not to become involved in such cases. Similarly, although there is evidence of numerous human rights infringements within the mental health care system, cases are very rarely taken up by the CLC system – only one in 1993 – and in Tokyo at least, CLCs routinely pass on complaints from patients with mental disorders to lawyers (Interviews at JFBA, 15 September 1998). Presumably MoJ officials are reluctant to allow their CLCs to stray on to MHW territory.

The JFBA in its ‘alternative’ report to the UN of 1998 was very critical of the CLC system on the grounds that it is not independent of the government, that the commissioners are unable to deal adequately with serious rights violations and that the system has no power to support its investigations. They want to see the creation of a new national human rights institution which is completely independent of government and operated in accordance with the UN guidelines as set out in the ‘Paris Principles’ (on National Institutions for the Promotion and Protection of Human Rights

approved by the UNGA in 1993) and the handbook produced by the UN Centre for Human Rights in 1995 (UN Doc.A/RES/48/134 (1993), JFBA 1998: 20–2). Many doubt whether the existing system could be transformed into an organisation that could play a role as envisaged in the ‘Paris Principles’.

Human rights in Japan: from the Korean War to the Gulf War

Human rights were not a major priority for the Japanese government in the immediate aftermath of the occupation. In Japan, as in probably all countries that were allied with the ‘west’ during the ‘Cold War’, it was the economic and political consequences of confrontation with the Soviet Union and its allies (including at that time China) which pre-occupied both state authorities and much of civil society. In the years which preceded the outbreak of the Korean War in 1950, the tolerance of the Japanese state had been put to the test. In the election of 1949, about 10 per cent of the electorate had voted for a Communist Party candidate. Then,

(b)etween late 1949 and the end of 1950 US authorities and the Japanese government collaborated in a ‘Red Purge’ in the public sector, and then in the private sector that essentially led to the firing of some 22,000 individuals, mostly left wing activists.

(Dower 1993: 14)

This purge included not only union members but also journalists and teachers in schools and universities.

The Korean War created numerous business opportunities for the sale of commodities to the UN (mainly US) forces involved in the fighting. It is suggested for example that the purchase of several thousand trucks by the US provided the stimulus for the recreation of the indigenous automobile industry. Central to government strategy in the 1950s was an economic policy which fostered industrial growth and, to a large degree, the other possible functions of the state – foreign and defence policy, social welfare and education policy – served the overall aims of the developmental state.

However this is not to argue that issues related to human rights disappeared entirely nor that they have remained permanently eclipsed by the government’s industrial policy. Moreover although the Liberal Democratic Party (LDP) was in political control from its formation in 1955 to 1993 it did not completely dominate politics during that time. There was usually a strong opposition movement which challenged and criticised government policy and which was active at local government level devising policies which provided, for example, more generous welfare provision than central government allowed.

In the pages that follow I will trace the development of proposals to promote and protect human rights in Japan from the inauspicious start in

the 1950s through to the time of the Gulf War. It is no coincidence that this period has as its bookends two major conflicts that involved UN forces in battle. One theme will be to track the influence of UN policy towards human rights on Japan. However more important is the theme of how human rights issues have been picked up and dealt with by actors within Japan's social and political structures. Two groups, Burakumin and Koreans resident in Japan, claimed that government policy was not consistent with either the spirit or the letter of the Constitution. How these groups organised themselves and the nature of their criticisms will be central to subsequent sections.

Japan and the United Nations' human rights structures

As a former 'enemy power' Japan was not involved in the process that created the United Nations, nor the drafting of the UDHR, nor even the drafting of the ICCPR or the ICESCR. Japan did not join the UN until early 1957 and although Japan was committed, then as now, to a 'UN centred' foreign policy, this did not mean that Japan actively sought new initiatives to strengthen the UN. On the contrary, 'Japan's early years in the world body were marked by a nearly total absence of initiative' (Peek 1992: 218). This Peek puts down to the fact that Japan had not participated in the process of constructing the organisation and thus lacked any significant stake in its principles or structure. Rather like the Third World nations who joined in the 1960s, they felt it was a club funded by the old colonial powers.

This may be part of the answer why Japan has not responded more positively to UN human rights activity but at another level it is clear that from the end of the occupation until at least the time of the first 'Oil Shock' in 1973, Japan was content to follow US foreign policy as long as it did not require Japan to commit resources outside the home islands. As far as the UN and human rights were concerned, US policy was set out by Dulles in 1953 when he declared the US intended 'to encourage the promotion everywhere of human rights and individual freedoms, but to favour methods of persuasion, education and example rather than formal undertakings' (quoted in Alston 1992: 133). The US, he went on, did not intend to become party to the draft covenants then nearing completion and would not even submit them to the Senate for consideration. This lack of US support was one of the main reasons why the CHR work on standard setting and having the covenants adopted by the UNGA was delayed.

Japan was not one of the thirty-five states that had ratified the ICCPR and ICESCR when they came into force in March 1976. Japan did not ratify them until 1979 when the UN human rights monitoring structure was starting to operate and the Carter administration was taking an interest in human rights diplomacy. When Japan joined the UN, a UN bureau was created in the MFA, one or two of whose members were regularly assigned to human rights questions. Criticism of Japan's poor human rights record

towards refugees from South East Asia and domestic and foreign protest about its general neglect of human rights issues prompted the LDP to approve the decision to create a Human Rights Division in the Bureau in 1984 with a staff of ten. The main function of the bureau has been to act as the central administrative unit which submitted periodic reports to the HRC. The committee's criticisms of these reports made the bureau take them, and human rights issues generally, more seriously, although this interest was not shared by the wider ministry or government as a whole (Peek 1992: 219).

At the time Japan ratified the ICCPR and ICESCR in 1979 it was party to only two international rights treaties: on the political rights of women (July 1955) and the suppression of the traffic in persons and the exploitation of the prostitution of others (May 1958). During the 1980s Japan ratified the Refugee Covenant and the Protocol Relating to the Status of Refugees (October 1981 and January 1982) and CEDAW in 1985. There was no haste to join the emergent international human rights regime and one might speculate why this was so. It may be that there are cultural reasons that deter the Japanese and the Japanese government from taking human rights issues on board. However as we will see in a moment most of the reservations referred to by Japan on ratifying the covenants have concerned economic not social or cultural issues. More persuasive is that Japan has followed the line set by the USA. The view of Japanese officials as summarised by Peek is 'while the UN may identify common categories of rights, it may neither set specific international human rights standards nor impose sanctions' (Peek 1992: 222). A view remarkably similar to that expounded by Dulles in 1953. Though the US ratified the ICCPR in 1977, it only signed the ICESCR and still has not ratified it as of summer 2001. Finally it might be that the Japanese government, the LDP in particular, did not want to draw attention to its human rights record nor to provide its domestic critics with the opportunity to use external arenas to criticise its policies.

When Japan ratified the two covenants she entered reservations: to article 22 of the ICCPR and article 8 of the ICESCR, which meant that workers in the public sector would continue to be denied the right to organise and strike and there were objections to another part of article 8 which would allow unions to join international federations. The government also registered its reservations on article 7 of the ICESCR on the right to remuneration on public holidays – union and opposition party voices of protest were not listened to – and to article 13 of the ICESCR which commits the government to work towards free secondary and higher education. Finally, Japan was opposed to article 41 of the ICCPR which empowers the HRC to deal with claims between states. This latter article and opposition is of only theoretical interest as it is not a function that the HRC has sought to develop but it is consistent with the Japanese government's attitude which was to oppose giving the HRC more to do than review periodic reports. Japan did not approve the optional protocol which would have allowed residents in Japan to appeal to the HRC about violations of

the covenant by the Japanese government. The LDP/government position is that this would be unconstitutional and contrary to Asian practice although it has been accepted by the governments of South Korea, Mongolia, the Philippines and Nepal.

Japan submitted its initial report to the HRC in October 1980. It was brief, just twelve pages, three of general remarks and nine which comment briefly on the twenty-seven substantive articles of the ICCPR. Most notorious was the comment on section 27 which refers to minorities. The Japanese government reported that minorities of the kind mentioned in the covenant did not exist in Japan. Hardly anyone within Japan was aware of the report or that it was being considered by the HRC. Meanwhile the committee, being poorly informed about Japan, did not know enough to ask the government representatives about its ethnic minorities.

The second report was due in 1986 but in the summer of that year the Prime Minister, Nakasone Yasuhiro, made some unguarded remarks about the homogeneity of Japanese society compared to the racial diversity of the USA, which attracted criticism both at home and from American minority group leaders. This seems to have caused a delay in the submission of the report until December 1987. Once again there was no consultation with groups outside government in the process of writing the report and NGOs only got to see the report after it was published by the UN. However on this occasion there was sufficient time for twelve NGOs based in Japan plus the World Council of Churches to submit counter-reports. The discussion between the HRC and the MFA officials ranged more widely and, for example, the topic of 'substitute prisons', which had been a concern of the legal profession for a long time, was discussed in an international forum for what was probably the first time.

To summarise, between 1953 to the start of the 1990s Japan was not an enthusiastic proponent of human rights within the UN. It participated in the bodies dealing with human rights issues only reluctantly and tended to respond defensively to proposals it considered at variance with Japanese law or practice. This was in part a result of Japan following the US lead in human rights policy as in most other areas of foreign policy. Second, Japan was reluctant to expose itself to criticism from abroad and did not want to give indigenous human rights organisations the opportunity to use international standards or institutions to exert pressure from outside. Third, we can see that Japan resisted measures that might interfere with the process of economic growth.

Buraku Mondai and the Buraku Liberation League

As many as three million Japanese citizens face real or potential discrimination in their daily lives because they are the descendants of groups which were legally excluded from mainstream society before 1870. Burakumin and their problems amount to the most important single domestic issue which

has called into question Japan's commitment to human rights protection and promotion. Until the mid 1960s, government sought to avoid the issue but, following the introduction of the Special Measures Law in 1969, significant resources have been provided to improve conditions within the Buraku communities so as to eliminate the material basis for discrimination and, it was hoped, prejudice.

Meanwhile, the Buraku Liberation League (BLL) since its formation in 1955 has been the major non-government organisation that has promoted human rights in Japan. Indeed in some areas of Japan 'human rights' has become, for better or worse, practically synonymous with actual or alleged Buraku discrimination. Sufficient has been written about this problem so that it is not necessary to dwell on the detail here (for more on this see Neary 1986, 1989, 1997b and Upham 1980, 1987, 1993). The main themes we will be interested in here are the development of government policy and the way the movement has become involved in the international human rights discourse.

During the Tokugawa period discrimination was a way of life. Society was divided into four main classes – samurai, peasant, artisan, merchant – with each being subject to strict and different regulations and with inter-marriage forbidden. Outside and beneath the main class system marginal groups existed in rural and urban areas who were associated with occupations or social roles that were regarded as impure or polluting. There was a great deal of variation across the country affecting the degree of prejudice encountered by members of these communities, the occupations they were identified with, the names used to describe them and the size of these groups relative to the neighbouring town or village. The new Meiji government dismantled the Tokugawa structures in the 1870s and this included the 'liberation' of the outcaste groups from restrictions on 28 August 1871. Social discrimination between former members of the four main classes disappeared quite quickly during the nineteenth century and had only vestigial significance by the early twentieth but prejudice against the former outcaste groups was recreated such that by 1900 few, if any, mainstream Japanese would knowingly employ or marry one. Discrimination manifested itself in a number of forms and its effect was to ensure that members of these groups remained poor and marginal to society. Burakumin, as they came to be called, resisted these social processes but their social movement, the *Suiheisha*, had little impact before it was forced to cease activity in the late 1930s.

Seven surveys on Buraku areas were conducted in the twentieth century, the most recent and most systematic in 1993. This reported the existence of 4,442 Burakumin communities with a total population of 892,751. More Buraku communities are located in the west of Japan, for example in Hyogo, Fukuoka and Osaka prefectures than in the north and east, but only Hokkaido and Okinawa, neither part of Japan proper before 1868, have no Buraku areas. Many Burakumin have moved to live outside the communities

where they were born (*Buraku Liberation News*, no. 96: 8) and many non-Burakumin have moved to live in them. Neither the former nor the latter are included in government statistics. The discrimination and prejudice against Burakumin tends to define them as those who are descendants of the residents of Buraku communities which existed in the 1930s most of whom (though not all) were the descendants of members of the outcaste groups of the pre-Meiji period. Burakumin thus became a caste-like minority who are regarded with distaste by many Japanese because of some kind of ritual pollution or social marginality. An estimate of how many Japanese might be liable to discrimination were their social origins known suggests a figure in the region of three million.

Awareness of the problem, and thus the incidence of prejudice is spread unevenly across Japan. A public opinion survey (n = 24,000) conducted in 1993 found that only 41.4 per cent of those living in Hokkaido and northern Japan were aware of the problem compared to 73.1 per cent in the region around Tokyo and 95.3 per cent in Osaka and environs (Sômuchô 1995: 29). Prejudice translated into discrimination in various ways. An extreme example would be where it divides families. A man describes his experience following marriage to a Buraku woman:

My parents said I could not have any relationship with them. I have two sons aged eleven and nine. My father met the first one once when he was a baby and the second time a few months ago by accident at the hospital where when we were visiting my grandmother.

(Daily Telegraph, 24 May 1994)

The two families have lived eight miles apart from each other for more than a decade with virtually no contact. His father refuses to relent even though his Burakumin daughter-in-law died of cancer two years ago. The shame of untouchable grandchildren appears too much for him.

The other key area is employment. Large- and medium-sized companies used to have a policy of not employing Buraku people. Before the period of rapid industrialisation and urbanisation it was relatively easy to find out about a person's background but as people moved into cities and as the cities themselves redeveloped and renamed their administrative units it became more difficult to check out a person informally. Nowadays many potential parents-in-law and employers take steps to avoid involvement with Buraku people by employing private detectives. This made it hard for young Buraku people to find work in the better companies or to enter relationships free of the fear of discrimination, not only ensuring that they remained economically and socially marginal to mainstream society but also that they have internalised a distrust of the outside world.

Burakumin have not been passive victims of these political and social processes and from the first years of the twentieth century have organised themselves to resist discrimination. At the same time as the rapid growth

of the workers' and peasants' movements of the 1920s one was also formed by and for Burakumin, the *Suiheisha*, 'a new collective movement through which we will emancipate ourselves'. Despite constant police harassment this movement spread throughout the Buraku communities demanding an end to inhuman treatment and the right of access to society's resources on equal terms. The movement's leadership was tempted by a range of explanations both of the social phenomenon they were encountering and the forms and strategies appropriate to their organisation. Liberals, social democrats, anarchists, communists and (in the 1930s) nationalists competed for control of the movement. At times internal division came close to splitting the *Suiheisha* but it remained active until 1941 and only ceased operation in response to the demands from the wartime state (Neary 1989).

A successor to the *Suiheisha* was formed in 1946 – the National Committee for Buraku Liberation (NCBL) – with Matsumoto Jiichiro as its leader. He had first been elected to the lower house of the Diet in 1936 as a member of the Social Masses Party. He joined the Japan Socialist Party as soon as it was formed in 1945 and was elected to the new House of Councillors where he served for a time as its Deputy Speaker. Matsumoto was not in this post for long. Having been a member of the Diet during wartime he was purged for alleged collaboration with the nationalist government. And, not long after he had had his purge order lifted at the end of the 1940s, he was caught up in the 'Red Purge', it is said on the specific orders of MacArthur (DeVos and Wagatsuma 1972: 70–1).

It proved difficult to revive the movement after the war. Living conditions were so dire that few had time to get involved in social movements. Moreover the reform of Japan instigated by SCAP which included guarantees of human rights in the constitution, land reform and education reform, suggested that the prospects for a thorough democratisation of Japan were good and that this would include the elimination of Buraku discrimination. Indeed the Communist Party endorsed this view. Even before the war they had argued that the Buraku communities were a remnant of the feudal era that had remained because of the incomplete nature of the bourgeois revolution of the nineteenth century. It seemed to them that the US occupation with its dismantling of the aristocracy, dispossession of the large landowners and similar reforms was completing that process so that Buraku discrimination would naturally disappear.

In 1951, just before the occupation ended, an incident occurred which demonstrated that segregation was being re-created in post-war Japan and that there was an important role for the new Buraku movement. In October of that year a pulp magazine, *All Romance*, published a story entitled 'Tokushû Buraku' set in a Buraku community in Kyoto. It portrayed a 'hell on earth full of black marketeers, illegal sake brewing, crime, violence, and sex' (Wagatsuma 1976: 352). It turned out that the author of the story was employed in the Kyoto city offices and, as the word spread, a campaign was

mounted which criticised not only the publisher of the story but also the Kyoto authorities. The incident became a hook on which the NCBL could hang a campaign about the continuing poverty and deprivation of Buraku in the city. They demanded that,

officials in charge of various administrative districts mark on a map all sections of the city lacking public water supplies, sewage disposal, fire hydrants and all areas with inadequate housing, high rates of TB, trachoma and other public health problems, high absenteeism in the schools and high concentrations of families on relief. The result was a vivid demonstration of Burakumin problems since the marked areas fell entirely within the eighteen Buraku of Kyoto and its environs.

(DeVos and Wagatsuma 1972: 76)

Clearly then the marginal situation of Burakumin was being re-created in post-war Japan irrespective of the formal democratisation of the political and social system.

The JSP urged the government to establish a commission of enquiry but the LDP resisted until, in a change of tack, in March 1960, Akita Daisuke, chair of the LDP Committee on Buraku Affairs, announced that a bill would be introduced to set up a commission of enquiry within the PM's Office. The bill was passed in August 1960, the members of the commission appointed in November 1961 and the report published in August 1965.

This report did not contain any socialist rhetoric but, apart from that, its overall approach was very similar to earlier JSP proposals. Government action was required in a number of fields to provide a comprehensive improvement in the lives of Burakumin such that their basic problems could be solved. The report even contained a section on human rights protection, which pointed out that too little was spent on training the CLCs or informing them about such matters as Buraku discrimination and that more needed to be done to make the system work more effectively. (Full report in *Jinken Yôgo Kyoku* 1988: 286, and more discussion in Neary 1986 and Upham 1980.) It concluded with the comment that resolution of the issues requires long-term, comprehensive planning to improve environment, industry, employment and education (*Jinken Yôgo Kyoku* 1988: 289). Broadly speaking the government accepted the report and four years later a Ten Year Plan was produced which was the basis for the Law on Special Measures for *Dôwa* projects (SML).

Between 1969 and 1993 the total amount spent on SML projects was ¥13,880 billion. There was some regional variation but broadly speaking there were three main types of programmes. First, there were the projects which targeted the physical environment – improving streets, schools, clinics and community centres and constructing high-rise housing to replace the old housing stock. Second, there was a system of grants that were paid directly to Buraku families. Upham describes the situation in the 1970s

where a family in Osaka with two children could receive over ¥400,000 annually from a combination of grants rewarding school attendance, twice yearly grants given to all, not to mention the one-off payments on marriage or the birth of a child (Upham 1980: 49). The third type of programmes relate to education, both programmes within the school classroom and 'enlightenment' programmes which aim to change public attitudes. In 1978 the programmes were extended for three years and since then, mainly due to successful lobbying by the BLL, they have been renewed several times. Most of the programmes came to an end in 1997 but there were some incomplete projects whose funding was renewed and money continues to be provided to support educational programmes.

There were other changes introduced in the 1970s which have deterred discrimination. When the first family records (*koseki*) of the Meiji era were produced, many local officials made sure that former outcasts would continue to be identifiable by marking the new registration form in some way. In some areas they even insisted that all 'new commoners' adopt the same surname so that it would be easy to distinguish between them and the rest of the population. These and subsequent family registration forms were open to public inspection making it easy for a potential employer or parent-in-law to check out an individual's family background. In the late 1960s the BLL led a campaign to restrict access to these records. Local governments placed their own restrictions on access and this became national policy in 1976 with the revision of article 10 of the *Koseki Law*. At the end of 1975 Buraku activists were anonymously informed that *Chimei sōkan* (comprehensive guide to place names) were being offered for sale to major companies. The one and only use that can be made of these is to ascertain from an individual's family address whether or not he or she might be from a Buraku community. Purchase of the first edition was condemned by the Osaka Civil Liberties Bureau as 'an exceedingly pernicious violation of human rights', and firms purchasing it were urged to achieve a 'fuller understanding of *Dōwa* problems'. However this did not deter the production of at least seven more such lists or their purchase by several hundred firms and at least one university (Tomonaga 1995; Upham 1980: 65). Faced with this evidence of pervasive discrimination among the major employers, the Ministry of Labour in 1987 issued an order encouraging the creation of '*Dōwa* Problem' study groups within companies. Meanwhile companies in Osaka and Tokyo and other cities created local organisations which would put on a series of lectures, seminars and similar events to be attended by personnel officers within the company.

These changes in the law plus the improvements which were taking place in their living environment encouraged the BLL to review its strategies in the 1980s. First, it began to place increased emphasis on the Buraku issue as a human rights problem and, as such, the infringement of the human rights of Buraku people had features in common with those faced by groups elsewhere in the world. Since 1980 the BLL has organised international

symposia and conferences on human rights. Within Japan the BLL was a prominent supporter of the campaign to ratify the UN Convention on the Elimination of all forms of Racial Discrimination (CERD). In 1984 PM Nakasone, in response to a question about this from the JSP chairman announced that 'I am basically for the International Convention. However at this minute I am making efforts to adjust domestic laws' (*Buraku Liberation News*, 18 March 1984: 1). It is not clear what he meant by this and the convention was not finally ratified until 1995 and even then with several reservations (see below). The BLL also made use of the UN structure in the summer of 1983 when it and the JCP supporting groups both sent representatives to attend the sessions of the Human Rights Committee in Geneva. (Not it might be said without some squabbling between them about who was the rightful representative.) In the short term this encouraged the Japanese government to pay closer attention to UN human rights policy.

The second strategy was to demand the creation of a Basic Law on Buraku discrimination. Although the Constitution makes clear the importance of basic human rights and the 1965 report proposed making improvements to Buraku living conditions, there was still no law in Japan which made discrimination illegal. To rectify this and to commit the government to a continued policy to review the progress of improvement in Buraku living standards, the BLL has demanded the introduction of a 'Basic Law'. In the words of one American legal scholar, Basic Laws 'are symbols of permanent national commitment to certain goals ... [and] ... establish a framework for government policy making in a particular area' (Upham 1993: 330).

The BLL wanted to have such a law introduced with three aims:

- to institutionalise national commitment to the goals of the 1965 report and to establish a legal framework for a comprehensive approach to the Buraku problem;
- to oblige government to take action in a broad range of areas beyond urban renewal;
- to prohibit a wide range of discriminatory acts and provide the statutory basis for direct legal attacks on discrimination by individuals and groups.

Government would be expected to submit an annual report to the Diet and conduct a survey on Buraku conditions every five years. Moreover it was proposed that a Buraku Deliberative Council be created to investigate Buraku discrimination-related problems (BLRI 1994: 27). This would ensure that the issue remained prominent within the public domain.

The LDP and the JCP were opposed to this proposal. The JCP argued that there was now no obstacle to a complete solution to the problem. Some elements of prejudice and discrimination may remain but new legislation will do nothing to improve matters. In this their attitude was very similar to that of the government which considered that:

To root out discrimination it is necessary to reform the psychology that gives birth to it. This can only be done by enlightenment. Not only can it not be done by punishment ... punishment will drive discriminatory consciousness underground and harden it.

(quoted by Upham 1993: 331)

Despite the fact that both civil and social rights were recognised in the 1947 Constitution, there was no mechanism that could ensure that these rights were put into practice. As members of communities marginal to Japanese society, the Burakumin were not as fully socialised as most Japanese citizens into the political culture of either pre- or post-war Japan. This explains in part why Burakumin resisted longer than most social movement organisations the demands of the pre-war state to cease activity and why they have been one of the main post-war advocates of human rights ideas. Nevertheless the state was able to resist demands from the BLL and its supporters for the provision of real improvements for a long time after they were first made. The report of 1965 gave further promises of state action but it is noticeable that it was not until 1969, when there was no danger of the SML projects interfering with the general process of economic recovery, that the first measures were introduced which would contribute to the improvement of Buraku living conditions. Even then the measures taken did not interfere with the recruitment practices of the major companies. There was no way in which an individual could take action to prevent, or claim redress for, actions taken by companies which infringed his or her constitutionally guaranteed rights.

The nature of the response of the Japanese state was quite different to that of the USA or the UK in the 1960s to protests about discrimination. There the Civil Rights Act and Race Relations Acts sought to remove the obstacles to equality of opportunity by making discrimination illegal, empowering the individuals to protect themselves through the courts. Improvement of conditions in the disadvantaged communities was of much less importance. In Japan the emphasis was almost exclusively on bringing the material living conditions up to the same level of the majority community in the belief that this would eliminate the grounds for discrimination. This is consistent with the policies of a developmental state: avoiding creating a rights consciousness which might interfere with the employment practices of the companies. But it is also fully consistent with Woodiwiss' account of the nature of the neo-patriarchal state in Asia-Pacific. The BLL used the democratic structure of post-war Japan to make demands on the state and thus 'enforce benevolence', stressing the rights of the Buraku communities to make claims on the state rather than insisting on policy that would guarantee liberties or immunities for individual Burakumin. The human rights demanded by the BLL challenged power relations in Japan but provoked a benevolent response from the state.

Koreans in Japan

Although they make up less than 0.8 per cent of the population, the Korean minority is the largest ethnic group in Japan with between 800,000–900,000 members. Their presence in Japan poses a serious challenge to the ideas of the mono-ethnicity of Japanese society and the ability of Japan to live up to the human rights standards to which it is constitutionally committed. Moreover the problems Koreans encountered in Japan became entangled in Cold War conflicts which provided a further dimension of complexity. As in the case of Burakumin, there is now an extensive literature in the origins of the problem and a considerable amount of writing on post-war developments (Weiner 1994; Ryang 1997). The purpose here is not to summarise that literature but rather use it to indicate the development of human rights thinking and practice in Cold War Japan as shown in the way it dealt with Korean minority issues.

At the end of the Pacific War there were 2.3 million Koreans in Japan of whom over 600,000–700,000 had been brought to Japan since 1939 as conscript labourers or military draftees (Ryang 1997: 6). Of the rest about half had moved to Japan more or less voluntarily during the war years with the remainder having moved and settled in Japan in the period between 1920 and 1937 (see Weiner 1994). The Japanese government hoped and the US forces expected that all of them would return to Korea and, indeed, many did. However, there was a limit to how much an individual or family could carry back and there were regulations on how much cash they could take with them (¥1,000). Given that the social and political situation in South Korea was confused and unstable many, especially those with families who had settled in Japan before 1930, decided to remain in the comparative safety of Japan rather than risk returning to unknown conditions (Mitchell 1967: 104). According to a survey carried out in 1954 there were 564,146 Koreans still resident in Japan of whom only 2.4 per cent had been born in what was by then the ‘North’ (Lee 1971: 157).

We cannot know how large the presence of Koreans in Japan loomed in the minds of those involved in the negotiations concerning the fine detail of the provisions of the constitution. It is nevertheless clear that a small but significant change was made in the wording of the Constitution as it passed from the MacArthur draft to the final version. In the draft version article 13 begins, ‘All natural persons are equal before the law’ and article 16 states unequivocally, ‘Aliens shall be entitled to equal protection of the law’. There is no doubt that the framers of the constitution had a fairly broad definition of ‘people’ in mind when they drafted the Constitution to include all resident in Japan. In the final version however we find that ‘people’ is translated as *kokumin* (national) and a new article 10 was introduced, ‘The conditions necessary for being a Japanese national shall be determined by law’. Article 14 (formerly 13) now became ‘All nationals (*kokumin*) shall be equal before the law’. The old article 16 disappeared entirely. In this way the Legislative

Bureau 'skilfully eliminated the human rights of foreigners in Japan in one fell swoop' (Koseki 1997: 180). At one level the post-war history of the Korean community in Japan has been a struggle against the consequences of this amendment.

A League of Koreans Resident in Japan (*Zainichi Chôsenjin Renmei – Chôren*) was formed soon after surrender and at first it co-operated quite closely with government to facilitate either repatriation or the provision of social services for those Koreans who stayed. However many left-wing Koreans were recruited into the JCP and were persuaded that the best guarantee of their rights would be within a 'People's Republic' of Japan. There was a large overlap of resentment against the Japanese government shared by Koreans and Communists, both were now advocating the overthrow of the emperor system.

In an understandable response to the Japanese colonial policy which had forbidden the use of the Korean language, even in the home, and prevented the teaching of Korean history in schools, immediately after the war Korean communities had set up their own schools. However, following the passage of the School Education Law in January 1948, the government ordered all Korean schools to close down. Violent protests erupted all over Japan, the worst in Kobe in April 1948 where at one stage the prefectural governor was kidnapped and forced to rescind the school closing order. The Occupation forces responded by declaring martial law and riots were suppressed following the arrests of several thousand Koreans (Mitchell 1967: 115). Practically all the schools were closed down and the Korean education programme only restarted after 1955. An Organisation Control Law was passed the following year which gave the government power to order *Chôren* to disband, charged with being a terrorist and undemocratic organisation. A few months later the 'Red Purge' was launched to dislodge JCP members from positions of influence. Supervision of the Korean community was stepped up after the outbreak of the Korean War as young Korean radicals planned to work alongside the JCP guerrilla groups attacking US bases.

Not all of the Korean community in Japan were sympathetic with the increasingly radical position taken by *Chôren* in the 1940s and a rival group, *Zainichi DaiKanminkoku Kyoryu mindan – Mindan*, was created shortly after the formal inauguration of the Republic of Korea. This group had links with the RoK government and even sent several hundred of its members to fight in the RoK army during the Korean War (Mitchell 1967: 120). Division of the peninsula was thus reflected in the Korean community which remained in Japan.

Koreans were in an ambiguous position during the occupation. On the one hand they had been part of the Japanese empire and were Japanese citizens until either the Korean republics were proclaimed in 1948 or the occupation came to an end. On the other hand anti-Korean sentiment was rife among society as a whole and there was no sympathy in government for their circumstances. The San Francisco Peace Treaty of 1952 did little to

resolve the problem. Japan formally recognised the independence of Korea and thus all Koreans were liberated from the jurisdiction of Japan and those who remained in Japan were treated as aliens. The official view was that eventually they would return to the peninsula. Given the historical background of ill treatment by Japan and a tradition of fierce national pride it may well have been that few Koreans would have accepted Japanese citizenship even if it had been on offer. Nevertheless the status of Koreans resident in Japan as 'aliens' meant that Japan has been able to justify its ungenerous treatment of its Korean community on the basis that international law gives states wide discretion in the treatment of foreigners. For example, all residents in Japan were covered by the Livelihood Protection Act until after the occupation when only nationals were eligible to receive it as of right. Others in need, and this in practice meant many Koreans, could receive it subject to the discretion of Japanese officials. The only option available to them was naturalisation, which until 1990 was a very strict process that required a high degree of economic security, which most members of this marginal community did not have, and evidence of assimilation into Japanese society which many Koreans did not want (Ryang 1997: 121–2).

The organisation of left-wing Koreans – the Democratic Front of Koreans – was divided between the internationalists who supported the JCP and the 'Korea first' patriots who supported the DPRK. When in 1955 the DPRK announced it was prepared to enter into diplomatic relations with Japan, the policy of the JCP came into potential conflict with that of the DPRK (potential in that diplomatic relations were not in fact established). Following intense debate, the Democratic Front was dissolved and a new organisation was created whose over-riding political objective was the unification of the fatherland. Looking to the DPRK for leadership, they created the General Federation of Korean Residents in Japan (*Chongryun*) in May 1955. Significantly for our purposes the *Chongryun* defined its members as 'overseas nationals of the DPRK'. North Korean funds supported the creation of a network of 161 schools from kindergartens to a four-year university college which was set up in 1959. In addition an elaborate network of credit unions was created to encourage the 'ethnic' business enterprises of *Chongryun* members. There is no doubt who was winning the battle for the hearts and minds of the Korean community at the end of the 1950s: of a total population of 613,671, 445,586 belonged to the *Chongryun* network, 162,891 to the RoK oriented *Mindan* (Mitchell 1967: 131).

Many Koreans in Japan were living on the edge of poverty and there were restrictions on the jobs available to them; most in the public sector were only open to 'nationals' and no major corporation would knowingly employ a Korean. Not only was the DPRK willing to subsidise the education of Koreans in Japan but they also offered to pay the travel expenses of all who wished to return and even offered housing and employment when they arrived. It took some time for the details to be worked out but the first boat load of 975 left Japan in December 1959. A year later 50,000 had gone and

by 1967, 82,000 Koreans plus 6,000 Japanese, mostly wives, had taken up the DPRK offer (Mitchell 1967: 140–4; Ryang 1997: 113).

This was a massive propaganda success for the regime in North Korea. Economic development in the north contrasted sharply with the confusion in the south. The DPRK's attractiveness is all the more remarkable when we remember how few of the Koreans resident in Japan had originally come from the north – there was no real sense in which they were going 'home'. For Japan it might have been an embarrassment – the first and only mass migration from a developed industrial nation to a communist country. On the other hand, it meant a substantial reduction in the numbers claiming Livelihood Protection – the Japan Red Cross estimated that 75 per cent of those who registered for repatriation were unemployed (Mitchell 1967: 144) – and it meant there were fewer supporters of the left-wing *Chongryun*.

Mindan developed as a much looser organisation than its rival and attracted very little support from the Syngman Rhee government of the 1950s. At the time of the 1965 Normalisation Treaty between Japan and the RoK, the Park Chung-hee government began to take a more active interest in supporting *Mindan* and pro-South Korea education in Japan. The assassination of President Park's wife in 1974 by a Korean who had grown up in Japan prompted Park's government to formulate a new policy to assist *Mindan*. Part of this new campaign was to try to win over *Chongryun* members by inviting them to visit the south on trips paid for by *Mindan*.

Normalisation of relations between Japan and the RoK in 1965 had little substantive effect on Koreans in Japan. Koreans with RoK nationality now had 'permanent resident status by treaty' but they already had *de facto* permanent residence. The main change was to make them eligible for national health insurance.

The 1970s saw the start of a change in attitudes in the Korean community as the influence increased of the second- and third-generation Koreans born in Japan. Unlike their parents they had never seen Japan as a place of temporary residence. They had been born and brought up in Japan, many knew no Korean and were not necessarily interested in the *Mindan/Chongryun* rivalry. The Hitachi incident highlighted this change. Park Chong-sok, a second-generation Korean who neither spoke nor read Korean applied in 1970 for a job with Hitachi. He was accepted for the post and was only asked to submit his family registration document (*koseki*) when about to move into company-owned housing, at which point the company realised that on the original application form he had pretended to be Japanese by using his Japanese name and putting his place of birth as Japan. Many Koreans, especially those who know no Korean, use a Japanese name on social occasions and Park reasoned that had he used his Korean name on the application form he would never have been considered for the job. A few days later the company wrote to him saying they could not offer him the job on the grounds that he had sought to deceive them by providing false information on the application form. Park alleged that this excuse hid a

discriminatory hiring policy and he filed a civil suit against Hitachi. It took four years before the case was finally settled in court during which time Park's campaign was supported by a group of Japanese and Korean human rights activists. They not only sought to influence domestic opinion but also used international rights forums to publicise the issue and organised a successful boycott of Hitachi products.

The court found for Park. The judge stated 'the court finds no apparent reason other than the factor of ethnic discrimination when the defendant [Hitachi] rescinded the contract to hire the plaintiff'. He found no malign motive in the plaintiff or harm caused to the company through the use of the Japanese name. He said the hiring notice issued by the company amounted to a labour contract and therefore the cancellation of the offer of a job amounted to an arbitrary breach of the contract and was thus in breach of both the Labour Standard Act and the Civil Code. Finally the court expressed its sympathy for the motive of the plaintiff because of the way Japanese society compelled him to act (Lee and DeVos 1981: 277-8).

This was not just a victory for Park. It suggested a wider interpretation of constitutional rights such that 'all people' in the constitution could be regarded as all people who establish legal residence in Japan, not just Japanese nationals. Important as this victory was, it did not involve either of the two major Korean residents' organisations. By using a Japanese name he had in their eyes tried to reject his national identity which lay at the centre of their world view. The 400 supporters of the Park campaign were Japanese or second-generation Koreans unconnected with the two main groups.

National pride and the exclusivity of the Korean and Japanese communities was breaking down. The ratio of Koreans marrying Japanese passed 50 per cent in 1976 to reach 73 per cent in 1990, while the number of naturalisations went up from 2,000 per year in the 1950s to 5,216 in 1990 (Wagatsuma 1998: 244). Meanwhile small changes in public policy have taken place. Resident Koreans became eligible to practise law in 1977 and in 1978 the Supreme Court, in a judgement that admittedly did not involve a Korean, confirmed that even aliens were entitled to freedom of political activity.

In 1979 Japan ratified the two major human rights covenants and in 1982 the UN Protocol on Refugees. In order to comply with these the government had to revise the social welfare laws which previously had limited benefits to nationals, revise the regulations for access to public housing or public loans and reform the legal position of those Koreans who were not RoK nationals. Normalisation of relations with the RoK in 1965 had given those with RoK nationality permanent resident status but this left those allied to the DPRK in a legal margin. New regulations in 1981 provided permanent residence status for all 'habitually resident Koreans' (Onuma 1992: 521).

This resolved the major problem but there remained a number of other issues which now came to the fore: fingerprinting and employment. Koreans complained that only criminals and aliens, most of the latter being Korean,

were compelled to have their fingerprints taken. It was an indignity that pressed home the fact that they were not Japanese. There remained the danger that Koreans who knew no Korean and had never visited Korea might be deported following conviction for relatively minor crimes, resulting in a serious form of double jeopardy. Finally there were a number of rights to hold licences of various kinds plus access to public offices, including teaching and nursing posts, that continued to be closed to aliens.

During the 1980s the anti-fingerprinting movement gained rapid support within the Korean communities and the human rights movement generally, although it was not supported by *Chongryun* which ordered its members to respect Japanese law. Human rights activists made use of the international human rights system to complain about the discriminatory treatment of Koreans by the Japanese government to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities at a meeting in August 1984 and in communications sent to the Human Rights Committee when the Japanese government made one of its periodic reports.

The Japanese government has tried to avoid having the resident Korean population regarded as an ethnic minority. In its reports to the UN in 1980 and 1987 there was no mention of the Koreans. It persisted in regarding them as aliens resident in Japan who would one day leave. Concessions were made to the fact that they had been resident in Japan for over two generations by granting them permanent residence in 1965 and 1982. This latter policy change, which mainly benefited *Chongryun* members, meant that they were able to travel abroad for the first time. The 1965 agreement with the RoK had left unresolved the problem of the status of 'third-generation' Koreans which was to be settled in 1991. In January that year the Ministers of Foreign Affairs from Japan and the RoK signed a memorandum that promised reforms in the Alien Registration Law and the Immigration Control Act. Effective from January 1992 the new laws gave all permanent Korean residents 'special permanent resident' status regardless of their allegiance. All are now eligible to apply for social benefits and for multiple entry permits. At the same time the number of crimes that might result in deportation has been greatly reduced. These reforms suggest that the Japanese authorities accept that Koreans born in Japan are not going anywhere.

By the end of the 1980s much had changed both within the Korean communities and mainstream Japanese society. While it would be unduly optimistic to claim that there was a change of attitude in Japanese society as a whole towards Koreans, the cumulative effect of the reforms of the 1970s and 1980s created the possibility for a freer assertion of rights. That this was achieved had little to do with the two groups that purported to speak for Koreans resident in Japan. From the mid 1970s it was clear that the bitter antagonism between the two of them interfered with the task of fighting against social injustice. Moreover both had become closely identified with the regimes north and south, neither of which had a noteworthy record in

human rights protection. Rather it was the single-issue groups that provided support in specific incidents, such as the Hitachi case, or the individuals involved in the wider human rights movement in Japan that provided help, for example, in the fingerprinting campaign. Finally we have evidence here of the impact of the UN sponsorship of rights issues. Japan's ratification of the rights covenants did change significant aspects of policy and conversely the presence of organisations such as the HRC provided a means by which groups such as the Koreans could expose the Japanese treatment of them to international inspection.

Human rights in Japan: post-Gulf War, post-Cold War

There was a qualitative change in the Japanese approach to human rights in the 1990s, which can be seen at a number of different levels. At the non-governmental level too, groups and organisations started to locate their demands for human rights within an international context and to seek to contribute to a broader awareness of rights issues regionally and internationally. At the governmental level we saw the MFA taking the lead in signing and ratifying a number of international human rights covenants and playing a more positive role in human rights promotion at UN conferences world wide and within the region.

One indication of this change came when on 30 June 1992 the MFA announced revisions in its Overseas Development Assistance (ODA) charter to include the principle that: 'Full attention should be paid to efforts for promoting democratisation and introduction of a market economy *and the situation regarding the securing of basic rights and freedoms in the recipient country*' (quoted by Hoshino 1999: 201, my italics).

Now there may be some debate about how seriously Japan has taken this principle but the fact that it adopted it at all symbolises the way Japan in the 1990s has taken on board human rights issues. In May 1994 Japan ratified the CRC and the following year the CERD. In 1997 the MFA began working on preparations for the ratification of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which became effective in Japan in July 1999. Meanwhile the government produced two periodic reports in 1991 and 1997 under the terms of the ICCPR and one in 1998 on the implementation of the ICESCR, each of these provoked the production of alternative reports from a large number of organisations including the JFBA and the JCLU. There have also been new policy initiatives in human rights education and to aid victims of human rights violations. For perhaps the first time, there was a feeling that human rights were being taken seriously within central government and the NGOs were keen to ensure that the government live up to its international commitments.

In this section we will start by considering the developments at the international level before moving on to consider the changes in the circumstances of Japan's principal minority groups. There were a number of human rights

NGOs that were formed in the early 1990s which grew out of the domestic human rights movement but which devised an international orientation. Finally we will consider the changes taking place within the CLB and the reforms planned for the first years of the twenty-first century.

The UN and international covenants

In the late 1980s and early 1990s the Japanese government was strongly criticised for its reluctance in ratifying international human rights conventions. At that time it was commonly reported that Japan had only ratified seven of the twenty-two human rights treaties (see, for example, Peek 1992: 221 n.9). Moreover, as we have seen in the reports made to the UN, there was often less than full disclosure.

Japan's change of attitude towards the international human rights regime can be explained by three interlinked factors. First the Gulf War showed the new significance of the UN in the post-Cold War world. Moreover there was widespread criticism of Japan for its policy immobility and inability to deal with an international crisis of this proportion. This was not only a matter of international politics. It was Japan's conspicuous failure to respond effectively to the Gulf crisis that moved Osawa Ichiro to demand reform in the structure of Japan's party politics and administrative structure, which contributed to the LDP's loss of power in 1993 and the uncertainty at the centre of Japan's political life that still (in 2001) has not been completely resolved. What Japan should do was not clear but no longer could Japan afford to sit on the side-lines of international politics contributing only cash, whether that be in the form of ODA or finance for the Gulf War effort.

Second, during the early 1990s international attention focused on the regional human rights conference held in Bangkok in April 1993 which was a prelude to the World Conference held in Vienna in June that year. These conferences forced Japan and many other nations to clarify their positions towards human rights. At both conferences the Japanese delegation made clear that it took the universalist view in opposition to the views expressed by the representatives of the PRC, Singapore and other South East Asian countries who insisted on placing human rights in the context of 'Asian Values'.

The third major change is that by 1990 a consensus had been achieved in the MFA to actively pursue Japan's candidature for a permanent seat on the UN Security Council, if and when there is any reform of UN structures. Public debate about this started in 1992–93. The more positive attitude of the MFA to the international human rights regime was no doubt part of the attempt to win domestic support for more positive involvement in UN activities. It would be difficult for Japan to press its case if it continued to ignore the demands in the international community that it ratify at least some of the outstanding human rights treaties.

The Covenant on the Rights of the Child (CRC) had been adopted by the UNGA on 20 November 1989 and entered into force on 2 September 1990.

It was rapidly adopted and had been ratified by all but twenty members of the UN by early 1994. One of the twenty was Japan. We will discuss later in more detail the reasons why Japan was late to ratify this, but it was considered at the time as being representative of Japan's reluctance to be bound by international agreements. However Japan did ratify the CRC in May 1994 and the MFA then began almost immediately to start to make preparations for the ratification of CERD. It had been the government's view that article 4 of this convention (on banning incitement to racial hatred) was incompatible with Par. 21 of the Constitution (which guarantees freedom of speech, press and all other forms of expression) and therefore it had stopped examining the treaty. Similarly the Japanese government concluded that there were some aspects of the Convention Against Torture that were unenforceable and therefore it would not make sense to ratify it. The government told Japanese NGOs that it was no longer considering these treaties and the JCLU concluded in 1993 that 'there is ... no future prospects for the ratification of these treaties' (JCLU 1993: 24).

Nevertheless three years later Japan had ratified the CERD with reservations on the provisions on the obligation to punish all dissemination of ideas based on racial superiority and racial hatred (Par. 4 a and b). Japan then ratified the Convention Against Torture in 1999. With this done Japan has ratified all the principal international human rights instruments with the single exception of the First Optional Protocol to the ICCPR which permits appeals to the Human Rights Committee.

The Third and Fourth periodic reports on civil and political rights submitted to the HRC in December 1991 and June 1997 were substantially longer than their predecessors stretching to fifty-one and fifty-three pages respectively. They contain discussion on theoretical issues, such as the concept of 'public welfare' in the Japanese Constitution, detailed discussion of the rights of Koreans resident in Japan (though in the context of article 2 'Concerns pertaining to foreigners', not article 27 'ethnic minorities') and there is lengthy discussion of the treatment of prisoners (see Third Report of Japan CCPR/C/70 and Fourth Report of Japan CCPR/C/115). Ainu, the indigenous group mainly found in Hokkaido, were referred to in the 1991 report for the first time and an update included in the fourth report. There is a brief discussion of the Buraku problem in each of the reports.

The NGOs are critical of the way the MFA continues to compile these reports without any input from the groups representing the various minorities and women, but there has been an increase of co-operation between them. Both reports were made public immediately after submission to the UN and the 'list of issues' that came from the HRC after it had read the report was passed straight on to the NGOs. Meetings took place between the NGO representatives and government officials who were going to Geneva. Twenty-three 'counter reports' were prepared and submitted prior to the HRC hearing in 1993 and eighty lobbyists were in Geneva for the meeting. In 1993 the Japanese government was represented by not only the

MFA but also by bureaucrats from the MoJ, the National Police Agency and the Management Agency (*Watchi* 1998: 5–6). In 1998 the MoL, MoE and MHW were also represented in the official party of twenty-six and there were fifty representatives of more than ten NGOs at the meeting (*Nichibenren Shimibun*, 1 December 1998: 9).

The JFBA produced very substantial counter reports in 1993 and 1998 – each over 250 closely typed pages which focus heavily, though by no means exclusively, on criminal procedure (JFBA 1993, 1998). Despite their long-term commitment to promoting human rights ideas within Japan, there is said to have been a feeling among lawyers before 1990 that to point out the inadequacies of the government report to an international audience was somehow shameful and unpatriotic. This is no longer a problem. Neither the JFBA nor any other of the human rights NGOs have such compunctions and they have become enthusiastic about exposing Japan to international scrutiny.

The fifth report is due in 2003. There were suggestions in the late 1990s that the HRC be invited to consider the Japanese report and reports from other Asian countries at a session held in Tokyo. This would focus the attention of the world on Asian issues (*Watchi* 1998: 7).

Through the regular process of report and counter report the Japanese government has been forced into a dialogue, not only with the international experts on the HRC but also domestically with the home NGOs. The growth in the length of the periodic reports over the years is not simply due to the questions that have come from the experts on the committee, but is also a result of government making an effort to maintain its position as the legitimate interpreter of the state of human rights in Japan. The scale of the response from the NGO side has generated a very large amount of data and conflicting interpretations of events which is fascinating for the outside observer. It also demonstrates the width of the range of groups now involved in rights issues in Japan. And, of course, it has generated a large amount of data available to the human rights community within Japan.

Domestic issues

The linkage between changes in the overall contours of policy making and the detail of policy implementation is always difficult to demonstrate, but it is surely more than coincidence that at a time of change in the governmental commitments to internationally decided human rights values there has also been change in policy towards the three most significant minorities in contemporary Japan. Let us briefly, then, consider how policies towards Koreans, Ainu and Burakumin have changed in the 1990s.

Koreans in Japan

Human rights activists had campaigned in the 1980s to attract public attention to the position of the Koreans (and to a lesser extent Chinese) resident

in Japan. In particular there had been well publicised protests against the requirement that each Korean have their fingerprints taken each time they re-registered as resident aliens. A concession was made in the late 1980s that all who had already been fingerprinted need not do so again but this now meant that third-generation Koreans had to submit themselves for registration and fingerprinting at the age of fourteen which raised the symbolic significance of the event.

In the late 1980s human rights campaigners put forward a detailed set of proposals that would have largely eliminated the threat of deportation, remove the fingerprinting obligation, open all but a few occupations to non-Japanese, provide some protection for ethnic identity and open up access to welfare programmes (Onuma 1992: 525). In 1991 Japan announced that following consultation with the RoK government it would abolish deportation except for crimes relating to 'vital national interests' and end the fingerprinting requirement within two years. The latter was effective from 8 June 1993. The 1992 Alien Registration Law divided foreign residents into three categories: permanent residents, who must review their registration every five years giving details of their family circumstances but with no fingerprinting obligation (mostly Koreans); non-permanent residents staying in Japan for more than one year, who must still both register and be fingerprinted (abolished in 1999); and a third category of those staying less than twelve months who are not fingerprinted. Thus two of the main irritants were removed.

Employment remains a problem. Well into the 1990s the Ministry of Home Affairs (MHA) was advising against the employment of non-Japanese nationals in local government. In the third periodic report to the UN in 1991, the Japanese government claimed that 'local government will be guided to expand employment opportunities for Koreans' (Par. 45) and that boards of education will be 'guided to open the way for Korean residents to take the same examination qualifying for the regular teaching service as for the Japanese' (Par. 46). Despite this there is no sign that the MHA has changed its opposition to the employment of Koreans in all but a handful of positions. The problem is that although there is no specific stipulation in law that Japanese nationality is required if a person is to become a public servant, it is an oft-repeated government view that it is a 'natural principle of law' that those who do not hold Japanese citizenship cannot be appointed to work even in local government.

Some local governments have taken the initiative, developing policies that would open all but the most senior posts to permanent residents, but at the end of the 1980s only a tiny proportion of local civil servants were not Japanese nationals – 0.017 per cent – and the figure has not changed much since then (JFBA 1993: 161). The same principle is invoked to justify the refusal to employ Koreans as teachers in public schools (elementary, junior and senior high school). A document issued in 1983 in the name of PM Nakasone states, 'participation in the operational duties of a school ... is

deemed to constitute employment which participates in the formation of the public will, and the application of *the natural principle of law* takes effect' (quoted NCC/J 1993: 34, my italics). This does not apply to private schools. In 1996 a Korean nurse employed by the Tokyo metropolitan authority was refused permission to enter an examination for a management position even though the relevant law contained no nationality clause. She appealed to the District Court which upheld the authority's decision citing the 'natural principle of law'. There has been some relaxation of the law with regard to teaching since 1991: aliens may take the examinations to qualify as classroom teachers but they will not be eligible for promotion to 'management' positions. The benign view of this is that it is intended to encourage naturalisation (Wagatsuma 1998: 156–8).

The Korean community has continued to make demands of Japanese society. In the early 1990s a group of Koreans took a case to the courts arguing that it was unjust that Koreans were not permitted to vote in local elections despite the fact that they paid the local taxes, the main qualifying requirement. The Supreme Court decision of February 1995 found against the Koreans saying that the statute did not give permanent residents the right to take part in local elections. However the court also suggested that it would not be against the Constitution if the law were amended to give permanent residents limited voting rights. This gave encouragement to the Korean groups to continue their campaign though their target was now the political parties, some of whom began to respond favourably (Wagatsuma 1998: 153).

In 1991 there were 693,050 Koreans registered with municipal governments, most of whom hold special resident permits. Between 1952 and 1995, 197,479 Koreans have been naturalised and in the 1990s the number successfully going through the naturalisation process each year was increasing, from 4,759 in 1989 to 10,327 in 1995. If we then include the children of Koreans who have married Japanese citizens the total number of Korean Japanese must be over 900,000 (NCC/J 1993: 12; Wagatsuma 1998: 244).

The two groups that have traditionally represented the Korean residents, *Mindan* and *Chongryun*, have gradually lost influence in the communities. They have tended to be dominated by first-generation immigrants, who by the 1990s were making up only 10 per cent of the Korean population. As the RoK economy grew rapidly in the 1970s and after, while that of the DPRK stagnated, more Koreans in Japan have opted for RoK nationality. Whereas in 1955 only 25 per cent of Koreans in Japan held RoK nationality, in 1992 the figure was 78 per cent (Ryang 1997: 127). It is not always easy to distinguish between *Mindan* and *Chongryun* supporters. Some who have taken RoK nationality may send their children to *Chongryun* schools. The MoJ estimates the *Chongryun* has a membership of 56,000, but it is not clear if this is just employees and fee-paying members or their families, students and supporters as well.

The influence of the *Chongryun* school system is declining. At its peak in 1961 it was educating 40,542 pupils and students but by the mid 1990s only some 20,000 of the 150,000 school-age Koreans were in *Chongryun* institutions (Ryang 1997: 24). Reforms have been made in the curriculum so it is less focused on North Korea and better preparation for the university entrance examinations. The schools are still not fully recognised by the MoE so their graduation certificates do not entitle their students to take the entrance examinations for national universities. Once more it is an open question whether this is conscious discrimination or further encouragement to assimilate/naturalise.

Some groups have emerged that are linked neither to *Mindan* or *Chongryun*. In 1989 a group split from *Chongryun* to form the 'Anti Dictatorship Anti Kim Il Sung Democratic Forum of Koreans in Japan' and in 1993 the Rescue the North Korean People! Urgent Action Network (RENK) was formed.

During the 1970s the RoK issued an open invitation to Koreans resident in Japan to visit the South. Several hundred members of *Chongryun* took up the invitation but some of those who went to South Korea either to settle or to visit were arrested as 'spies' because of their contact with North Koreans in Japan. A group of Korean Japanese formed to work for their release. Following the democratisation of the late 1980s most were released so the group decided to reorganise and expand its remit. In October 1990 the *Zainichi Kankokujin Minshu Jinken Kyôkai* (*Minkenkyô* – Korean Rights Group, Japan) was formed with three main aims. It continues to take an interest in political prisoners in Korea and is alert to pick up news of new cases of 'spies' being arrested. It has close contacts with the more active rights groups in Korea (*Minbyun*, *Inkwon Sarangbang*) and attends some of the meetings they organise. More widely, it tries to act as a lobby group on behalf of the whole Korean community, so they can move more easily between Japan and Korea, so they can learn about Korea at school and take part in the promotion of 'one Korea' festivals in Japan. Although small in relation to the older groups it represents the new generation of Koreans who are seeking to improve their living conditions in Japan rather than being committed to returning to Korea at some stage.

Overall some concessions have been made by the Japanese government since the reform of the Alien Registration Law in 1992, which have made life easier for Koreans in Japan. Nevertheless although there has been no clear statement of policy, the change that has taken place is from one of an expectation that they would return to an insistence that they assimilate. Japan's government is not willing to accept them as an indigenous minority group and refuses to force changes in public employment practices or recruitment into national universities which would enable permanently resident Koreans to access them. Meanwhile, although the 'myth of return' may have been powerful among the first- and even second-generation Korean immigrants, subsequent generations who speak no Korean and have only a limited

acquaintance with Korea have no other 'home' than Japan. Government policy in education and employment legitimises the social discrimination within Japanese society as a whole, which explains why only 10–20 per cent of holders of Korean nationality use their Korean names socially. While the changes of the 1990s are to be welcomed it nevertheless seems that government policy still lacks full appreciation of the spirit of the human rights affirming and anti-discrimination aspects of international treaty provisions. While there may be increased tolerance there is still less than full endorsement of the value of an ethnically plural society.

Ainu

In the Initial Report to the HRC produced in 1980 the Japanese government stated with reference to Par. 27 concerning the rights of minorities,

The rights of any person to enjoy his culture, to profess and practice his religion or to use his own language is ensured under Japanese law. However, minorities of the kind mentioned in the Covenant do not exist in Japan.

(CCPR/C/10/Add.1:12)

For the purposes of this report the MFA chose to regard the Korean community as alien residents with no rights as minorities and to disregard the existence of the Ainu minority entirely. The 1991 Third Report recognised Ainu as an 'Article 27' minority for the first time.

The Ainu community is small – estimates suggest there are only 24,000 of them living in Hokkaido. Meiji government policy regarded Hokkaido as an 'empty land' to be settled by immigration and developed along capitalist lines. This policy required the dispossession of the Ainu who were defined as a 'dying race' whose fate was to be assimilated with the Japanese. The 1899 Aboriginal People Protection Act granted Ainu families small plots of land in an attempt to turn what had been a 'hunter-gatherer' population into settled farmers. The land on which they had fished and hunted was designated for agricultural settlement by immigrants from Japan.

Hampered by an extreme lack of resources the Ainu were unable to put up much resistance to the policies of the powerful Meiji state. Members of Ainu communities, which were recreated on the edge of urban areas, tended to be excluded from economic and social development. Rather like Burakumin elsewhere in Japan, they were regarded as being different and therefore to be avoided. In 1930 an Ainu Association was set up under the control of a Japanese bureaucrat ostensibly seeking assimilation. This body provided an arena in which leaders of the isolated communities could meet and recreate a fragile sense of common heritage (Siddle 1997: 24–5). The group ceased to meet after 1945 and for the next twenty-five years the

emphasis on economic and attendant social reconstruction left no space or resources for the protection or promotion of Ainu identity.

However from the 1970s there emerged a notion of Ainu nationhood. Until that time the main demands of the Ainu organisation – the *Utari Kyōkai* – had been aimed at ensuring the provision of welfare, more particularly, education, housing and a secure livelihood. However, younger Ainu began to take an interest in investigating their own history and reviving their own culture. In this they found encouragement and support not only from the BLL and Korean groups within Japan but also from abroad following contacts with and visits to other indigenous groups such as the native peoples of the American Arctic. Official denials of their existence as in the 1980 report to the HRC angered both radical and moderate Ainu and prompted them to renew their political demands.

From the 1980s the BLL had campaigned for a Basic Law on Buraku liberation and in the same spirit in May 1981 the *Utari Kyōkai* leaders set up a committee to study proposals for a New Ainu Law and in 1984 a draft new law was accepted by the *Utari Kyōkai* General Assembly. The Hokkaido General Assembly unanimously endorsed the proposal in July 1987 and sent it for consideration by central government. Progress there was very slow. The bill was composed of a set of cultural, social and economic policies, including a declaration of rights, on the elimination of discrimination, securing special seats in the Diet and local government, a fund for the promotion of Ainu autonomy, educational and economic measures to support Ainu children and the creation of a Standing Council. As far as Ainu were concerned, the process of the development of these demands resulted in the creation of the notion of an Ainu nation as a body of people linked by history and culture. They defined themselves as an indigenous people, rejecting the label of ‘dying race’.

Ainu leaders have continued to take part in UN indigenous groups’ rights activities and have now won recognition outside Japan as an indigenous people. They took part in the opening ceremonies of the UN international year of the World’s Indigenous People in December 1992. The 1986 report to the HRC briefly mentioned the Ainu people while stressing their Japanese nationality. The 1992 and 1997 reports go further to discuss the surveys done of Hokkaido *Utari* (Ainu) living conditions and policies being considered.

In 1995 a ‘Round Table on Policy for the Ainu People’ began considering a policy for Ainu and in April 1996 it submitted a report to the Chief Cabinet Secretary. Among other things it pointed out the need for legislation to ensure respect for Ainu language and culture and to abolish the Aboriginal People Protection Law, a relic of Ainu policy of the nineteenth century. The ‘Expert Committee on the *Utari* Measures’, an advisory committee to the Chief Cabinet Secretary, noted the significant destruction of Ainu culture resulting from the Japanisation policies pursued since the mid nineteenth century and it recognised the indigenous

and minority nature of the Ainu people. This became the basis of an Ainu Culture Promotion Law, enacted in May 1997, which also abolished the 1899 Act.

While generally welcomed, this act came under severe criticism from two sources. First, it is limited to cultural issues, the promotion and teaching of Ainu culture and does not contain any of the provisions to improve economic and social conditions within Ainu communities. Second, while recognising Ainu as an ethnic minority, government was careful not to recognise their 'indigenous rights'. Recognition of the Ainu as a minority in Japan, 'a different people and a different culture' in the Japanese state, is certainly an advance in the development of policy but rights of 'minorities' are not the same as 'indigenous rights' which are presently under consideration by a UN Commission on Human Rights 'Task Force'. Recognition of indigenous rights would include the idea of the right of enjoyment of culture, the right to self-determination and to land and resources.

This has to be seen in the context of a campaign by Ainu activists opposing the construction of a dam in Nibutani, which will flood a site used in Ainu ritual. In a controversial decision the Sapporo District Court recognised Ainu people as an 'indigenous people' with a right to enjoy their own culture. On this basis it declared illegal the decision of the Ministry of Construction to approve the dam construction project and expropriate the land. However as the main part of the dam had already been constructed, the court dismissed the request to destroy the dam as not in the 'public interest' (JFBA 1998: 39–40; Teshima 1998: 74–83).

So, while there has been some progress made in the formal recognition of Ainu as a minority group and government has been forced to abandon its view of Ainu as a 'dying race', policy has not been permitted to develop to the extent that its implementation might affect the economic priorities of the state. Moreover it is clear that the state intends to remain in control even of the promotion of culture: of the fourteen directors on the board which establishes policy for promoting research and culture, only four are themselves Ainu (Uemura 1997: 30).

Burakumin

From the 1950s it had been a key BLL aim to persuade government to fund an improvement programme and, having succeeded in this, to have the various programmes extended. However, in September 1992, Uesugi Saichiro, the BLL's leader, announced that the movement would not demand any further extension to the SML when its current lease of life expired in 1997. This came as something of a shock to many of the movement's activists and it marked the start of an ongoing debate on how the movement should prepare for its 'third era'. The first era was that of the *Suiheisha*, which came to an end in the late 1940s. The 'second era' really began with

the formation of the BLL in 1955, but for most of its latter half it has been characterised by its involvement in and the support it has got from the various improvement programmes. Preparing for the 'third era', the BLL had to devise new tactics.

In the early 1990s the movement seemed to have lost its sense of purpose. This is in part related to the general ideological confusion that followed the collapse of Cold War certainties, but it may also reflect the fact that the improvements of the previous twenty-five years had succeeded in resolving many of the problems faced by Burakumin. The movement could no longer attract the support of the bright young people of the Buraku communities; indeed many of them were moving out altogether. In 1993 the central committee followed up the decision not to work for the further extension of the SML with a call for a re-examination of the movement's situation. Three areas were identified for consideration:

- What would amount to a 'solution' to the Buraku problem?
- What is the link between Buraku discrimination and poverty?
- What international dimensions to the problem exist? For example, to what extent do Japanese companies practise discrimination abroad?

Proposals for each of these areas were presented to the BLL conference in May 1995 to allow for wide debate within the movement over the following twelve months so that the new policy could be adopted by the movement at its conference in March 1996, well before the expiration of the SML. The proposed set of aims and principles set aside the 'class history' perspective in favour of one founded on democracy and human rights. It outlines what a society without Buraku discrimination would amount to and links this to a vision of creating a '*Suiheisha* for the whole world' (*Kaihō Shimbun*, 8 May 1995: 9–10).

The BLL had been closely associated with the Japan Socialist Party since its formation in 1955, their overall political approach was similar and the League's central and local bodies usually gave the JSP support in election campaigns. However, in 1992 the Okayama branch of the BLL decided to support the LDP candidate in the next election on the grounds that he would best represent their interests in the Diet. This generated massive concern within the movement about its loss of political integrity. However it turned out that the JSP was on the edge of rapid and irreversible decline. Although in 1990 it won more seats in the Lower House and a greater proportion of the vote than at any time since 1967, in the general election of 1996 the remaining core of the socialist party, now calling themselves the Social Democratic Party, won only 15 seats and 2.2 per cent of the vote (Stockwin 1999: 159–60). As the parties re-group and re-align, following the decline of the JSP, the BLL decision to free itself from the automatic support of any party may not turn out to have been particularly important.

The Buraku issue was quite different in the 1990s compared to forty years

earlier. Fundamentally, however, the political problem remained the same: what, if any, action should the state take? This question became urgent as the movement drew closer to 1997 and the expiry of the SML. A major survey was made in 1993 of all the 4,603 designated Buraku communities, 60,000 Buraku households and 24,000 non-Burakumin. The resulting report ran to 2,000 pages, which included analysis of the conditions in the Buraku areas of each prefecture. The aim was to provide a detailed basis for policy making both at the national level and in prefectures and cities.

Overall the conclusions were that while real improvements have been made over the last twenty to thirty years there were still clear differences between Buraku communities and the mainstream. So, for example, only 52 per cent of Buraku households received 'livelihood security support' in 1993 compared to 76 per cent in 1975. However, this was almost twice as high as the non-Buraku households in the same areas (28.2 per cent) and well above the national average of 7.1 per cent (Sômuchô 1995: 4). Similarly, the entry of Burakumin children into senior high school was close to that of the mainstream, 91.8 per cent compared to over 96 per cent for the non-Buraku samples. However the rate of persistent, long-term absenteeism of Burakumin children from primary and junior high schools was almost twice the mainstream averages; 1.6 per cent and 4.5 per cent compared to 0.8 per cent and 2.4 per cent respectively. Access to higher education had improved; less than 2 per cent of Burakumin over 55 had any experience of higher education, whereas over 20 per cent of Buraku teenagers could expect to continue their education past high school (Sômuchô 1995: 10–11, 15). This was a considerable improvement but still lagged behind the figure of over 40 per cent for the population as a whole. Probably linked to this difference in educational achievement was the fact that only 10.6 per cent of Burakumin were reported to be employed in enterprises of over 300 employees, well below the national average of 23.3 per cent (Sômuchô 1995: 20). Since it is only the larger enterprises that can provide stable employment, higher salaries and fringe benefits, these figures suggest that Burakumin remain marginal to Japanese society.

Such differences in employment might also be explained as the result of continuing discrimination in the employment practices of the larger companies. The discovery in 1975 that lists of Buraku communities had been sold to many Japanese companies showed that many firms did seek to avoid employing Burakumin. It is hard to be certain that this no longer exists. When asked about their experience of discrimination, only one third of the Buraku respondents reported feeling their rights had been violated at some time. Most frequently this was in incidents which took place at work, at school or involving marriage (Sômuchô 1995: 25). Few of them did anything about it; the largest single group, 46 per cent of the sample, kept quiet and put up with the discriminatory treatment.

If marriage outside the Buraku community can be regarded as showing the decreasing power of discrimination there was some encouraging

evidence. Around 80 per cent of those over 80 married fellow Burakumin, but this had dropped to less than 25 per cent of those under 25. When asked a hypothetical question about marriage of one of their children to a Burakumin, 45 per cent of the non-Buraku sample said they would respect their wishes, 41 per cent said if their children felt strongly enough there was nothing they could do about it; only 5 per cent said they would completely oppose the marriage. This latter figure was down from 7.6 per cent in 1985 (Sômuchô 1995: 31). However, despite the categorical rejection in the 1965 report of the different racial origins of Burakumin which had been widely repeated, there were still about 10 per cent of the population who reported subscribing to this explanation of the background to the Buraku problem (Sômuchô 1995: 29).

The government's response to the survey was to publish a brief report in May 1996 to guide policy making on the issue (Chiiki Kaizen Taisaku Kyôgikai 1996). Outlining its basic approach, it noted that Japan had ratified numerous conventions on rights and thus is committed to playing a role within the world community to eliminate discrimination. However, it also pointed out that the *Dôwa* issue is still not taken seriously by many, even though Japan now has an international responsibility to do so. Over the previous forty-five years the state had done a great deal to improve living conditions but now the emphasis had to be placed on solving the problem between citizens as a human rights issue. This was not the resolution of a problem from the past, rather it was a current problem whose solution was linked to other kinds of human rights problems.

It suggested four directions for future policies. First, education is important in the elimination of discrimination and the creation of an awareness of human rights. This needs to be supported through research on the development of improved teaching materials for use in schools, the encouragement of leadership training schemes and the inclusion of human rights issues in university courses. In December 1995 a committee was formed within the PM's Office to devise a plan for Japan as part of the UN Decade of Human Rights Education (1995–2004). This report argues that *Dôwa* issues should be part of that plan (Chiiki Kaizen Taisaku Kyôgikai 1996: 13).

Second, the report suggests the need to strengthen support for the victims of discrimination. Ideally the aim should be to create a situation where the prejudice which leads to discrimination does not exist. However, this situation has not yet been created and human rights violations occur, but there is no system that will give victims sufficient redress. The CLC system is not able to do this at the moment so it should be improved to make it better known and better able to give advice on rights issues and to give positive assistance to victims of human rights violations.

The third set of issues concerns how to continue to provide some degree of special assistance in specific areas such as the very small Buraku communities, which have not so far benefited from the *Dôwa* programmes, and to certain sectors of the larger communities who still need, for example, some

financial support to enable their children to remain in education till they graduate from senior high school.

Finally it admits that there remains work to be done in the area of changing the image of the *Dôwa* projects and Buraku communities. This can be done by using education and the media to overcome the idea that '*Dôwa* is dangerous', but it is also necessary to encourage the formation of citizens' groups within Buraku communities to promote a change of image. Once more it is suggested that incorporating *Dôwa* issues into the Plan for the Decade of Human Rights Education can contribute to this process and to the overall aim of preparing for the twenty-first century – the century of rights (Tomonaga 1997: 7–13).

The BLL is changing its priorities too in line with some of these recommendations. In the future it will play an active role in the international movement opposing discrimination, will co-operate with others opposing discrimination and other anti-democratic tendencies in Japanese society and work to create a stable living environment within the Buraku communities. In this latter context the movement's local groups are encouraged to ensure that the facilities built using state funds are used by the whole neighbourhood, not only Burakumin, and to join in campaigns for the provision of improved facilities, for example for old people, to be used by the whole community (Tomonaga 1998: 4–5, 14–16).

Towards a co-ordinated human rights policy?

Murayama Tomiichi became Prime Minister on 30 June 1994, when the JSP agreed to join the LDP to form a coalition cabinet. Very quickly the JSP dropped most of its more radical policies, especially those related to foreign affairs, and this did not become an opening for policy innovation that some BLL activists had been looking for. It did provide the opportunity to put human rights issues close to the top of the national political agenda. The BLL revived its efforts to have a Basic Law enacted. In December 1994 a 'project team' was created of representatives of the three coalition parties (LDP, JSP and Shintô Sakigake) to consider the implementation of the proposals for a Basic Law on the Buraku Mondai. The main premise of the group was to make Japan a 'human rights implementing society' (Tomonaga 1997: 4). An opposition party 'project team' was also created. It was hoped (by the BLL) that cross-party support would result in the passage of a bill during the summer of 1995, but this was not to be. It was agreed, though, to create a high-profile committee within the PM's Office to establish Japan's plan for the UN Decade of Human Rights Education. This was formally chaired by the PM and contained five senior ministers plus the deputy vice minister from all the main agencies and ministries. This is the first time such a high-profile committee had been set up to promote human rights with the authority to co-ordinate human rights policy across all government departments.

In January 1996 the CERD became effective in Japan and in the same

month Murayama resigned as Prime Minister. Although his successor Hashimoto Ryûtarô had a right of centre image, the momentum behind the push towards giving human rights a higher profile continued and the JSP remained a member of the coalition cabinet. In July 1996 the Civil Liberties Bureau announced the creation of a new structure, *Jinken Chôsei Senmon In* (Human Rights Adjustment Specialists) within the MoJ offices, at first, of Tokyo, Osaka and Nagoya. These are mainly CLCs who are lawyers who now have additional powers to enable them to investigate more serious cases of discrimination which are referred to them by MoJ officials. In 1997 the system was extended to the remaining five 'blocs', Hokkaido, Sendai, Hiroshima, Takamatsu and Fukuoka. The remit of these new 'specialists' is not simply to prevent the repetition of human rights violations, which has been the main aim so far, but to offer some assistance to the person whose rights has been infringed. This may be an immediate response to the criticisms of the CLC system which appeared in the '*Chiiki Kaizen*' committee document of May 1996 (interviews at Ministry of Justice, 14 July 1997).

The BLL was still pressing the 'project teams' to push for the passage of a Basic Law when, in December 1996, a Law for the Promotion of Human Rights Protection was passed by the Diet effective from March 1997. This clarified the duty of the state to protect human rights through the promotion of human rights education and protection of the victims of human rights infringements. It established a committee of twenty people – the Policy Council on Rights Protection – nominally chaired by the PM to produce a report within two years recommending legislative measures on human rights education and, within five years, suggestions for policy to give redress to victims of human rights violations. The aim is to 'resolve human rights problems including the Buraku problem' (quoted in Tomonaga 1997: 19).

In March 1997 the Diet gave its approval to a partial revision of the SML, which will allow some projects relating to education and the provision of facilities to small Buraku communities to continue until 2002 (Tomonaga 1998: 48–9). In July 1997 the PM's Office published its detailed proposals for the UN Decade of Human Rights Education. As well as including detailed discussion of the overall aims of the programme – in brief, equality before the law and respect for the individual – it discusses nine specific areas: women, children, old people, the disabled, *Dôwa* issues, Ainu, foreigners, HIV patients, former prisoners.

In December 2000 the 'Law on the Promotion of Human Rights Education and Human Rights Awareness Raising' was passed, which provides a legal basis for the implementation of measures proposed by the Prime Minister's committee on human rights education. It requires the formulation of a basic plan by national government, encourages activity by local government and individual citizens and enables central government to fund relevant projects. Each year government must report to the Diet on its human rights promotion programme. This provides the basic framework within which Japanese government can carry out the obligations to publicise

human rights, entered into when it ratified the ICCPR, ICESCR and CERD (*Buraku Liberation News*, no. 117: 1–6).

Since 1985 the BLL had been involved in a campaign for a Basic Law on Buraku Liberation which was to have five elements: a declaratory element committing the state to resolving the Buraku issue and opposing all kinds of discrimination; a project element concerning the implementation of remaining projects; an educational element aimed at improving public awareness of discrimination issues; a restrictive element which would place legal restrictions on discrimination and provide redress for victims of human rights violations; and an organisational element which would consider the necessary measures to co-ordinate all of the above. Although they have not been ‘bundled’ in a Basic Law, the measures, which the government introduced since 1996–97, have gone most of the way towards meeting the demands of the BLL and its allies. The BLL will continued to keep up the pressure on the various policy councils to influence the final reports, to try to have them meet in public and to receive reports from a range of groups. Even Tomonaga, for a long time a critic of the inadequacy of government policy admits that, though there is still a need to address the roots of its discriminatory culture, Japan is now at the start of the implementation of article 14 of its Constitution, ‘All of the people are equal under the law and there shall be no discrimination’ (Tomonaga 1997: 23–4).

Human rights NGOs such as the BLL were very critical of the way the twenty people were selected to serve on the advisory council, which will propose measures on human rights education and redress for victims. Not enough of them have direct experience of discrimination. Therefore, in November 1997 representatives of Amnesty International, the Buraku, Korean and Ainu communities, the disabled, plus some academics, formed a group calling itself *Jinken Forum 21* to monitor the activities of the advisory council and prepare its own report on educational material for human rights promotion and on the current state of discrimination for submission to the advisory council (interview with Tomonaga Kenzo, 17 September 1998).

Other initiatives

The significance of these moves by central government goes beyond the co-ordination of policy among the main agencies, they have promoted activity elsewhere. Following the criticisms of the CLB in the *Sômuchô* report of 1996 and the creation of the Policy Council on Rights Protection, that will produce a report containing some recommendations about the CLC system, the CLB decided in the first half of 1997 to establish its own committee of enquiry on itself that it may submit to the Policy Council at a later stage. First meetings were held in the summer of 1997. Proposals to reform the system in line with the UN’s ‘Paris Principles’ will be published in the course of 2001.

At the level of local government a number of prefectural and city governments have launched their own initiatives. Kanagawa-ken set up its

Human Rights Centre in 1990, Tottori-ken created a human rights committee in 1996. Osaka-fu and city, Sakai city, Fukuoka-ken and city established their own committees to produced local versions of the national ten-year plan for human rights education. Osaka's plan has been published on the internet.

In some areas the local government has provided support for the creation of what are a cross between a human rights research organisation and an NGO. The Kyoto Human Rights Research Institute (*Sekai Jinken Mondai Kenkyû Sentaa*) was established in 1994 in commemoration of the 1200th anniversary of the establishment of the city of Kyoto with the following aims:

- to conduct research on universal human rights issues,
- to promote academic exchange with domestic and foreign research institutes in the field of human rights, and
- to contribute to the promotion of understanding of these issues at home and abroad.

It has four research divisions: on international human rights protection systems, on the Buraku issue, on the rights of foreign residents in Japan, on the rights of women. Apart from funding research and promoting academic exchange, it collects documents and publications concerning human rights, publishes books and journals and organises lectures to disseminate the results of their research.

At about the same time over in Osaka the Asia Pacific Human Rights Information Centre (APHRIC) was officially opened in December 1994 with four goals:

- to promote human rights in the Asia-Pacific Region,
- to convey Asia Pacific perspectives on human rights to the international community,
- to ensure that human rights perspectives are included in Japanese international co-operative activities, to contribute to the Asia Pacific region,
- to raise human rights awareness among people to promote the internationalisation of Japan.

It is supported by the Osaka prefecture, the Osaka city and several NGOs, plus organisations and individuals. Staff organise courses both within Japan, for example, for workers in local government as well as seminars for those interested in human rights within Asia. It has publications in Japanese and English. This is more of an NGO than the Kyoto centre and it is eager to facilitate communication between NGOs in the region in an attempt to create a regional structure which might in some way be able to monitor human rights standards and infringements.

Amnesty International has a firm base in Japan with 156 groups and just

over 9,000 members. Since the end of the Cold War its growth has levelled off but it is still the largest AI branch in East Asia and plays an important role in Japan not only through publishing material about prisoners of conscience and human rights more generally, but also acting as a human rights advocate. It worked with the PM's Office in producing the plan for the Decade of Human Rights Education.

The International Movement Against All Forms of Discrimination (IMADR) was formed in 1988 by a number of organisations and labour unions led by the BLL with the aim of supporting groups in Japan and across the world which are campaigning for equality and against discrimination. It has organising committees in the USA, France and Argentina and an office in Geneva. In 1993 it was granted consultative status by the UN which enables it to play a more positive role within the UN human rights network. Much of IMADR's energy since 1994 has been spent co-operating with a regional policy on the trafficking of women in Asia. One part of that project has been to produce a manual that it hopes to use in training courses for police, immigration officers and similar groups of officials who have regular contact with women who may have been victims of the international sex worker industry.

Conclusion

Some things remain unchanged. Despite all the concessions made by government to ensure Japan is included in the international human rights regime, one still detects an attitude within the bureaucracy which is unhappy with co-operation with either foreigners or people outside the bureaucracy. NGOs have not been able to persuade the MFA to let them take part in the process of putting together the periodic reports or even to see drafts of them before they are sent off to Geneva. There is no likelihood that the Japanese government will ratify the first optional protocol that would allow Japanese citizens to take complaints to the HRC. There is no enthusiasm within government for the creation of a regional mechanism for East Asia of the kind that has been developed in Europe or the Americas. There are indeed formidable obstacles to the creation of such a mechanism but the Japanese official position that it is better to work through the existing UN machinery rings hollow given the Japanese objections to ratifying the first optional protocol.

The initial response of the Japanese state to demands from the BLL and Ainu activists was benevolence – the provision of extra resources to make up for past and present inequality. Claim rights were recognised but demands to empower or strengthen the immunities of individuals were not. During the late 1990s this policy was modified, as taking the international human rights regime seriously meant that more attention had to be paid to how to deal with the violation of the rights of individuals. Nevertheless it is noticeable that even the new policy is placed in the context of the state taking a major role in providing human rights education. Woodiwiss' model of enforced

benevolence within a neo-patriarchal state continues to have explanatory power.

And yet, there does seem to be a wave of interest in human rights at a number of levels. Even if one can dismiss some of the apparent enthusiasm for human rights at the national level as being more related to the campaign to get Japan a permanent seat on the Security Council than a genuine interest in rights issues, activity at this level is having something of a 'cascade effect' as local governments and NGOs adopt policies aimed to further promote human rights in Japan and co-operation internationally. These initiatives will mean that human rights will remain high on the political agenda for at least the next ten years.

During the 1990s there were a number of changes that took place in policy towards minorities although in each case there was room for further improvement. In the case of Koreans in Japan policy changed from being based on the expectation of their return to their assimilation, Ainu were treated no longer as a 'dying race' but as an ethnic minority and the Buraku issue was linked to broader human rights policies. In each case there remains room for improvement. Some Koreans question why they should assimilate on Japanese terms, some Ainu want recognition of their rights as an indigenous minority, some Burakumin remain sceptical of the government's commitment to a rights-based policy. The spirit of the UN documents is to encourage the celebration of diversity and difference but it cannot be said that this informs government policy yet.

Nevertheless, after an unpromising start in the 1950s Japan reached the end of the twentieth century with a government committed by international treaties to most of the major covenants and with a domestic network of rights-aware groups that continue to press both for specific changes to the policies that affect their supporters and for human rights ideas generally to challenge the interests of those in power. A generalised human rights culture is now developing. In later chapters we will discuss how this has worked through in the areas of the rights of children and patients.

3 Human rights in South Korea

Although they have a great deal in common, at least to the eyes of western observers, Korean political culture is substantially different to that of Japan. Oppositionism is stronger, liberal influences are weaker and Confucianism has been even more pervasive. Neo-Confucian ideas were not only the dominant ideology during the Choson dynasty (1392–1910) but they were also much more widely disseminated throughout the population. Whereas the Tokugawa state was a decentralised structure which interfered relatively little with the affairs of rural communities, the Choson dynasty court exercised direct control over the whole country for most of the period 1392–1910. There was nevertheless no unanimity among Korean Confucians and, within the confines of the neo-Confucian tradition, there were significant disputes over the correct interpretation of the classic texts and how to judge the behaviour of contemporary statesmen.

The Yangban, Korea's ruling class, was in theory an open class into which men of merit might rise, but such upward mobility was rare. They stood at the top of a status system in which the higher could expect obedience but the lower could not enforce obligations, only trust in the benevolence of their superiors (Yoon 1990: 6). Law consisted largely of a series of 'don'ts' and both penal and public law was designed to regulate personal conduct as prescribed by public regulations (Yoon 1990: 17). Obligations were imposed on the populace independent of any notion of rights: notions of public good were unintelligible outside the state.

Under Japanese rule legal regulation was intensive and pervasive throughout social life, even to the insistence, from the late 1930s, that the Korean language be not used by Korean people in their own homes. Laws were regarded as the means to impose the will of the colonial rulers in order to advance their interests. In common with the pattern of the Choson period the bureaucracy charged with imposing this law spurned all popular participation and the colonial regime, unlike its predecessor, felt no obligation to be benevolent. The Japanese authorities tried to revive Confucian ideas sponsoring the reformation of an academy in Seoul hoping that it would be supportive of its rule in the colony. To a certain extent this worked but some Confucians also supported organised resistance against

colonial rule. And, for many Koreans during the colonial period, violation of law was tantamount to a patriotic act. Opposition to the colonial regime was legitimated by public sentiment.

The liberal tradition was weak. Christian influence within the education system grew in the late nineteenth and early twentieth centuries but religious instruction in schools was banned between 1905–15 and after that missionary schools were carefully supervised. The Tonghak movement had inspired massive anti-government demonstrations in the mid nineteenth century and an anti-government, anti-foreigner peasant rebellion in the 1890s. This transformed itself into a religious organisation, the Ch'ondogyo, one faction of which at first supported the Japanese against the Russians but later joined the Korean nationalist cause (Jacobs 1985: 241). Christian and Ch'ondogyo ideas informed anti-Japanese activity as did the socialist movement but they were all subject to harassment and control by the colonial police, particularly during the 1930s.

Neither liberal nor socialist ideas were permitted to develop local roots pre-war and nowhere on the peninsula in the 1940s was a critical tradition encouraged. Unlike in Japan, when the country was liberated following the Allies' victory, the number of people with experience of activity within civil society was small. Indeed neither during the Choson dynasty nor during colonial rule had there been a clear idea that there could or should be unrestricted activity in the space beyond the family and before the state.

In this chapter we will begin by describing the circumstances in which attempts have been made to advocate and implement human rights ideas by looking at the main contours of political development and the specific influence of the National Security Law. Democratic resistance to the authoritarian regime developed in the 1980s, successfully forcing the military to relax and then release its grasp on political power. Many of these activists in the 1990s became involved in the human rights movement.

Liberation from Japanese rule

The Soviet Union had entered the war against Japan only on 8 August 1945 and the Soviet army then began to fight its way into Korea. Meanwhile US military planners proposed on 11–13 August that the Soviet Union accept the surrender of the Japanese forces north of the 38th parallel while the US take control of the south. The Soviet forces, arriving a little earlier than the Americans at the agreed site, obediently stopped and thus the country was divided into two alien, non-communicating and hostile military governments. Japanese soldiers, administrators and settlers were repatriated quite rapidly. Most of them had gone by Spring 1946.

In the north the Soviet Union gave its backing to Kim Il Sung, who had established a reputation for himself in the armed struggle against the colonial regime. Within weeks the retreating Japanese administration was replaced by a government composed of Koreans, albeit often ethnic

Korean-Soviet citizens trained in the Russian system (Henderson 1991: 126). Koreans who had served the Japanese were not permitted to take up positions within the new system. A radical land reform was implemented from March 1946 and a law nationalising basic industries, transport and communication facilities and banks put approximately 90 per cent of the industrial and financial centres under state control. Those who were opposed to, or worried by, the new regime fled: 1.8 million refugees had moved to the south by 1948. However, those who remained regarded the new government as legitimate as it had no link with the colonial regime, and the new elite was able to play up its anti-colonial credentials. Operating under a system of administration, justice and law that was modelled on that of the Soviet Union and dominated by the Korean Workers' Party, there was no commitment to human rights or the rule of law – a situation that remains at the time of writing.

Meanwhile in the south the US military was struggling to control or even understand the situation that it faced. The Japanese administrators were abruptly repatriated giving the US military more direct control of South Korea than they had as occupiers of Japan. By the end of 1945 over 90 per cent of industry and 12 per cent agricultural holdings, plus large amounts of commercial and domestic property, were in the hands of central government as the US military took control of former Japanese public and private possessions. The problem was that the new government was ideologically unprepared and practically incapable of controlling its new wealth. Black markets, gangsterism and quiet evasion of the law became the norm.

In the short period between surrender/the collapse of the Japanese administration and the attempts by the US to establish control, People's Committees were created across the peninsula to take over some of the functions of government. Cumings estimates that one half of all the counties in South Korea were at one time governed by such committees (Cumings 1981: 275). In the north these committees were incorporated into the new political structures but in the south, where they were more numerous, they hastened to form a 'government' which could negotiate with the Americans. A 'Korean People's Republic' was created but its leftist orientation did not endear it to the US administration, which on 12 December outlawed it and the People's Committees (Henderson 1991: 131). Now, cut off from the only popularly supported movement and faced with the task of finding manpower to replace the Japanese managers and administrators, the US had little choice but to utilise those who had worked for the Japanese. They were well educated, had the only available experience of administering the country and their anti-communist sentiments put them in sympathy with the Americans. Most particularly it was decided to retain and strengthen those who had served the security interests of the colonial regime – the police, judges, prosecutors and military officers. So, although virtually all Japanese people left Korea, the systems of security, arrest, imprisonment, torture and legal process that had been created by the colonial regime were retained and

even strengthened after 1945. This use of former collaborators kept the Americans in control but did little to legitimate their regime.

Within twelve months of liberation the two halves of the Korean peninsula were launched along quite separate trajectories which were to move them further and further apart over subsequent years. The differences between the two regimes were confirmed by the promulgations of constitutions prior to the establishment of independent states. The Republic of Korea (RoK) was inaugurated on 15 August 1948. On that day US military rule ended and Syngman Rhee took over as President under a constitution adopted the previous July. Shortly after, a Supreme People's Assembly ratified a constitution in Pyongyang and on 9 September the Democratic People's Republic of Korea (DPRK) was proclaimed with Kim Il Sung as its Prime Minister. The Soviet Union and its allies recognised the Pyongyang based government while the UNGA on 12 December 1948 resolved that the 'lawful government (the government of the RoK) having effective control and jurisdiction is the only such government in Korea' (quoted in Rees 1988: 91–2).

It is not my intention to say any more about the process that led to the Korean War and the armistice that froze the north-south division. Nor do I intend to say any more about the situation in the DPRK. In the rest of this chapter I will concentrate instead on the development of the legal and social climate which was at first hostile to, but which more recently has become more supportive of, the promotion of human rights ideas and their implementation.

Constitutional and political evolution

The US military did not play a more pro-active role in support of democratic reform in South Korea in part because, unlike Japan, Korea was regarded as an ally rather than a defeated enemy but mainly because the American Military Government had so little expertise at its disposal: no expert in Japanese law advised the military and no specialist in Korean law existed anywhere. More than 95 per cent of the law which governed Korea in August 1945 was transmitted unchanged to the new republic. The biggest change over the next few years was that the laws were translated into Korean (Henderson 1991: 143).

The military government repealed some of the laws which had supported the Japanese colonial regime but did very little positively to promote an appreciation of, still less the implementation of, human rights. In April 1948 'The Ordinance of the Rights of the Korean People' was issued by the US military government,

The Ordinance consisted of 12 articles guaranteeing the freedoms of religion, assembly and association, expression and publication, and the rights to legal counsel, to a speedy and fair trial, and to equal protection

under law. It also prohibited torture and deprivation of freedom and property without due process of law.

(Kim and Lee 1992: 305)

They may have had some influence on those who, shortly after, drafted the 1948 Constitution – a small committee selected from an assembly elected on 10 May 1948. The election took place amid ‘confrontation, threat, force and illegality’ (Henderson 1991: 147) and was boycotted by most non-rightists: 188 of the 198 elected assemblymen supported Syngman Rhee. The drafting committee itself had little legal expertise but it did seek the advice of Korean scholars who were mostly knowledgeable about the Japanese and European constitutional systems, one of them, Yu Chin-o is credited with the inclusion of reference to socio-economic rights as set out in the Weimar constitution.

The Constitution declares that sovereignty resides in the people, by which it presumably means Korean nationals whose definition was defined by law. In the original draft Yu Chin-o had used the word ‘people’ but during the National Assembly deliberations the term ‘national’ (*kukmin*) was introduced. It is said the reason for the replacement of the more universal term was that the North Korean communists had already used the term ‘people’ quite widely and thus those in the south decided to use the more restricted concept of ‘national’ (Oh Jae-shik 1996: 31). Thereafter the constitution refers to, in the English version ‘citizens’ though in Korean *Kukmin*, whose rights are protected as set out in Chapter II.

This second chapter on ‘Rights and Duties’ lists equality before the law, personal liberty, freedom of domicile, freedom from trespass and unlawful search, freedom of private correspondence, the freedom of speech, press, assembly and association, the right to property, equal opportunity in education, the equality of men and women, the rights to elect public officials and to hold public office. However, most of these freedoms were granted with such qualifications as ‘except as specified by law’ or ‘except in accordance with law’ and Par. 28 stipulates that ‘laws imposing restrictions upon the liberties and rights of the citizens shall be enacted only when necessary for the maintenance of public order or the welfare of the community’ – almost an invitation to the executive to suspend rights. This Constitution owed much more to the spirit of the Meiji Constitution than to that of the USA or the new one in Japan. Elsewhere in its provisions the Constitution established a strong Presidency with a relatively weak, unicameral assembly and a presidentially appointed Supreme Court with limited jurisdiction. A constitutional court chaired by the vice president and composed of five Supreme Court justices and five National Assembly members might have been able to protect some of the constitutionally guaranteed rights and freedoms. In fact in its twelve years of existence (1948–60) it only reviewed seven cases and found only two laws unconstitutional (Yoon 1990: 155).

Syngman Rhee’s regime became increasingly authoritarian during the 1950s. In 1960 he was forced to resign and flee the country following student

demonstrations in protest at widespread electoral fraud. Constitutional amendments effective in July 1960 replaced the presidential system with a parliamentary form of government. Later that year there was further constitutional change to enable the retro-active punishment of those guilty of electoral irregularities, corruption and the appropriation of public property. Elections in July 1960 produced a majority for the Democratic Party and its leader Chang Myon became Prime Minister. But the government faltered. It was unable to quell student dissatisfaction, it proved unable to deal with the financial crisis bequeathed by the Rhee regime and its policy towards the North was seen as weak.

In May 1961 the South Korean military took over control of the government by *coup d'état* in order, they said, to save the country from communism and economic confusion. It seems that this coup was not so much a reaction to the failure of the Chang government but rather that the army had planned a take-over even before Rhee fell. Their timing had been delayed by the creation of the new democratic government. When Chang Myon showed himself unable to deal with the mounting problems the army decided to act (Rees 1988: 144).

Following the coup, power lay in the hands of a newly created, and extra-constitutional, Supreme Council for National Reconstruction, which assumed all executive, legislative and judicial power. Within this group Park Chung-hee emerged as leader. He was to dominate Korean politics for the next eighteen years and the army was to be the pre-eminent institution of control for the next thirty years. During 1962, the fifth set of amendments to the Constitution created the Third Republic which moved the President back to the centre of political focus and the reforms were approved in a referendum held in December. Presidential elections were held in October 1963 and Park Chung-hee, who had formally resigned from his army post, was elected with 47 per cent of popular support, his principal opponent getting 45 per cent (Hinton 1983: 33). When he was inaugurated as President he claimed that the transition from military to civilian rule was complete but the military in fact remained more than in the background. Park Chung-hee set up a number of executive agencies which reported directly to him, thus further strengthening the power of the president *vis-à-vis* the other constitutional structures.

Within the revised constitution the Supreme Court was given the power of judicial review; 'in case a question arises about whether or not a statute violates the constitution in a pending case, the Supreme Court shall make final determination' (Par. 102). Lower courts during the 1960s had held several statutes unconstitutional, including parts of the Anti-Communist Law but the Supreme Court never endorsed these decisions (Kim and Lee 1992: 313–14). Yoon comments that the Supreme Court during this period exercised 'strong self restraint' (Yoon 1990: 159). However in the late 1960s two lower courts found some provisions of the Government Tort Liability Law unconstitutional. If this were endorsed by the Supreme Court it would

not only amount to a symbolic defeat for the government and a victory for judicial independence but it would cost the government several billion won in compensation (US\$3–12 million). To prevent this the government tried to revise the Judiciary Organisation Law which made it necessary for the Supreme Court to have two thirds of its members present and the agreement of two thirds of those present before a law could be declared unconstitutional. On 22 June 1971 the Supreme Court ruled the Judiciary Organisation Law unconstitutional by 11:5, and decided by 9:7 that the Government Tort Liability Act ran counter to constitutional guarantees of equal protection (Kim and Lee 1992: 314–15). The government denounced the judiciary for not understanding the situation of the nation. Academic and practising lawyers hoped this might be the start of vigorous protection of human rights against government abuse.

The Constitution as it stood in 1962 did not permit the President to serve more than two terms, but Park had the Constitution amended in October 1969 to permit him to stand a third time although during the 1971 presidential election campaign he promised he would not stand again. Park won the election with the support of 53 per cent of the vote compared with the 45 per cent who voted for his rival Kim Dae Jung. Nevertheless, prompted in part by the decisions of the Supreme Court and partly by the narrow margin of election victory, Park felt he needed to further strengthen his position. In October 1972 he proclaimed martial law, suspended the Constitution, forbade political activity and imposed rigid press censorship. At the same time he unveiled the seventh set of constitutional reforms to create the *Yushin* (revitalising reform) Constitution, which, among other things, permitted the President an unlimited number of six-year terms. The new Constitution came into operation in December.

The nine Supreme Court judges who had held the two laws unconstitutional were excluded from renomination and the Constitutional Committee, all of whose members were appointed by President Park was revived to deal with issues of the constitutionality of law. No cases were ever heard by it. The President had power to rule by decree (and he did); the power of constitutional review was taken away from the courts. A National Conference of Unification (NCU) was set up not only to elect the President but also to appoint one third of the members of the National Assembly. As Hinton commented, 'for all practical purposes Park was now a dictator, potentially for life' (Hinton 1983: 35). The increasingly evident prosperity of the Korean economy kept criticism muted at first but protest began to mount once more in 1975, in response to which Park issued decrees on 13 May which banned all criticism of the government and of the *Yushin* Constitution.

In 1978 Park insisted on standing for yet another term as President and was elected by the NCU despite the fact that the opposition, the Democratic party, won 1 per cent more of the popular vote than the ruling party. This was the prelude to a political crisis in which Kim Young Sam launched an increasingly trenchant campaign of criticism of Park's rule, which culmi-

nated in him being expelled from the National Assembly in September 1979 in a vote boycotted by the opposition parties. Student demonstrations continued through the summer sometimes supported by workers. On 17 October martial law was proclaimed in Pusan.

Park's advisers were divided. Some urged a new round of repression, others conciliation. Fearing that Park would shortly launch a new round of repression and dismiss him, one of the 'conciliators', KCIA director Kim Jae Kyu, shot Park on 26 October and had KCIA agents kill other senior government officers.

After Park's assassination there was a brief period of hope that democracy could be established. Kim Young Sam, Kim Dae Jung and Kim Jong Pil began to organise their political bases and the National Assembly created a committee to work on a draft for constitutional revision. There were debates over such issues as whether a presidential or parliamentary form of government was preferable and how far strong emergency powers should be permitted on the assumption of an imminent threat of invasion by the North. Student protest continued, culminating in a massive demonstration on 15 May. Government feared, or at least claimed to fear, that the North was starting to take a worryingly close interest in events.

On 17 May 1980, 'extra-ordinary' martial law was proclaimed. Immediately the 'three Kims' were arrested. In Kwangju, one of the cities where pro-democracy activity had been widely supported, there was a student demonstration held on 18 May demanding the end of martial law. Three thousand paratroopers were sent in to disperse them but despite the use of great violence they failed, and instead aroused the anger of thousands of Kwangju citizens who joined the demonstrators to drive the soldiers out of the city. At the peak of the demonstration, which by then had developed into an insurrection, there were 300,000 people on the streets of central Kwangju, almost the entire population of the city (Choi 1999: 268). When the army retook Kwangju on 27 May government estimates suggest 200–400 died; eye witnesses and a 1986 Asia Watch report suggested a more likely figure of 2,000.

Major General Chun Doo Hwan, then head of the KCIA/Defence Security Command was at the centre of a group of military men who on 12 December 1979 had occupied the key government offices in central Seoul which include the presidential 'Blue House'. Over the next few months this group consolidated its power within the army and also took control over political events. Following the announcement of martial law and the crushing of the Kwangju insurrection, Chun, like Park before him, launched a 'purification campaign' against corrupt officials, bureaucrats and politicians; censorship was reinforced, 172 journals were closed down, thousands in the press and media lost their jobs (Rees 1988: 174; Hinton 1983: 53). Two of the Kims were released but Kim Dae Jung was blamed for the disorders of Spring 1980 and criminal proceedings on charges of sedition were started against him in a military court. In September 1980 he was found guilty and

condemned to death. His appeal was rejected but he was not executed mainly due to foreign concern.

Chun Doo Hwan was elected President unopposed on 27 August 1980 by the National Conference for Unification (NCU). Within a month he put forward the eighth amendment to the Constitution, which was approved by referendum in October. Under the new Constitution of the Fifth Republic the President was still selected by the NCU but only for one, non-renewable term of seven years. The constitutional role of the NCU was greatly reduced in that it was no longer responsible for the selection of one third of the members of the National Assembly. Some changes were made to the Rights and Duties of Citizens: most were recast in a more positive way and they were not subject to the qualification 'except as provided by law'. Thus, for example,

Par. 12 *Yushin* Constitution: No citizen shall be subject to restriction of freedom of residence or change thereof, except as provided by law.

Par. 13 1980 Constitution: All citizens shall enjoy freedom of residence and the rights to move at will.

There was a new constitutional commitment to the notion of the presumption of innocence:

Par. 26 (4) The accused shall be presumed innocent until a determination of guilt has been confirmed.

Having said that the 1980 Constitution, just like its 1972 predecessor, gave the President the power when he deemed it necessary to take emergency measures which would temporarily suspend the freedom and rights of the people as defined in the Constitution (*Yushin* Par. 53 (2); 1980 Par. 51(2)), and to declare precautionary or martial law in case of a 'military necessity or a necessity to maintain the public safety and order by mobilisation of the military forces ...' (*Yushin* Par. 54 (1); 1980 Par. 52 (1)). Moreover, during times of extraordinary martial law 'special measures may be taken, as provided by law, with respect to the necessity for warrants, freedom of speech, the press, assembly and association ...' (*Yushin* Par. 52 (3); 1980 Par. 52(3)). However, in the 1980 Constitution, even when restrictions necessary for 'national security, the maintenance of law and order or for public welfare are imposed, no essential aspect of the freedom or right (*sic*) shall be violated' (1980 Par. 35(2)).

Two final points on the constitutional reforms. The new Constitution included:

Par. 33. All citizens shall be entitled to live in a clean environment. The State and all citizens shall have the duty to protect the environment.

And,

Par. 125. The State shall ... guarantee the consumer protection movement intended to encourage sound consumption activities and improvement in the quality of products.

President Chun made some attempts at reconciliation, releasing a few political prisoners and meeting with leaders of the political parties but this did not win over the student movement nor the important Christian-wing of the dissident movement. Despite his attempts at censorship, one Christian radio station continued to broadcast criticism of the government. At least one of its journalists was threatened with arrest and persuaded to go to study abroad in order to silence him; effectively a policy of exiling critics. Nevertheless demonstrations against the government and for human rights continued.

There were specific requests for the direct election of the President at the next election scheduled for 1988. As early as 1985 a council protesting about the use of torture was formed, composed of Protestants (thirty-three), Catholics (twenty-four), Buddhists (ten), members of the United Minjung Movement for Democracy and Unification (sixty), representatives of Families of the Arrested (twelve) and the New Democratic Party (fifty-one). There were other similar, temporary coalitions, which put the leaders of various social movement organisations in contact with one another forming the background to the creation of the National Coalition for the Democratic Constitution (NCDC) in 1987 which was the organisation which led, inspired and co-ordinated the democratic uprising of that year through its twenty-two branches across the country (Chung 1997: 81–97).

On 13 April 1987 President Chun announced that all public and official discussion of constitutional reform would be forbidden and that there would be no reform of the Constitution until after the Olympic Games were held in Seoul in 1988. This meant that the next election for the Presidency would be held using the indirect system of the NCU and with the mass media subject to strict control. Some suspected that Chun might himself stand again or put forward a close associate. However, instead of closing down discussion and protest, this declaration coupled with government admissions of responsibility for the death of a student while being tortured by the police, caused the protest to intensify.

On 10 June massive demonstrations were staged in twenty-two cities and protest rallies continued over the next few weeks. Security analysts advised that the situation was beyond the ability of the police to control so the government had to choose between military intervention or making constitutional concessions. On 29 June Roh Tae-woo, the Prime Minister and Chun's designated successor, announced his acceptance of the democratisation movement's basic demands: constitutional reform including direct election of the President, the restoration of basic human rights, freedom of the press and local autonomy. Following this, anti-government activity subsided rapidly and negotiations began between the parties about another round of constitutional revision to create the Sixth Republic. A draft was

complete by 17 September, accepted by the National Assembly on 12 October and approved by referendum on 25 October. An important supplementary provision specified that the election of a new president should take place before the revised constitution took effect and so the first election under the new system took place on 16 December 1987. Both Kim Dae Jung and Kim Young Sam stood dividing the opposition vote and allowing Roh Tae-woo to be elected with 36 per cent of the vote (Kim Dae Jung and Kim Young Sam won 27 per cent and 28 per cent respectively).

The main feature of this set of amendments to the constitution was the elimination of the presidential electoral college, the remnant of the NCU created in Park's *Yushin* Constitution. The President was now elected by direct ballot. However there were some further reforms of a more liberal nature in criminal procedure and the freedoms of expression, association and assembly gained formal recognition. A detainee now had the right to be informed of the reasons for his or her arrest and a right to be assisted by counsel (Par. 12.5). Permits were no longer required for public speeches, publications, associations or assemblies (Par. 2.2) (Kim and Lee 1992: 326). The section on the rights of citizens extends the previous commitment of the state to give special protection for women by including a provision that 'they will not be subjected to unjust discrimination in terms of employment, wages and working conditions' (Par. 32 (4)). Moreover, 'the state shall endeavour to promote the welfare and rights of women' (Par. 34(3)). The right to collective bargaining and action is no longer qualified by it having to be 'exercised in accordance with the provisions of law'. Moreover, Par. 33(3) now states that only workers in important defence industries may have their right to collective action restricted or denied. Previously this clause covered workers in 'central and local governments, state run enterprises, defense industries, public utilities or enterprises which have a serious impact on the economy' (1980: Par 31(3)). A rewritten Par. 35 extends the notion of environmental rights to include the duty of the state to endeavour to ensure comfortable housing.

There were some slight increases in the power of the National Assembly. Its ability to inspect and investigate state administration marginally increased (Par. 62.2). It is required to consent to the appointment of Supreme Court Justices and the head of the nine 'adjudicators' in the Constitution Court. This new organ is comprised of three presidential appointees, three selected by the Chief Judge and three by the National Assembly (one of whom is chosen by the Opposition). It has wide powers of review over areas of legislation, impeachment, the dissolution of political parties, state agencies and local government and petitions about the Constitution. On controversial issues such as labour law or concerning the teachers' union this court has always backed the government, often with an 8:1 verdict (interview with Park Won-soon, 2 July 1995). There is some evidence in these new arrangements of increased checks on the power of the President and he has slightly fewer emergency powers.

Roh Tae-woo's period in office came to an end in 1993 and he was replaced by Kim Young Sam who in turn stood down in 1998 when Kim Dae Jung finally achieved his ambition to be elected President. It would seem, then, that a procedure for political succession has been created and that the military has given up attempts to control political events. It should be possible for Korean social and political life to develop out of the shadows of authoritarianism, which were still present during the rule of Kim Young Sam. If his five years as President was a period of transition away from military rule then the five years from 1998 could be a period of the consolidation of democracy and the preparation for the arrival of a new generation of political leaders for the twenty-first century.

At the time of writing the Constitution had been left unchanged for over ten years. The frequent amendments before the 1980s lowered the credibility of the Constitution as Supreme Law. On the other hand the process was one which incrementally introduced liberal ideas into the Constitution. It may be that we can now talk about the normalisation of politics and the re-introduction of elections to local government assemblies in 1993 was a further step in that direction. The constitutional court has been quite active in reviewing cases even if it has so far not presented a major challenge to the executive branch of government.

Despite the successful attempts by successive presidents to impose their will through the governmental structure, it is noticeable that there was usually a strong opposition which was able to put up one or more candidates in national elections who were able to win as many or even more votes than the incumbent. Presidents could not be sure of getting their policies, such as constitutional amendments, approved by the National Assembly, even when their party had nominal control. Rhee in 1952 intimidated the Assembly with mass demonstrations and the arrest of forty-seven anti-Rhee assemblymen before it would give its approval to his plan to have the President and Vice-President chosen by direct elections (Han 1974: 21). In 1969 the amendment to the Constitution which authorised Park standing for a third term was passed by the National Assembly at 2.28 am on a Sunday morning in a separate building, as the opposition parties were occupying the National Assembly building (Yoon 1990: 103).

Within the 1988 constitutional structure the prospects for the propagation and implementation of human rights ideas were good but there remained serious impediments of which the most important was the National Security Law.

The National Security Law

The Republic of Korea was established in August 1948. At the end of September a regiment bound for Cheju to put down a leftist rebellion mutinied and took control of two southern cities. The mutiny was defeated with the loss of several thousand lives but this did not end the 'instability';

between September 1948 and April 1949, 89,000 arrests were made and in May 1949 two army battalions defected to North Korea (Henderson 1991: 159–60). In the midst of this, on 20 September 1948, an Anti-Treason Law was proposed to the National Assembly. There was some opposition to it. It was argued that the (Japanese origin) criminal code already permitted the punishment of serious crimes such as murder or arson and there was the danger that to make it treasonable to join organisations thought to have subversive objectives created the possibility of arbitrary enforcement and political abuse. Despite this, the law was approved on 1 December 1948 as the National Security Law (NSL).

Essentially it was a reincarnation of the Public Peace Police Act, which had been passed by the Japanese government in the second half of the 1920s to enable the state to control left-wing dissidents. The main target of this act was those ‘organising for the purpose of overthrowing the national polity’, which at first meant the Japanese Communist Party but the definition was later extended to include social democrats and, by the late 1930s, even liberals. The NSL too was aimed at those ‘organising for the purpose of overthrowing the state or assuming the titles of the government against the national constitution’. No crime had to be committed, it was enough to be a member of such an organisation. Anti-state organisations included the government of North Korea as well as any group sympathetic to it. This made even dialogue with the DPRK a violation of the terms of the NSL.

During 1949, 188,621 people were arrested or imprisoned under the NSL but in December it was revised so that the leaders of anti-state organisations or individuals who advance their cause could be sentenced to death. The mass of arrests created problems for the court system so the three-tier trial system was set aside for NSL offences and a one-tier system with no possibility of appeal was introduced. This did not last for long. In April of the following year the National Assembly defied the President and reinstated the right of appeal.

Third, in another measure that was borrowed directly from the colonial period, those who demonstrated the likelihood of ‘thought conversion’ (*tenko* in Japanese) could have their verdict deferred. The goal was to make sure that ‘political offenders must receive a stern penal servitude as well as conversion education to recant their ideology’, but they ‘must convert from their heart to become honest and contributing citizens’ (quoted in Park 1993: 12). The converse of this was that those who did not ‘convert’ might not be released at all.

Syngman Rhee’s Liberal Party became extremely unpopular in the later 1950s and, in an attempt to suppress the media and silence their critics, the NSL was revised again. The notion of a state secret was redefined in 1958 to go beyond military matters and to include political, economic, social and cultural information. It now became a crime not only to divulge such state secrets to an enemy but it even became illegal to collect such information, possess inaccurate information or publish ‘secret’ information. A crime of

'inciting social disorder' was created to enable punishment of those 'who knowingly disseminate false information or who distort facts and disseminate such facts to benefit the enemy' (Park 1993: 15) and a new article was devised to criminalise 'slander and libel of the head of our state ... or other constitutional body by the North Korean regime'. There was widespread criticism of these reforms and the opposition parties in the National Assembly tried to prevent them being approved. Three hundred riot police were sent into the National Assembly building to arrest or assault members of the opposition parties and the bill was approved in their absence.

Some of the most oppressive provisions were removed in the slightly more liberal climate of May 1960 but new ones were also created, notably the crime of travelling to and from 'unlawful areas' and that of 'failing to report to the authorities'. This made it possible to indict those who travelled to the North and those who failed to report violations of the NSL by their family, friends or neighbours (Park 1993: 16-17).

Anti-communism was one of the guiding principles of Park Chung Hee and the other leaders of the military coup of May 1961. In June an anti-Communist Law was pushed through the National Assembly with much broader powers than the NSL. First, all socialist states, not just the DPRK, were now defined as enemy states and thus out of bounds. Second, it was no longer necessary for the courts to prove membership of an anti-state organisation to convict, henceforth anyone who 'praises or encourages' or 'engages in activities helpful' to one, committed a crime.

As the South Korean economy developed businessmen came into increased contact with East European, socialist states. In order to enable economic exchanges with the socialist bloc countries the anti-Communist Law was abolished in December 1980 but most of its provisions were incorporated into a revised NSL. The 1988 constitution permitted much freer political activity and there was discussion of the repeal of the NSL. However, the opposition parties could not agree and so it was not until May 1991 that a revised NSL bill was introduced into the National Assembly and passed in a matter of seconds without any debate, 'while the ruling party members physically surrounded and immobilised the protesting opposition members' (Park 1993: 25).

As the first civilian President to be freely elected, one might have expected Kim Young Sam would have dismantled the security apparatus as he was urged to do by the human rights groups. The National Security Planning Board (NSPD, formerly known as the KCIA) in 1993 lost its right to investigate allegations of committing the crime of 'praise and supporting the enemy' (article 7) but on 26 December 1996, in an early morning session that was only attended by members of the ruling party, the NSL was revised once more. This gave the NSPD the right to investigate those who were alleged to be involved in internal rebellion or foreign invasion and allegations of breaches of the law on military security. The conservatives within government were still exerting control over policy making.

In 1958 Cho Pong-am, opposition party presidential candidate, was condemned to death under the NSL and executed in 1959. Other presidential candidates have also been tried on charges relating to the NSL; Suh Min-ho, Kim Chul and Kim Dae Jung. Many hundreds of professors, poets, artists, book-shop owners and publishers have been arrested under the law. People were even arrested and convicted on the basis of comments made when drunk in casual conversations (Park 1993: 39). Changes were made in 1991 that placed a heavier burden on the prosecution to prove the intentions of the violators so that, for example, in making contact with the DPRK 'the intention was endangering the liberal democratic order'. However this amendment did not result in a reduction in the number arrested or changes in the trial procedures.

There has been a remarkable continuity in the way the law has been revised over the years. From the 1950s through into the 1990s the National Assembly has been treated with contempt by the executive when it has wanted to revise the NSL. There has been opposition both on the streets and on the floor of the National Assembly but it has usually been ignored. Not only have the various forms of the NSL been used to criminalise normal democratic political activity, which is ostensibly permitted by the Constitution but also the methods used to amend that law have been inconsistent with the democratic process and rule of law apparently guaranteed by the Constitution.

Kim Dae Jung did not promise the removal or revision of the NSL in his 1997 election campaign although he has said that in the long term it will need to be revised. In the period of economic down turn which followed the East Asian financial crisis of 1997–98, the act proved to be a useful tool enabling the government to harass students and workers who organised demonstrations and other forms of protest against unemployment. Over 400 people were arrested in the first half of 1998. There has been sustained criticism of the NSL during the 1990s by the human rights NGOs often led by lawyers. Indeed in Korea just like in Japan the legal profession has played a key role within the human rights movement, so next we turn to consider the development of the Korean legal profession.

The legal profession

Attempts were first made to introduce a modern court system in 1895 and ten years later the Gwangmu Lawyers Act was passed to regulate the emerging legal profession in Korea. However, the wholly Korean attempts to modernise legal practice – to incorporate western legal methods into traditional legal structures – were halted in 1905 by the seizure of judicial power by the 'Residency General of the Japanese Empire', which was a prelude to the annexation of Korea by Japan in 1910. Regulation of the bar system was now in Japanese hands and the legal structure in Korea was finally reformed on the Japanese model by the Chosun Lawyers Decree of 1936, which changed the regulations on qualifications and the regulation of the bar association.

The Chosun Lawyers Decree remained in effect after liberation but it was joined by a Lawyers Act promulgated by the US military government. Not long after the establishment of the Republic of Korea a new Lawyers Act was passed (November 1949) but it included very little by way of innovation. Thus in this area, as in several others, there was a strong element of continuity between colonial and independent South Korea with some aspects of the Japanese system lasting longer in Korea than in Japan itself.

It was not until 1982 that the Lawyers Act was fully re-written. This gave the Bar Association a degree of independence. Responsibility for keeping the lawyers' registry was transferred from the Ministry of Justice to the Korea Bar Association (KBA). In 1993 the KBA structure was revised by a new law which caused it to establish a Lawyers Discipline Committee enabling it to exercise disciplinary power over its members.

A 'Hansung Bar Association' was formed in 1905 but its membership was never larger than ten. During the colonial period a bar association existed in each district court but there was no formally constituted federation of bar associations, the Chosun Federation of Bar Associations was no more than a voluntary organisation (Korea Bar Association n.d.: 19). The number of lawyers until 1945 was very small (see Table 3.1).

The size of the legal profession did not change much over the next ten years but there were substantial changes in its organisation. In November 1945 a Chosun Bar Association was created as a national association with

Table 3. Lawyers and population of Korea, 1911–94

<i>Year</i>	<i>Population</i>	<i>Lawyers</i>	<i>Lawyers per population</i>
1911	13,832,000	59	234,440
1915	15,958,000	94	169,766
1920	17,264,000	105	164,419
1925	19,020,000	166	114,578
1930	20,438,000	209	97,789
1935	22,208,000	217	102,341
1940	23,547,000	201	117,149
1944	25,121,000	393	63,918
1949	na	na	na
1955	21,502,000	293	73,385
1960	24,954,000	456	54,724
1965	28,705,000	662	43,361
1970	31,435,000	719	43,720
1975	34,681,000	809	42,869
1981	38,693,000	1,013	39,196
1986	41,568,000	1,483	28,029
1994	44,450,000	2,805	15,847
1995	44,830,000	3,001	14,945

Sources: Yoon 1990: 129 and figures from the KFBA

chapters in each district court area. The chairmen of these district chapters were organised into a central council, which was chaired by the Chief Justice of the Supreme Court. Attempts to reorganise the Korea Bar Association (KBA) in the summer of 1950 were interrupted by the outbreak of war and it was not until 1952 that the KBA was finally created in its current form. There are twelve local bar associations but two thirds of lawyers live and work in Seoul and just over 9 per cent live in Pusan (Yoon 1990: 129). Up until the mid 1980s there were some districts which had courts but no resident attorney.

The profession is largely self-governing through its committees but there is also a Lawyers Discipline Committee in the MoJ which decides in certain cases involving lawyers (Korea Bar Association n.d.: 15). 'The mission of lawyers is to protect basic rights and attain social justice. Therefore, in accordance with such mission lawyers must sincerely perform their functions and endeavour to preserve social order and the improvement of the legal system' (Article 1 Par. 2, Lawyers Act 1982).

Although there were clear limitations imposed by the political circumstances, since its re-formation in 1982 the KBA has played a key role in trying to establish a democratic order and respect for the rule of law. It has made specific suggestions about the organisation of the Supreme Court and generally tried to act 'as watchman over the enactment, application and enforcement of the law' (Korea Bar Association n.d.: 40). One of its standing committees focuses on human rights and since 1986 it has produced an annual Human Rights Report, which comments on changes in the situation in a number of different areas.

As is clear from Table 3.1 the number of lawyers in Korea remains relatively small: in 1994 there was one lawyer for every 15,847 people. Entry into the legal profession is similar to Japan. First, one must pass a highly competitive examination to enter the Judicial Research and Training Institute and there complete a two-year training course. Between 1949 and 1980 only around 50–60 people passed the bar exam each year: a pass rate of 1–2 per cent, which meant that over this thirty-year period only 1,902 were successful. In 1981 the number allowed to pass each year was increased to 300, so between 1981–87 another 2,090 got through. Each year 20,000 take the examination. Since 1996 there has been a programme underway which will gradually increase the size of the legal profession. In that year 500 passed and it was planned to allow for an increase as follows: 1997 – 600, 1998 – 700, 1999 – 800, 2000 – 1,000 (interviews at Ministry of Justice, 5 July 1995).

During the 1960s perhaps only five or six of the 600–700 strong legal profession were interested in human rights, by the 1970s this had increased to twenty to thirty and in the 1980s it had more than doubled. In 1986 a group of lawyers who had been defending political prisoners formed a group called *Jungbubhoe* (Organisation for Law based on Justice). It grew in size and in May 1988 changed its name to *Minbyun* – Lawyers for a Democratic

Society – at which time it had fifty-one members. As of September 1997 it had grown to 207 members, about 7 per cent of the legal profession. In addition to the main office in Seoul, there is also a branch of around thirty members in Pusan (interview with Mun Jae-in, 26 June 1995).

Between 1988–94 *Minbyun* handled over 580 cases involving 1,225 people; most of them related to the NSL (40 per cent) or the Law on Assembly and Demonstrations. When the organisation is informed of a case a member will be assigned to it both to monitor the proceedings and to try to prevent torture or other mistreatment. In addition to these purely legal functions, *Minbyun* tries to disseminate an awareness of human rights issues by organising seminars and debates. It has conducted research on the working of the NSL and the Mental Health Act and it has played a key role in organising the ‘counter-reports’ which have supplemented the reports made to the UN by the Korean government under its obligations in the various UN covenants. Finally, *Minbyun* is a key member of the Korea Human Rights Network (KOHRNET) set up in 1994 and composed of nine groups in all. KOHRNET is committed to ‘implement the spirit and principles of the UDHR, the two International Human Rights Conventions and other human rights conventions’ in the spirit that ‘all human rights are universal, interdependent and inter-related as re-affirmed by the Bangkok NGO declaration and Vienna Declaration’ (KOHRNET n.d.).

There remains a deep-rooted idea that law ‘is an instrument at the state’s disposal, not a device to regulate state power’ (Yoon 1990: 200). That was its role in the Choson period, it was how the Japanese used law and it has been the attitude taken by the post-war government at least until the early 1990s. As we have seen, not even the Constitution was accorded much respect, being amended to suit the immediate needs of whoever was President at the time. On the only occasion that the Supreme Court tried to seriously challenge the government, in 1971, the state’s response was to reform and emasculate the court. The National Assembly has been suspended three times: 1961–63, 1972–73, 1980–81.

It is only since 1986 that it has been common for lawyers to offer their services to those threatened by state power and only since 1987 that detainees have had a right to be assisted by counsel. The number of lawyers has increased to double what it was in 1988 and that number is likely to double again over the next few years. In part, of course, this increase in the number of lawyers reflects a growth in the demand for legal services in commerce and industry as the economy has expanded, but it will continue to have the effect of increasing the number willing to defend those who feel themselves to be victims of state policies. In this sense lawyers are becoming directly involved in the process of delineating the limits of the state using law to regulate state power. Conversely this defines the area in which non-state actors are free to act – civil society. Over the last decade many human rights groups have been formed to actively demand the recognition of rights and we will briefly describe some of them in the next section.

Korean human rights NGOs

Already I have briefly described how the pro-democracy movement of the mid 1980s had been successful in forcing concessions from the government in the process that led to the 1987 constitutional reforms. This in turn was a successor to the protest movements of earlier decades – from the 1 March 1919 independence demonstrations to the student movement which toppled the Rhee regime. However having achieved their immediate goals, the democracy movement did not disappear but their dynamism carried through into the 1990s and it became the motive force behind the human rights groups.

Analysts of the 1980s point to the existence of three different strands in the pro-democratisation movements. First, there were the student groups, second, there were the Christian organisations of various denominations and third, there was the *chaeya*, the civilian camp, ‘dismissed reporters, writers, renowned anti-government figures, lawyers, former politicians and feminists as well as dissident youths’ (Chung 1997: 85). Various transitory attempts were made to organise this latter sector but the first *chaeya* movement organisation was the Youth Alliance for Democratisation Movements set up in 1983 – the first non-Christian organisation to be able to support itself (Chung 1997: 87). It did not collaborate too closely with the student groups lest it be considered a ‘background agitation of campus disturbance’ but there was some co-operation.

In 1985 a United Minjung Movement for Democracy and Unification was created including most of the active pro-democracy groups apart from the Protestant organisation led by the National Council of Churches in Korea (NCKK). It had support in most areas of South Korea and several of the largest cities. There were other network groups formed, for example one to oppose torture which contained Catholics and Protestant Christians, Buddhist monks and representatives of the families of the incarcerated. A series of councils were created which brought the leaders of social movements together and after some jockeying for position this resulted in the creation of the National Coalition for a Democratic Constitution (NCDC), which co-ordinated many of the activities of the ‘June Uprising’ in 1986 (Chung 1997: 83). Once Roh Tae Woo conceded most of the NCDC’s demands it dwindled in size but many of those who had been active in the 1980s continued to support the more varied social movements of the 1990s and many of them were involved in human rights campaigns of one sort or another.

Already I have briefly described how *Minbyun* – Lawyers for a Democratic Society – emerged in the late 1980s. It played a key role in the formation of KOHRNET, which started as a network formed in 1993 to prepare for the UN Human Rights Conference held in Vienna. KOHRNET has nine constituent groups whose activities sometimes overlap but most complement each other. I will briefly comment on the most prominent of

these groups (for more detailed comments on these and other human rights groups in Korea see Neary 1998).

The Human Rights Committee of the NCCK was founded in 1974 and protested about the human rights violations committed during the Park and Chun regimes. It had the support of many of the Protestant churches of Korea and branches in several of them. Its Catholic equivalent was only established as an independent unit within the Catholic Centre in the 1980s, although the Catholic church had been involved in human rights protests and the democratisation movement for several years before then. Many Buddhists had taken part in the pro-democracy movement of the 1980s and a small group in November 1990 set up a Buddhist Committee for Human Rights. Not only did they try to develop a Buddhist perspective on human rights but they also sought to establish links with the Buddhist community in North Korea.

The *Inkwon Sarangbang*, Centre for Human Rights, was founded in 1992, mainly by released prisoners and victims of human rights violations. Its chair is Suh Jun Sik. He was sentenced to seven years in prison in 1972 but then was detained in protective custody for ten years because he refused to submit a statement of conversion from his socialist ideas. When he was released in 1989 he refused to make regular reports to the police and he was arrested and imprisoned once more. Late 1997 he was arrested again and spent three months in prison, this time on charges of having screened an unlicensed film as part of the Seoul Human Rights Film Festival. The organisation has the support of lawyers and intellectuals. It produces a daily newsletter in Korean, 'Human Rights Daily News' which is distributed by fax and it maintains an internet home page which includes a summary in English of the previous week's faxes. It houses a specialist human rights library, runs courses on human rights and prepares and publishes educational materials as well as organising the annual film festival. It has links with human rights NGOs in other Asian countries and it has organised and attended joint conferences on such topics as national security laws.

There are several groups that were formed by or work for the victims of human rights violations. The *Minkahyup* Human Rights Group was probably the first of these, being set up in 1985. It has a membership of around 1,500 with perhaps 300 people being active at any one time in groups in nine cities outside Seoul. It tries to draw attention to the plight of prisoners of conscience, it has an education programme to generate an awareness of human rights issues. There is a counselling service for the families of prisoners and the organisation raises money for prisoners both while they are in prison and upon their release. Each Thursday since 1993 it has held a rally outside Tapkol Park in central Seoul to draw attention to the fact that there still are political prisoners behind bars in Korea (interviews with Nam Kyu-sun, 30 November 1995, 10 September 1997). The National Council of Bereaved Families for Democracy complements the work of *Minkahyup* by

giving support to the families of those involved in the democratic struggle who have died in demonstrations or in prison or who have committed suicide.

The People's Solidarity for Participatory Democracy (PSPD) was formed in September 1994 by people who had been active in labour unions, tenant and welfare groups and who were moving away from being interested in demands for pay and towards an interest in demanding broader social and economic rights. By mid 1997 it had a full-time staff of twenty-seven and more than 300 members including 100 lawyers and 200 academics. It then embarked on a campaign to increase in size, had recruited 2,000 members by March 2000 and planned on an expansion to 30,000, which, if successful, would radically change its character. It is involved in a broad range of campaigns: social welfare, economic democratisation, 'networking for self-governance'. It maintains a vigilant eye on the legal system publishing a journal, *Justice Watch Newsletter*, and it keeps files on the careers of all judges and prosecutors. Similarly it monitors the affairs of the National Assembly publishing a *National Assembly Watch* newsletter.

There is a particularly interesting campaign to encourage Korean citizens to stand up for their 'small rights'; to complain to local government or to demand redress from officials who have mistreated them in some way. It encourages small shareholders to use their rights to attend shareholders' meetings and to ask awkward questions about the company's behaviour. PSPD acts internationally by monitoring the activities of Korean companies overseas and the impact of Korean government ODA programmes and by sponsoring meetings for Asian human rights activists. In 1995, for example it held a conference in Seoul on National Security Laws in Asian countries, which was attended by delegates from fifteen countries. Broadly speaking PSPD attempts through its campaigns to create a 'transparent society' within which a network of autonomous 'action centres' keep watch on the activities of government.

These brief sketches of the activities of some of the human rights NGOs active in Korea in the mid 1990s can only provide a glimpse of the way in which the number of groups and the range of activity have increased since the democratisation period. With some of them there is evidence of continuity with the period of 'democratisation' of the 1980s, this is quite clear in the case of the lawyers' groups and Christian organisations. Others, notably the PSPD and *Inkwon Sarangbang* are consciously seeking to develop new forms of organisation and new sets of demands to keep pace with the changes in mainstream politics. During the 1980s the groups were almost exclusively interested in human rights promotion and protection within Korea but since 1990 their horizons have expanded. On the one hand this is because of the increased presence of foreign workers in Korea who face new kinds of rights problems. Each of the religious groups has created organisations to assist or advise foreigners working in Korea. On the other hand it is in line with lessons learned at the Bangkok and Vienna conferences where NGOs from Korea

and elsewhere in Asia decided that they needed to co-operate with each other if their governments were to be kept alert to rights issues.

Meanwhile, following the Korean government's membership of the UN it has ratified most of the major human rights conventions. Thus the NGOs can legitimately claim to be demanding that government do no more than fulfil obligations voluntarily entered into. Korea has never officially endorsed the 'Asian values' critique of human rights that the governments of China and South East Asia have found so attractive although at the same time, even in the 1990s, it continued to invoke the security situation to justify its use of the NSL and similar laws to maintain its control over domestic critics, as shown by its harassment of Suh in late 1997 in the run-up to the presidential elections.

The South Korean government and human rights

The Ministry of Justice is the agency formally responsible for administering the protection and promotion of human rights since its formation in May 1950. A document produced in the 1990s by the MoJ explains, 'full scale (*sic*) of human rights in Korea have begun with the establishment of the Human Rights Division on May 21, 1962' (Ministry of Justice, n.d.). As this was exactly the time that Park Chung-hee was governing by martial law prior to the creation of the new constitution this does not suggest fully fledged commitment to human rights protection. Apparently the division was originally called the Human Rights Protection division but the name was changed following embarrassing questions about what the division was doing to protect human rights. It is still not clear what this division actually does apart from publishing a few leaflets each year. It does not conduct any investigations and rarely responds to criticisms from within or outside the country (interview with Park Won Soon, 2 July 1995). Since the signing of the international covenants its most important role has been to assist with the production of periodic reports made to the UN.

The Ministry of Foreign Affairs had a UN division within the international organisation bureau even before the RoK joined the UN on 17 September 1991. In 1994 this was expanded to create four divisions on: UN Policy, Economic Policy, Disarmament and Nuclear Policy, and Human Rights and Social Policy. This latter division handles most of the political aspects of UN membership, especially those relating to human rights. While the responsibility for the reports is handed to specific ministries – CEDAW to the Ministry of Political Affairs, CRC to the MHW, CERD to MFA and the Anti-torture treaty to the MoJ, the MFA has played an important role in co-ordinating the compilation of the periodic reports. The RoK has taken an active role in international human rights affairs since it became a member of the UN. It participated in the Commission on Human Rights 1993–98, has supported the Asia Pacific Human Rights workshops and has provided a special rapporteur for Afghanistan, Paik Choong-hyun of Seoul National University.

Since the mid 1990s there had been a suggestion that a National Human Rights Commission (NHRC) might be created. There was little enthusiasm for this idea in the human rights movement and none from the MoJ. The MFA however sent observers to the regional workshops organised by the UN High Commission for Human Rights on national human rights bodies organised in the Asian region. Kim Dae Jung was an enthusiastic supporter of the proposal and soon after his election as President he announced a plan to establish one in Korea. In September 1998 the Ministry of Justice produced, without any consultation with human rights groups, a draft bill. International criticism of the proposals came almost immediately from Amnesty International and the UN High Commissioner for Human Rights, not only of the proposals but also of the undemocratic and opaque way the policy had been formed. Within Korea the proposal was condemned by the Korean Council of Trade Unions as an 'attempt to make human rights government property' and a National NGO Coalition for an Independent NHRC was set up, based on, at first, thirty-one groups although its support was to grow to seventy-two groups by the end of 1999 (*Focus Asia Pacific*, December 1999, vol. 18: 11).

The NGOs viewed these moves with suspicion and with some justification. There have been at least two occasions in the past when government, or people close to the government, have sought to create human rights organisations. In 1953 an International Human Rights League of Korea was created and it survived through the 1990s. Now it appears to be composed of 'establishment' figures, several of them formerly senior officials in the MoJ. By the 1990s it was virtually inactive and produced no material in either English or Korean about the human rights situation in the RoK. However in the office next door there is the Center for the Advancement of North Korean Human Rights which has produced several books and pamphlets about the human rights situation in North Korea. The same person is the Secretary General of both organisations.

In 1961, another group, the Korean Human Rights Protection Organisation, was created to promote the protection of the basic human rights as listed in the Constitution and the UDHR. At the end of the 1990s it claimed a membership of 500 including former high court judges and vice chairmen of major companies. It would seem that these groups were created to try to demonstrate to the international community that there was an interest in human rights issues in Korea and to take pre-emptive control of that movement should it emerge. As things turned out in both cases soon after the formation of these groups, the organs of state repression were sufficient to prevent the formation of an autonomous human rights movement until the 1990s.

Forced to reconsider by the barrage of criticism from home and abroad the MoJ revised the draft bill several times during the course of 1999, but although the jurisdiction and investigative scope of the committee were extended the ministry could not be persuaded to allow the new organisation

to be independent or have the legal power to enforce their decisions on those found violating the law. Such bodies do exist, for example, the Fair Trade Commission or the Commission for Eliminating Gender Discrimination. Even then, after giving in to pressure to expand the committee's remit, the areas of violations of freedom of expression, rights relating to the environment, residential facilities, education and prisoners' rights, remained outside its scope. The ruling party in the National Assembly took on board many of the NGO criticisms but it could not overcome MoJ obduracy, and in December 1999 it decided to postpone enactment of the bill, 'we cannot pass the bill in a situation when human rights organisations are opposed to it' (*Focus Asia Pacific*, December 1999: 10).

The fact that the popularly elected President supported by the ruling party in the National Assembly were unable to overcome the attempts of the Ministry of Justice officials to protect their authority suggests that there remain some weaknesses in the democratic nature of Korean government. That aside though, the fact that the combined power of a coalition of human rights groups was able to prevent the imposition of a human rights commission that would clearly have worked more to sustain than to challenge power represents a major success for the human rights movement. It will nonetheless be important for the human rights movement to continue to participate in the creation of human rights structures and ideas in Korea to avoid the process being manipulated by government. Government, at least in the form of the MoJ, continues to resist the liberal notion of law as a way to regulate state power.

South Korea and the international human rights treaty regime

As of 2001 the RoK had ratified thirteen of the twenty-five international human rights covenants, and all of the seven most important covenants, putting it in the group of what Mushakoji calls the 'Human Rights Accepting Nations of Asia' (Mushakoji 1997b: 19). One of these treaties – on genocide – it ratified in 1950. The RoK ratified the treaty on female political participation in 1959, that on the Abolition of the Sale of Humans and on the status of stateless persons in 1962. For some reason the Park regime in 1978 ratified the treaty opposing all forms of discrimination (CERD), and, on 27 December 1984, almost at the end of the UN Decade for Women, the RoK ratified CEDAW. However it was not until April 1990 that South Korea ratified the most important human rights treaties, the ICCPR, the ICESCR and the first optional protocol (effective from July) about a year before formally becoming a member of the UN. In November the following year the RoK ratified the CRC, in December 1992 the treaty on Refugees and related Optional Protocol and in January 1995 the covenant on the abolition of torture (CAT) became formally effective.

Just as law has been for most part regarded as a device at the disposal of the Korean state to enable it to control society rather than a mechanism to

regulate state power, so the idea that international treaty obligations might restrict the activities of the state or its bureaucrats is not one that the Korean ruling elite has found easy to accept. Moreover there remain a number of problems relating these treaties to domestic law.

The first report to the UN HRC made by Korea under the reporting obligations of the ICCPR addressed this problem. Government representatives at the time of the HRC's review of the RoK report stressed that there was no conflict between the Constitution and the Covenant, which together formed the core of human rights law in Korea. The government's position is that the treaty 'has the same effect as domestic laws without the enactment of separate legislations' (quoted by Lee Suk-tae 1993: 712). However critics have argued that if the covenants are only equivalent to domestic law, in principle international standards legislation could be overturned by domestic statute. The Korean government has described this view as underestimating the degree of the RoK commitment to rights but the last thirty years of Korean history gives plenty of reason for doubt on such matters. Moreover, as pointed out by the HRC, the RoK Constitution does not cover all the rights endorsed in the ICCPR, so it was necessary for the government to check existing and pending laws for compliance with the covenant. Lee Suk-tae argues that the covenants supplement the Constitution creating governmental obligations towards individuals in accordance with international standards and precedents such that if a law or even constitutional provision were interpreted to protect human rights no longer, the covenants could be used to challenge that interpretation (Lee Suk-tae 1993: 729).

However, despite domestic criticism, the NSL has remained on the statute books and has been used to arrest critics of government policy. Its principles are vague, especially article 7 which enables police to arrest those guilty of 'action likely to benefit the enemy', and the 'duty to inform' continues. The act can be, and has been, abused to restrict freedom of thought, conscience and expression as well as the right to know, all of which are protected by articles 18 and 19 of the ICCPR.

A Security Surveillance Law was introduced in 1989 (amended 1991) to enable the MoJ to place under observation those who have been imprisoned for violations of the NSL. This was a reform of the Social Safety Law of 1975, which had allowed the MoJ to order the detention for up to two years (renewable) of those who had been convicted under the NSL and thought to have a high propensity to re-offend. Though not imprisoned, those under observation are obliged to report every three months about their main activities, meetings attended and other matters deemed important by the local chief of police. This, too, is a clear breach of articles 12, 17 and 18 of the ICCPR. Then there is the Law on Demonstrations, introduced in 1989 ostensibly to guarantee the right of freedom of expression but which gave the government, through the police, the power to ban any demonstration at its discretion. As a final example, we note the Laws Prohibiting Interference by a Third Party, which prevents people from becoming involved in labour

union activity or collective bargaining when they are not directly concerned. Throughout the 1980s this law was used to prohibit groups from giving support to the labour movement, for example the Catholic Workers Movement. As a report by *Minbyun* and the NCKK pointed out, this law has never been used to punish 'third parties' who took the side of management (Lee Suk-tae 1993: 734).

RoK's reports to the United Nations

States party to several of the UN human rights instruments are obliged to present periodic reports to one of the UN committees. As we have seen in the case of Japan, these reports create the opportunity for NGOs to contest the government's often rosy depiction of the domestic situation.

The initial report of the RoK government to the UN Human Rights Committee under the ICCPR was submitted in July 1991 (CPR/C/68/Add 1). In the general comments it claims to have plans to reinforce the Human Rights Division in the MoJ, that remedies for human rights violations are available in law and that lawyers in the Supreme Court and Constitutional Court can 'solve legal problems by applying the Covenant in litigation'. This is followed by slightly more detailed comment on articles 1–27 of the ICCPR and how they apply in the RoK.

In May 1992, *Minbyun* and the NCKK produced a joint response to the government report entitled 'Human Rights in South Korea'. It begins, 'The government report falls short of achieving the purpose of the reporting obligation of the State party as set out in the Covenant' (Minbyun and NCKK 1992: 2). Moreover, while it admits that the constitutional structure now appears to protect rights it also notes the 'weakness of the normative power of the constitution' and its standing as Supreme Law (Minbyun and NCKK 1992: 5). Contrary to government claims, remedies against rights violations are not readily available. Investigative agencies do not look into cases involving high-ranking officials, there is widespread distrust of the judiciary, judicial independence has been undermined by the use of such practices as despatching judges who find against the public prosecutors to remote rural courts, there are frequent obstructions to communication between lawyers and the accused and the state appointed counsel system is ineffective (Minbyun and NCKK 1992: 21–32). There is detailed criticism of the NSL, which it refers to as 'the constitution in the real sense' and it notes that there was no reduction in the number of arrests under the NSL following ratification of the ICCPR. Detainees continue to be routinely mistreated and often tortured. The treatment of prisoners, both those on remand and convicted, falls short of the UN Minimum Rules for the Treatment of Prisoners and thus the RoK is in violation of ICCPR Par. 10. It points out that unions may not take part in political activity although there is no corresponding restriction on employers. Soldiers are routinely expected to support the ruling party

through their absentee vote, an infringement of their political rights (Minbyun and NCKK 1992: 80).

Korea's initial report under the ICESCR was submitted in October 1993 and this provoked ten NGOs to submit a counter-report in April 1995, which was edited by PSPD and Minbyun (E/1990/5/Add.19, Minbyun and PSPD 1995). Once again the NGOs begin their criticisms with quite withering attacks on the accuracy and credibility of the official report. Not only does it fail to 'accurately portray the current situation regarding economic, social and cultural rights in Korea', it provides statistics in such a way 'that it is almost impossible for one to compare them to objective standards or norms', and it is 'filled with ambiguous promises'. The government report does little more than list the provisions in the domestic law which relate to the exercise of rights listed in the covenant, the legal structure which prevents the easy exercise of these rights is not explained. The report itself was compiled without any consultation with the NGOs and, indeed, they were unaware of the existence of the report until they heard of it from the UN Committee on Economic and Social Rights and obtained a copy from them. They point out that far from the government taking steps to publicise the covenant there is no translated version of it available to the public. The fact that it has been ratified is not mentioned in any textbook and it has not been actively covered by the mass media (Minbyun and PSPD 1995: 1-3).

They invoke the 'Limburg Principle' – that violations of the covenant can be said to occur when a government 'wilfully fails to meet a generally accepted international minimal standard of achievement which is within its power to meet' and suggest that the government of South Korea falls far below meeting these requirements (Minbyun and PSPD 1995: 3-4). The bulk of the report considers in detail articles 6-95 of the covenant, i.e. the rights to work (5-13), labour standards (14-32), the 'three labour rights' – association, collective bargaining and collective action (33-9), Social Security (40-9), Protection of Women, Children and the Family (50-61), Rights to Adequate Housing (62-6), Rights to Physical and Mental Health (67-71), Right to Education (72-86), Cultural Life (88-95). The report ends with a list of sixty-four questions to the government based on the report.

The right of direct petition

The UN Human Rights Committee, as well as receiving reports from states party to the ICCPR, may also under the first Optional Protocol receive 'communications from individuals claiming to be violations of any of the rights set forth in the Covenant'. The committee considers these 'communications' in closed meetings but publishes its final decisions, called 'views'. These 'views' are forwarded to the parties and the case considered closed. They are not binding in law and cannot be enforced but 80 per cent of governments are said to comply with 80 per cent of decisions in 80 per cent

of cases (Coliver 1996: 101). In 1991, fifty-five of the ninety-six states which had acceded to the ICCPR had also accepted obligations under this Optional Protocol but only four of the twenty-four countries in the Asia Pacific region had ratified, of which one was the RoK (APHRIC 1997: 116–17).

The Optional Protocol is not well known in Korea and although there are no statistics about its use it does not seem to have been used very often. One case which did go to the HRC in July 1995 was *Sohn Jong-kyu vs. RoK*. In February 1991 Sohn called a meeting of the Solidarity Forum (the Solidarity Forum of Large Company Trade Union Leaders had been formed in autumn 1990) to express solidarity with a strike taking place in the Daewoo shipyard on Guje island. They expressed their support for the actions of the Daewoo Shipyard Union, their opposition to the decision of the government to send in troops to end the strike and they transmitted their views to the shipyard by fax. The officers of the Solidarity Forum were charged with having interfered in the dispute thus committing the crime of ‘third party intervention’. All five were convicted by the Seoul District court and Sohn Jong-kyu’s one and a half-year sentence was upheld in the Supreme Court in 1992.

Sohn took his case to the HRC, which gave its view that his right to freedom of expression (Par. 19.2) had been violated and it did not accept the government’s assertion that his statements had threatened national security. They suggested the RoK should pay compensation to the official and revise article 13 (2) of the Labour Disputes Law. The RoK government did not comment on the ‘view’ until Sohn’s lawyers made it public then they declared that they would not comply with it and that it had no binding force (Minbyun and NCKK 1992: 60; Coliver 1996: 101).

The official response to the Sohn case typifies in many ways the attitude of the Korean government to the international human rights regime. At one level the post-democratic revolution regime has been an enthusiastic supporter of the international discourse on human rights going further than its neighbour Japan, which has not yet ratified the Optional Protocol. However, it cannot be said that the state has completely accepted its obligations under the various international treaties or made significant changes in domestic law or even changed its practices. At least up until the end of 1997 and the last days of the Kim Young Sam presidency, the government continued to invoke the delicate security situation as the reason for not dismantling the security apparatus whose legal framework and actual practice clearly contravenes the letter and spirit of the international conventions. However, the government had also been able to get away with this because of the relative weakness of the human rights NGOs, which, in part, of course, is related to the security framework which has made it hard for them to operate openly. For this reason the international legal structure is important as it enables the activists to argue that they are not simply dissident critics demanding that the state take their ‘alien’ values seriously but rather

that they are merely insisting that the state live up to its freely made international commitments.

Civil society in Korea

The variety and energy of the NGO community demonstrates that there now exists in South Korea a civil society which contains groups 'at some intellectual variance with the operations and sometimes the tenets of the state' as Steinberg puts it (Steinberg 1997: 146), and which therefore is able to act as a corrective to the acts of the state whoever wields power and whatever problems it addresses. The debate about the proposed National Commission for Human Rights in 1998–99 shows the strengths and limitations of civil society in relation to the contemporary Korean state.

How far civil society existed in pre-modern Korea has been the subject of some academic debate of late. Cho Hein has argued that it has a long tradition in Korea prior to its suppression in recent decades and that 'the development of civil society in Korea has historically been associated with the growth of Confucianism' (Cho 1997: 24). He goes further to suggest that the idea of 'rights' in the sense of 'defending people from possible abuses by the state ... was present in the Confucian tradition too. In fact it was a matter of major concern, for it is exactly what the Confucian set out to do' (Cho 1997: 28). However, he does not manage to go much further than to demonstrate the existence of a 'backwoods literati', which was more or less autonomous of the state, possibly critical of it but in no position to oppose it. Moreover, we are talking here of just one element of a numerically small albeit dominant class. There was no space, time or authorisation for non-literati to assert independence from social or political structures much less to criticise them.

Clearly there has to be some space created between the family and before the state for civil society to exist but for it to have any political significance the groups that form within it have to have a degree of communality and be critical of the use of state power. We can remain agnostic about whether it makes sense to think of the 'backwoods literati' as evidence of a pre-modern civil society but it is nevertheless significant that there are scholars who want to make the case for the existence of civil society and even a degree of pluralism in Choson society but that this tradition was disrupted by the Japanese intervention and then military rule from 1961 until the late 1980s. Despite these disruptions, 'the genuine political culture of Korea never died out and continued to wage its well known struggle against the military dictatorships until it eventually managed to defeat them' (Cho 1997: 35).

Thus it is argued that it is authoritarianism which is the historical aberration and the democratic movement of the 1980s and the human rights NGOs of the 1990s can be regarded as belonging to the traditional political culture of Korea. At the very least this is a challenge to the 'competent readers' of Korean tradition and legitimates the activities of the human rights activists.

Conclusion

Successive governments in South Korea have sought to rule by law but only to the extent of using law to enforce the wishes of the ruler or ruling group and without subscribing fully to the notion of rule of law. Even after the adoption of a constitution with nominal commitment to human rights and democratic practice the state has sought to maintain an authoritarian tradition. On the other hand there was an almost equal and opposite tradition of opposition: complaints about the incompetence and immorality of the Choson regime in its later years, opposition to Japanese colonial rule, resistance to American control and criticism of the indigenous authoritarian regimes of the late 1940s onwards. The various post-war regimes periodically sought to legitimate themselves by national elections to the position of President, but in spite of the government's ability to control the mass media and intimidate its critics, opposition candidates were consistently able to attract sufficient votes to put them within a few percentage points of defeating the incumbent.

It was not easy to sustain this activity in between national elections and there were no local elections between the early 1960s and the 1990s. The NSL or its equivalent could be used to detain or imprison those who actively engaged in opposing the regime. The events in Kwangju in 1980 showed both how strongly some people were opposed to the Chun regime and how ferociously the state could respond. Yet in retrospect this was a turning point. As the opposition groups reorganised themselves later in the 1980s there was an over-arching objective – democratic reform – shared by a number of diverse groups. Different religious groups – Catholic, Protestant and Buddhist, different social groups – students, workers, *chaeya* – combined. There was within this process a tacit acceptance of liberal values of tolerance and plural notions of the good. Moreover once the immediate goal had been achieved the opposition movement did not so much fade away as evolve into groups that sought to develop the project of democratising Korean society and to do so in ways which were appropriate to their priorities. Support for human rights in the 1990s has come from a variety of groups using a variety of strategies. Though not explicit we can perhaps observe the development of a liberal consensus within the opposition camp.

Moreover, during the 1990s there has been extensive study of the Kwangju People's Uprising of 1980. The government accounts of the time portrayed it as 'unlawful rioting by the communists' controlled by 'North Korean spies and their collaborators who infiltrated into Kwangju' (both quotes from Han 1999: 191, 193). Since then there have been a number of more positive interpretations of the event in terms of its contribution to the democratisation process of the later 1980s. In the later 1990s, work has sought to reveal the 'multiple meanings' that the uprising had both for the actors who participated in the events themselves and those who have sought to understand it. Some go as far as to argue that 'liberated' Kwangju was an 'absolute community' in which for a short time 'there were no private possessions, one did not

differentiate between one's life and that of another, time ceased to flow' (Choi 1999: 242) – an unconscious Asian re-creation of the Paris Commune perhaps? Kwangju became linked to the wider Asian human rights movement when a conference held to commemorate the uprising was selected as the location for the launch of the Asian Charter for Human Rights. In this way the process of creating a national human rights tradition has been tied in to the formation of a regional human rights discourse that has been kept under the control of the NGOs and which could rival the network being created by states through the UN structures.

A process of peaceful political succession seems to have been established within the constitutional structure based on a consensus among the leading political actors. Yet there remains some doubt about how deeply democratic change can affect policy making. The bureaucracy seems capable of maintaining its authority even in the face of requests from, for example, the elected President.

Challenges to the bureaucratic state's 'rule by law' have often been led by the legal profession which has insisted on the 'rule of law'. Lawyers have taken seriously the constitutionally supported idea that justice could be served by law, subverting the Confucian inspired idea that the rulers should rule and the ruled be content to be ruled. Once the state ceased its direct control over the legal profession and it became more or less self-governed it quickly established a place for itself as a, possibly the, leading advocate of human rights in Korea. Moreover, since the 1980s they have found inspiration and support in the international rights standards endorsed by the UN.

So we have the social movement groups and part of the legal profession ranged against the orthodoxy of the Korean state whose ideology was based on notions of family statism, which had little room for a clear concept of the division between state and society, still less that of civil society. The state has conceded little and grudgingly to the demands from the social movement groups that its activity should be bound by clear frontiers and yet those frontiers are being established. Meanwhile, in this area between the family and the state a plethora of groups are engaged in activity based on a plurality of ideas – different forms of Christianity, Buddhism, indigenous Korean ideas, socialism of various forms – supported by a legal profession committed to liberal notions of the rule of law and an academic profession that is seeking to re-interpret Korea's history and culture.

But how far does this spirit of resistance to the power of the state and attempts to use law to define the boundaries of the state go? We may perhaps find some answers to this question by considering the implementation of the rights of patients and the rights of the child.

4 Human rights in Taiwan (Republic of China)

Taiwan reverted to Chinese rule after the defeat of the Japanese but this was quite a different 'liberation' from colonial rule compared to that experienced by the Koreans. Though many, probably most, of Taiwan's inhabitants resented Japanese rule there was an appreciation both then and in retrospect,

that Taiwan under Japanese rule was the second most advanced area in Asia. Whether measured in the infrastructure of transportation and communication, the rate of economic growth, the ratios of medical doctors and school children to the population Taiwan was only next to Japan. ... And in politics, although Taiwanese never had equal status with Japanese, they were ruled by a rather efficient and clean government.

(Wu Naiteh 1997: 7)

On 25 October 1945 Chiang Kai Shek, leader of the Kuomintang (KMT – Nationalist Party) placed Taiwan under military rule and very soon the Japanese officials were replaced by mainland Chinese whose administration was both incompetent and corrupt.

Anger among the Taiwanese at their treatment by the mainlanders built up and burst out in violence during a demonstration held on 28 February 1947. On this day and in the following weeks the KMT troops brought in from the mainland brutally repressed this protest and it is estimated that over 20,000 people were killed or disappeared, many of them the local elite. In 1948/9 as the Communist Party consolidated its control of mainland China the KMT position became untenable and Chiang Kai Shek finally withdrew to Taiwan in December 1949 accompanied by his elite troops and the Chinese gold reserves. Around two million Chinese fled the mainland to Taiwan, joining an existing population of seven million. The newly arrived ruling group seized political control, imposed their language (Mandarin) and set about to determine the content of school curricula and other means of cultural production.

Thus in the first phase of Taiwan's post-war history the state was seen as a powerful force imposed from outside, which did not take the interests of the Taiwanese seriously. Later, advocates of independence many of them also human rights activists would talk of the two invasions of modern history, the first by the Japanese in 1895 and the second by the Chinese fifty years later. Although nominally committed to democratic values, the Kuomintang (KMT) on Taiwan, particularly during the lifetime of Chiang Kai Shek, never took them seriously. Criticism of the regime was not permitted, opposition parties were not allowed to form. Those critical of the KMT outside Taiwan were blacklisted and threatened with arrest should they return. Strict control was exerted on what could be taught at school, the curriculum focused on China with little or nothing about Taiwan. There were limits to academic enquiry about Taiwan before 1945 and it was not possible to write or research about the 28 February incident.

Political change on Taiwan in the 1980s and 1990s has not received as much academic attention as the more or less contemporary changes in South Korea. Moreover I do not propose to add to that literature rather just summarise some aspects of it. Reflecting the general themes of this book we will be concerned to pick out the development of those trends that supported human rights in the development process, the role of social movements and the extent to which Taiwanese society is confronting its past.

In order to do that we will begin by describing some aspects of the political and social circumstances of Taiwan in the 1950s and then consider the constitutional framework which set the parameters for political activity. As we will suggest later, a process of liberalisation of the political structures developed into their democratisation, which culminated with the election of a leader of an opposition party to the post of President in 2000. Human rights activists belonging to opposition parties and social movement organisations have adopted democratic values and human rights ideas with enthusiasm, as did their contemporaries in Korea and Japan. One major difference though has been the lack of direct international influence on this process, which we will consider in the final section.

Those resident on Taiwan in 1945 comprised of a small group of aboriginal peoples, making up about 2 per cent of the population, and migrants from the south of China who had arrived before Taiwan was ceded to Japan in 1895. Of this latter group most were from Fukkien province but there was also a group of Hakka from Guangdong province who spoke quite a separate dialect of Chinese. The Hakka/Holo distinction has not had much political significance but the Taiwanese/mainlander difference has. Native Taiwanese viewed the invading Chinese as backward, corrupt, immoral and irreligious. Meanwhile the mainland Chinese thought that while they had been fighting the Japanese many Taiwanese had been collaborating with them and ended up totally 'acculturated into slaves' by the colonial regime. For this reason the mainlanders thought that the native Taiwanese did not

deserve the equal political rights that were among the demands made at the time of the 28 February uprising.

Ethnic origin still has political salience. Most support for the opposition Democratic Progressive Party (DPP) comes from the Taiwanese who make up 85 per cent of the population. During the 1950s and 1960s, the decades of Kuomintang domination, political affairs were controlled almost exclusively by mainlanders serving Chiang Kai Shek. However, even before his death in 1975, changes were taking place in the ethnic make-up of the party. Between 1950–52 the KMT grew in membership from 50,000 to 282,000 as it integrated the local networks. A deliberate policy of ‘Taiwanisation’ was adopted as the party grew in size from one million in 1970 to two million in 1980 and three million by 1990, by which time 13 per cent of the island’s population were members of the party (Ferdinand and Halbeiren 1996: 4–10).

The USA had not expected the KMT regime to be able to resist the PRC’s attempts to establish control over Taiwan and would not have gone to Chiang Kai Shek’s aid had the PRC invaded. However, following the outbreak of the Korean War, China feared the UN/US force might invade through Manchuria and so sent the troops who were poised to take Taiwan to the north to resist the expected invasion and they pushed UN forces back down the Korean peninsula. With this, the taking of Taiwan was postponed and the frontiers of the Cold War in Asia clearly marked out. From 1951 the USA was committed to defending the Republic of Korea from attacks across the 38th parallel and defending the Republic of China from attacks across the Formosa Straits.

Détente between the US and PRC in the 1970s defused but by no means ended the Cold War in Asia. In 1971 the RoC was expelled from the United Nations as the PRC was invited to represent China on the Security Council. Over the next few years the USA began to withdraw its troops from Taiwan and in 1979 the USA severed diplomatic relations with the RoC and annulled the 1954 security pact at the same time as normalising its relations with the PRC in Beijing. Ironically it was just at the time when the US was withdrawing from Taiwan that the first moves were made in the liberalisation of the island’s political structure which was the prelude to democratisation later in the 1980s.

By ‘liberalisation’ we are suggesting a process of loosening restrictions on political activity and expression which can, and in the Taiwan case at first did, take place without democratisation which entails the creation of new institutions. This latter process also crucially involves the elite, in this case the KMT and military, alienating its control over the outcomes of conflicts. Whereas the stress in the liberalising period is on civil rights, democratisation requires the ability to implement and exercise political rights (Squires Meaney 1992: 98).

The main purpose of this chapter is to describe the development of human rights ideas in the Republic of China on Taiwan (RoC) as it is

currently known. It begins with a discussion of the origins and development of the Constitution and a summary of the political events which took place within that constitutional structure up to and including 1989. Then we will consider the role played by non-government organisations and international standards in the local implementation of human rights standards.

Constitutional and political evolution

The Constitution

Sun Yat Sen and the KMT were committed by the ‘Three Principles of the People’ to the notion of constitutional government. Sun envisaged a process in which the military would sweep away all anti-revolutionary forces followed by a period of ‘political tutelage’ where there would be local self-government and the Chinese people would get their first training in democratic practice. When half the provinces of China had self-government, a National Assembly was to be convened to lay down a constitution. Following Sun’s death in 1925 and the increased Japanese military intervention in China in the 1930s, this gradual process could not be implemented. It was decided that creating a formal constitution earlier than planned and practising constitutional government might unify the nation to better resist Japanese aggression. A draft constitution was therefore promulgated on 5 May 1936, which it was planned to have adopted by a meeting of the National Assembly in November 1937. The outbreak of full-scale hostilities in July 1937 meant the planned National Assembly and adoption of a constitution had to be postponed until after the end of the war with Japan (Lin and Ma 1992: 92).

The move towards authoritarianism during the 1930s as Chiang Kai Shek took control of the KMT did not go unopposed. As Svensson has documented in some detail, there was a group of liberal intellectuals who formed a Human Rights Movement to argue the case for the opposition. Hu Shi, for example, produced a series of articles in which he challenged the KMT’s suppression of free speech and argued for a constitution which included human rights and gave the citizen legal protection against the state (Svensson 1996: 210–12). Others went further. Lo Lung-chi had spent seven years in the US and UK and was strongly influenced by Laski in advocating that human rights enable man to ‘be himself at his best’. He argued that human rights were an essential condition for the development of man’s moral being as well as for his physical existence. Rights, such as the freedom of speech, make it possible for individuals to contribute their thought to the general wellbeing. In these circumstances to suppress an individual’s freedom of speech is to destroy not only the life of the individual but also the life of the community as a whole. Talking about the state he wrote,

The function of the state consists in its protection of human rights – the maintenance of conditions essential to being man. Whenever it fails to secure these essential conditions, the state will lose its function and I will no longer be obliged to obey it.

(Lo Lung-chi 1930, quoted in Tan 1972: 229)

Although significant contributors to the intellectual debate of the early 1930s, the liberals were squeezed between the authoritarian KMT and the Chinese Communist Party (CCP), which was no more sympathetic to human rights. Nevertheless they still managed to occupy a precarious position as a ‘third force’ throughout the war years. Indeed Zhou Jingwen, even as late as 1941, criticised the KMT human rights violations arguing that protection of human rights would encourage people to better contribute to the war effort (Svensson 1996: 265).

We should note here Chinese contributions to the foundation of international law on human rights. As one of the Allied Powers China was represented at the preparatory meeting for the creation of the United Nations charter in 1944 at Dumbarton Oaks where, against the wishes of the US and UK, the Chinese representative argued for the inclusion of references to non-discrimination and equal rights. Later P C Chang, vice chair of the drafting committee of the Universal Declaration of Human Rights, successfully spoke against the inclusion of references to God or natural law in the final draft (Svensson 1996: 43). At more or less the same time a constitution was produced for the Republic of China which in its preamble lists ‘the protection of people’s rights’ as one of the aims of government and includes a chapter on the Rights and Duties of the People. It must also be mentioned, however, that article 26 also allows restrictions of these rights in order to ‘avert an imminent crisis, maintain social order or promote the public interest’.

In January 1946 a Political Consultative Conference was convened attended by representatives of a number of parties including the KMT and CCP (Lin and Ma 1992: 92). It agreed to a draft constitution, which was the basis for that approved by the (Nationalist) National Assembly on 25 December and effective from 25 December 1947. In the intervening period, of course, the political situation had not developed to the KMT’s advantage and it was found that the Constitution might excessively restrict government power so in May 1948 the ‘Temporary Provisions Effective During the Period of Mobilisation for the Suppression of Communist Rebellion’ were passed which gave substantial extra power to the President of the Republic. The plan was that in two years time constitutional amendments could be considered. Just over a year later, on 20 May 1949, martial law was declared which strengthened the power of the executive still further and in effect suspended the operation of the Constitution. Martial Law subjected even non-military personnel to military trial if accused of the crimes of sedition, espionage, theft or sale of military equipment and, from 1976, some cases of

murder and robbery and killing (Chiu 1993: 27). Martial law continued in force until 15 July 1987 and the 'Temporary Provisions' were not terminated until 1 May 1991.

Sun Yat Sen had devised a theory of government that specified in addition to the legislative, executive and judiciary, the organs of examination and control, together five Yuan: the Legislative Yuan, the Executive Yuan, the Judicial Yuan, the Examination Yuan and the Control Yuan. In addition to them there is a National Assembly whose main function was to elect the President and Vice-President and to consider constitutional amendments. The Constitution defines the activity of these six institutions following a preamble about the scope of the Constitution and a brief list of the Rights and Duties of the People.

The first set of members to the National Assembly were elected in 1948 representing all areas of China and elections should have been held every six years thereafter. However as 'the nation entered a period of communist rebellion' it was not possible to hold subsequent elections. Nevertheless the elected members continued to serve. At the time of the major reform of the Assembly in 1991 only 593 of the 3,000 originally elected were still alive (and only 581 attended the final session). The Legislative Yuan was made up of 773 members elected to represent all areas of China. Elections to this body too were first held in 1948 and should have next taken place in 1951. By then all of the Chinese mainland was under the control of the PRC and elections could not be held, so the incumbents continued to serve. This was strictly speaking unconstitutional but in 1954, to regularise the situation, the Grand Justices of the Judicial Yuan ruled that because of the 'grave crisis' elections were not possible and therefore sitting members should serve in the legislative until it became possible to hold fresh elections. There was an attempt to introduce 'new blood' to the system through elections held in 1969 to fill some of the seats vacated by death but the older generation remained in control.

The Examination Yuan is included in the Constitution to recognise and maintain the Chinese tradition of recruitment to the administration by open competitive examinations. However in 1967 the President used his powers under the 'Temporary Provisions' to place a Central Personnel Administration of the Executive Yuan in charge of personnel recruitment undermining the constitutional role of the Examination Yuan. Finally there is the Control Yuan which has supervisory powers over the Executive Yuan, its ministries and commissions. Its members were also initially elected in 1948, should have come up for re-election in 1954 but some served until 1991.

The list of the basic rights of the citizen includes equality before the law, personal freedom, freedom of residence, speech, teaching and writing, religious belief, assembly and association and 'all other freedoms that are not detrimental to social order or public welfare shall be guaranteed' (Par. 22). This is, however, followed by another portmanteau clause providing that

these freedoms or rights shall not 'be restricted except as may be necessary to prevent infringement upon the freedom of other persons, to avert an imminent crisis, to maintain social order or to promote public interest' (Par. 23). Needless to say, under the terms of the 'Temporary Provisions' and martial law neither this section on rights nor the Constitution as a whole worked as an effective check on the power of government. Just to take one example, we have already seen how martial law subjected non-military personnel to military courts in a wide range of cases, a range that was extended in 1976 such that between 1950–86 over 10,000 cases involving civilians were decided by military trials (Hsiao 1995: 125). Yet this is explicitly forbidden by article 9 of the Constitution, 'Except for those in active military service, no person shall be subject to trial by military tribunal.'

However this did not make the Constitution meaningless. Government was committed, nominally at least, to the maintenance of democratic patterns of government, particularly in the context of the Cold War. Strict controls were maintained over political parties, two parties in addition to the KMT were permitted to organise though their role in the political structure was, as one critic put it, mainly to serve as 'two flowers in a latrine'. Though no elections were held to the 'national' level institutions, elections were held to local government bodies and independents did stand against the KMT candidates. An attempt to form a China Democratic Party as an independent opposition party in 1960 failed when the founder Lei Chen was sentenced to ten years in prison by a court martial. Even so, when elections were held in 1969 to fill some of the seats in the Legislative Yuan vacated by death, there were some independents who stood against the KMT.

Paths to reform

Having said that it must be admitted that the political situation in Taiwan between 1948 and 1980 was grim. Human rights activists claim that in this period 265 people were executed and 6,000 years in prison were served for political offences. The Garrison Council created by martial law and the National Security Council set up in 1967 gave the president powers which went well beyond those permitted in the Constitution. The Sedition Laws were worded vaguely enabling them to be used to suppress any opposition and the military control of the courts prevented fair trials. Political opponents could easily be imprisoned and torture was not uncommon. Political critics were subject to close surveillance and there was censorship of literature critical of the KMT or its policies.

Some slow change could be observed in the 1970s. Following Chiang Kai Shek's death in 1975, his son Chiang Ching-kuo became President and he proved to be more tolerant of reform. During the 1977 local elections the media began to refer to the non-KMT candidates standing in local elections as *tangwai* (outside the party) and they tried to co-ordinate their campaigns, succeeding in winning twenty-two of the seventy-seven seats in the Taiwan

Provincial Assembly. These elections were followed by mass protests against irregularities in KMT vote counting. The following year a Campaign Corps was created to formalise this co-ordination. The KMT kept tight control over the electronic media and newspapers but magazines were relatively free such that the *Taiwan Political Review* and *Formosa* were able to develop as vehicles for ideas critical of the government.

Human rights ideas were circulating in Taiwan. The Presbyterian church had a small but strong base particularly in central and southern Taiwan with perhaps 210,000 followers. Always more critical of the regime than the Catholic or Methodist church, they also received encouragement and support from Presbyterians in North America. They produced a Declaration of Human Rights in 1977 and the following year they gave support to meetings held to commemorate the 30th anniversary of the UDHR (Tien 1992: 48). Then, on 10 December 1979 (UN Human Rights Day), an anti-government demonstration was held in Kaohsiung, which provided a pretext for the government to try to suppress the growing opposition movement. In retrospect the 'Kaohsiung Incident' was a key turning point in the development of Taiwan's democratic movement. Over sixty of its key members were arrested, including eight Presbyterian ministers. Eight of the leaders were tried and sentenced to periods of imprisonment but this did not set the movement back much. In the elections held in 1981 the wives of several of the imprisoned critics stood and some were elected. Many of those imprisoned became leading members of the DPP including Annette Lu, elected vice-president in 2000, and one of their defence attorneys was Chen Shui-bian, President since 2000.

At this time the KMT leadership was divided. While Chiang Ching-kuo urged tolerance towards the opposition, conservatives within the party urged strict control. When, in 1984, the *tangwai* created an Association of Public Policy Studies it was formally declared illegal but, curbed by Chiang Ching-kuo, the government did not seek direct confrontation. This association set up branches outside Taipei and then on 26 September 1986 it changed its name to the Democratic Progressive Party (DPP) and announced its intention to run candidates in the forthcoming election. Though this too was illegal the government once more adopted tolerance rather than repression. In April 1986 the KMT announced it had created a 'task force' to study reform and in October it made a number of recommendations including the lifting of martial law, which duly took place in July 1987.

The domestic context of this was an increasing number of anti-government demonstrations in Taipei and other major cities. Meanwhile elsewhere in Asia, particularly in the Philippines and South Korea similar manifestations of 'people's power' were overthrowing or forcing concessions from governments. The KMT was also starting to realise that it was important to improve its international image if Taiwan were to get the international respect that its economic strength warranted and which it needed if it was going to compete in an international arena with the PRC. Taiwan had developed its economy

from one which had a per capita GNP of US\$50 in 1952 to US\$2,344 in 1980 and US\$11,604 by 1994. There were many in government in the 1980s who sought international recognition and who recognised that the existing pattern of political control was not conducive to that.

The KMT had started off as an all-inclusive party and as it grew rapidly in the 1960s it tried to ensure all sections of society were represented within it. Rapid economic growth created conditions for the formation of social groups that either could not or would not represent themselves to government through the KMT. Between 1952–88 the proportion of privately owned industry within the national economy almost doubled from 43.4 per cent to 82 per cent. The number of registered associations grew from 2,560 with 1.3 million members (16 per cent of the population) to 12,605 with 9.2 million members (42 per cent) (Tien 1992: 37). Meanwhile Taiwan's society was becoming increasingly plural. There was a growing middle class that was starting to give its support not only to the overtly political groups like the DPP but also to social movement organisations outside the KMT.

One of the most active non-political organisations was the Consumers Foundation founded in 1980. It won favourable media coverage, support from liberal intellectuals and became involved in policy dialogue with government officials. Local protest about environmental pollution emerged: there were 108 campaigns between 1981–88 which did not shrink from direct action when petitioning local government agencies failed to bring results (Hsiao 1992: 59–60). The first wave of modern feminist thought arrived in Taiwan in the 1970s, then in 1982 the Awakening Foundation was formed mainly by women who had studied overseas and who wanted to improve the status and quality of life of women in Taiwan. Its activity first centred on the production of a magazine but following the lifting of martial law it became more active developing programmes linked to specific issues such as women's health or the revision of the family law. By 1998 there were twenty-four women's groups in the Taipei area alone (interviews with Ni Chia Chen, 9 October 1997; Lin Mei Jung, 24 September 1998).

An Alliance of Taiwan Aborigines (ATA) was formed in 1984 to co-ordinate protests and demonstrations of the aboriginal communities on Taiwan. There are nine aboriginal tribes in Taiwan whose size range from the Atayal, population 81,800, 24 per cent of the total, to the Yami with only 4,004. Their combined population was 381,174 in 1996 around 2 per cent of the total (Kung 1998: 5). The liberalisation process of the 1980s and 1990s encouraged a regeneration of interest in Taiwan's indigenous culture and history, which was contrasted with the more recently arrived Chinese customs. The upsurge in interest in aboriginal cultures and languages added further degrees of complexity to the process of democratisation and these groups asserted that theirs was the truly original culture of Taiwan. There were reported to be sixteen distinct aborigine rights groups in 1998.

Their campaigns have featured three main demands: to gain access to their native lands, to be renamed and to reform the government

administration responsible for policies towards them. To a certain extent government has recognised their demands. A constitutional amendment of 1994 introduced the word *Yuanchumin* (Indigenous People) to replace references to Hill Tribes and Plains Tribes which they found insulting. Since 1996 they have been legally permitted to change from using their Chinese to aboriginal names on official documents such as their ID cards (Kung 1998: 14). A draft Aborigine Development Bill is currently under consideration (as of spring 2001), which will recognise a degree of autonomy for aboriginal peoples within designated areas allowing them to manage their affairs and encourage development and investment in these areas. A Council for Aboriginal Affairs set up in 1996 has been criticised by the movement activists as being too close to government and reforms may be made in the near future to increase its independence.

Hakka culture and language are quite distinct from that of the mainland and Taiwanese mainstream. However the use of the Hakka language at school was forbidden and media regulations restricted its public use. However the Hakka can hardly be regarded as a disadvantaged minority as many political and economic leaders in Taiwan (and the PRC) come from the Hakka community. Nevertheless the first demonstrations by Hakka, backing such slogans as 'Give Us Back Our Mother tongue', attracted considerable support in the late 1980s. The first wave of protest faded somewhat but 1994 saw the start of a revolution in the electronic media as the government-dominated radio channels were challenged by the 'underground' radio broadcasters. One of these, TNT (Taiwan New Telecommunications), started with one hour of programmes in Hakka and following a favourable response in September 1994 a channel was launched which broadcast in Hakka 24 hours a day – Formosa Hakka Radio. There are now a number of Hakka groups ranging from those who support the DPP to those who argue that they would be better off in a united China (interview with Chen Kuei-Hsien, 24 September 1998).

The rise in the influence and support for the DPP was, then, only one part of a diverse set of social phenomena in which groups critical of the Taiwanese establishment gained influence. Some, though by no means all, were linked to the DPP. If they had few shared goals, it is clear that a common denominator in their demands was to increase the autonomy of their group (and groups like them) within Taiwan's civil society.

Political and constitutional change

Under Chiang Ching-Kuo most of the obstacles to the liberalisation of Taiwanese society had been removed, in particular the restrictions on political activity and freedom of expression had been considerably relaxed by the time of his death in 1988. The next question was if, or when, a decisive step towards democratisation would be taken. When would the party/military risk alienating its control over the outcomes of political conflicts?

Succession to the post of President by Lee Tenghui, a Taiwanese technocrat with no family connection to the Chiang dynasty, was the first step in that direction. But there remained questions about how far and how fast he and other senior members of the KMT would allow the process to develop.

Lee was personally well disposed to the trend towards greater liberalisation and there was widespread support for it. When in 1990 he seemed to be faltering on the issue of constitutional reform and appeared to be giving in to conservatives in the KMT by appointing a retired general, Hau Pei-tsun, to serve as Prime Minister, there were massive demonstrations in opposition (Squires Meaney 1992: 101). Formally speaking Lee had been serving out the remaining years of Chiang Ching-Kuo's period of office until March 1990 when he was elected by the National Assembly in his own right. On his inauguration he committed himself to constitutional reform within two years and a National Affairs Conference (NAC) was convened in June preceded by 119 consultative meetings and two public opinion polls – one of the masses and one of the elite. The NAC was composed of a broad spectrum of people who were to try to generate a consensus on constitutional reform and policy toward the mainland.

During the 1990s there were a series of radical reforms that fundamentally changed the nature of the political institutions in Taiwan. The KMT abandoned the illusion that it was the true exiled government of China and sanctioned the reform of the governing structure to eliminate the overlap between Taiwan's provincial bureaucracy and the government of the RoC. Most aspects of martial law were removed and a system of direct elections was introduced for the mayors of major cities and, from 1996, the posts of President and Vice President. The aged members of the National Assembly, Control and Legislative Yuan, some of whom had been elected in 1948, were forced to resign and a new set elected to represent the citizens of Taiwan. Regular elections were held at every level. New relationships were created between the legislative, executive and judicial branches of government.

The KMT was weakened by the defection of a group, in protest against the abandonment of the 'One China' policy, to create the New Party. Meanwhile, in 1994, the DPP succeeded in winning a plurality of seats on the Taipei city council and got its candidate elected mayor. Opposition party members thus achieved powerful political positions for the first time. The DPP remained considerably weaker than the KMT both in terms of its membership and financial backing. Moreover it has been internally divided into three or four factions some of which have threatened to split the party. Nevertheless it remained united throughout the 1990s and succeeded in capturing the major prize of having Chen Shui-bian (formerly mayor of Taipei 1994–97) elected President in March 2000. Recriminations within the KMT following its fall from power brought it close to collapse though it continues to be the dominant party in the legislature. Be that as it may, there can be no doubt that a democratised political framework now exists

and the only threat to the democratic structure comes not from within Taiwan but from mainland China.

In parallel with these political changes the judiciary too has been acting with a greater degree of independence. Under present arrangements each of the fifteen Grand Justices serves for nine years, the fifth group having been appointed in 1994. Whereas in the first two sets there was only one Taiwanese now only four are 'mainlanders'. As with many other Supreme Courts it may only make judgements on actual cases which are brought to it by appeal but in 1995 it ruled government actions unconstitutional on three significant occasions. It was asked to make a judgement on the relationship between the Ministry of Education and the universities. It found that the MoE was in breach of constitutional guarantees of academic freedom (Par. 11 of the Constitution) by deciding which courses be regarded as compulsory. In the same year it found unconstitutional the so-called 'Hooligan Act', an act designed to strengthen police powers to fight organised crime by allowing them to summon to court unidentified and therefore unchallengeable witnesses. Finally it decided that the practice of public prosecutors to imprison accused but untried prisoners was unconstitutional. It gave the government two years to reform the law.

In 1998 the Ministry of Justice announced partial reform of the criminal justice procedure as its response to the Supreme Court's ruling on the practice of the public prosecutors. This is the first phase in a process which will shift the criminal procedural system in the direction of an adversarial system (Tsai 1998).

In 1997 the court issued judgements that seem to have marked a final close to the era of martial law. It ruled that several major parts of the law on court martial were unconstitutional. In particular it declared that any person tried in a court martial in time of peace has the right to appeal to a superior civil court. The military justice system had hitherto been quite independent of the civil court system and appeals were not permitted. The military justice system will have to be integrated with the civil to create a unified justice system. Once again the court gave the government two years to eliminate all the unconstitutional parts of the court martial law (*China Post*, 3 October 1997). The following year the Grand Justices found invalid a statute that prohibited the advocacy of communism or the 'division of national territory' (i.e. advocating independence). This removed the most serious of the restrictions on freedom of speech and publication that remained.

Thus by the end of the 1990s, it was possible to put into practice most, probably all, of the rights that were promised in the constitution.

The legal profession

In the chapters on Japan and Korea we have seen that the legal profession has played a critical role in the development of the human rights movement

and that changes in the structure of the legal profession have worked to enable that change. This has also been the case in Taiwan.

It is no exaggeration to say that there was no legal system as such when the Japanese took control of the island of Taiwan in the 1890s. They created a structure of law which served their interests and which reflected their view of the relation of law to society. When the KMT arrived in the late 1940s they brought with them not only a constitution but also legal codes which had been devised in the 1930s for use on the mainland. However many of the judges and lawyers who served in Taiwan's courts in the late 1940s and 1950s had been trained by the Japanese and some had worked in Japan itself. Despite some similarities in certain aspects of the legal system, for example the civil law system is close to that of Japan, there are other areas of clear difference such as criminal procedure, where Japan has been influenced by US practice that in Taiwan is nearer to the German model.

During the period of martial law the legal profession was under close government control. The offices of both the Taiwan and Taipei Bar Associations were located in the buildings of the Ministry of Justice. There were two main ways of becoming a practising lawyer before 1992: the military and civil routes. When a person had served for five years or more in a legal position in the army it was possible for him to become a practising lawyer. The other route was based on the 'Japanese model' and involved passing an entrance examination for admission to a training scheme operated by the Ministry of Justice. However, the number permitted to pass this examination was tiny – only around ten per year. In 1989 when the total size of the Taipei Bar Association was 800, 300 were from the military and they tended to vote as a bloc enabling them to control the proceedings of the association. However, after 1989 the 'university trained' lawyers united to contest elections and these younger lawyers took control. A KMT candidate stood for election in 1994 but failed to be elected, in 1996 there was no conservative candidate at all. The military group is now weak and getting old, many of them are over seventy (interviews with Fan K C, November 1995 and Koo W L, 10 October 1997).

In 1992 a new Law for Practising Lawyers was introduced which fundamentally revised the organisation of the profession giving it autonomy. Its opening section requires lawyers to 'protect human rights, carry out social justice and promote the rule of law and democracy'. Among other things this law greatly reduced government control over the bar associations and increased their autonomy. They were now free to debate whatever issues they chose and not simply resolutions concerned with the 'common benefit of their members'. Individual lawyers must affiliate with one, but may affiliate with up to three, of the local bar associations which make up the RoC Taiwan Bar Association, whose offices remain in the MoJ building. There was a further round of partial reform in 1998 to permit foreign lawyers to practise in Taiwan and which allows public prosecutors to work as lawyers after they have been employed for six years.

In 1996 the Taipei Bar Association moved out of MoJ premises (the only one so far to have done so) and into a new suite of offices paid for by donations from over 300 Taipei lawyers. Here the association has a library and its offices. It offers a free advice service twice a week on its own premises and every day from a base in Taipei City Hall. It runs its own courses, some on rights issues. As a freer organisation it can now offer the services of a lawyer to all those charged with a crime for which the penalty is death and who cannot afford their own lawyer. It acts as a pressure group demanding that government or the Legislative Yuan take rights issues more seriously, especially taking up issues which they allege to be in violation of the Constitution. For example, they argued that the power of the public prosecutor to detain subjects was unconstitutional, a view which was later sustained by the Grand Justices. It has also campaigned on a number of issues concerning more general judicial reform. Ten committees exist within the Taipei Association, including ones concerned with legal aid, children, women and the disabled. A Human Rights Committee has existed since 1990 and has campaigned on such matters as the right of those accused of crimes for which the penalty is death to have a defence counsel appointed and paid for by the state. It has made suggestions to the Legislative Yuan and the committee on judicial reform.

In 1991 a group of fifty younger lawyers set up the Judicial Reform Foundation to start a 'legal watch'. This involves surveying the activities of judges, putting pressure on the Judicial Yuan to ensure it maintains its commitment to reform and conducting studies of its own on various aspects of Taiwan's legal system. In 1997 it made suggestions on the reform of criminal procedure and it has been concerned for some time about the quality of judges, presenting a draft to the Legislative Yuan in 1998 which would change their working conditions.

Over the last ten years the situation of the legal profession has changed dramatically. There are now just over 3,400 practising lawyers (though the practice of multiple registration makes it hard to be accurate). The main route to becoming a lawyer now is to pass the bar examination and undergo training but the pass rate has improved from the 100:1 of the 1970s to around 16:1, with the number admitted to the bar going up from ten per year to 200–300 in the 1990s. The content of the training has changed. There is now a component on human rights which is taught by practising lawyers in the seminar rooms of the Taipei Bar Association. Changes in the legal profession have broadly reflected changes in the wider society with lawyers being advocates for change both within society and within their profession.

Human rights and NGOs

Next we turn to ask to what extent the political and constitutional changes already discussed have enabled human rights to influence the lives of RoC

citizens. As we will see the development of human rights groups occurred in parallel with the emergence of the range of independent groups that has been sketched out above.

Until 1987/88 merely to mention human rights was equivalent to criticising the government, practically the language of traitors, an attitude which has not completely disappeared. In a general sense after the lifting of martial law it became easier to organise social movement groups. This was followed in April 1991 with the ending of the 'Temporary Provisions' and soon after the abolition of the Sedition Law and the amendment of Par. 100 of the criminal code, which made even non-violent acts of sedition a criminal offence. The government dropped pending cases of non-violent sedition and released several political prisoners (Hsiao 1995: 181). Political dissidents resident abroad who had been blacklisted and thus unable to return to Taiwan were now allowed back and many took up positions within the DPP. The revision of the National Security Law in 1992 removed prohibitions on 'actions against the constitution' but the prohibition on advocating communism remained until lifted by the ruling of the Supreme Court in 1998.

By 1995 there were no prisoners of conscience in Taiwan as defined by Amnesty International, though there were many in prison as a result of activity in pursuit of aims connected with the labour union movement, environmental campaigns or the indigenous people's rights groups. Moreover the rules that require the names and addresses of thirty people before a group can be registered still gives the government the power to supervise the social movement groups and can enable employers to blacklist those who join them.

Relaxation of censorship led to a proliferation of newspapers; from 31 to 274 between 1988–93. The three main terrestrial TV stations are owned by the Taiwan provincial government, the KMT and the Ministry of National Defence (Rawnsley and Rawnsley 1998: 109–10) but many Taiwanese now have access to cable and/or satellite TV giving them access to a huge range of television channels from across the region. In June 1997 a new TV station, Formosa Television Corporation, began broadcasting from Kaohsiung with a board of directors principally from the DPP and committed to using local dialect in its programmes (Rawnsley and Rawnsley 1998: 120). Growth has continued in the number of legal and semi-legal radio stations which broadcast in languages other than mandarin Chinese and which represent a range of political views. In January 1999 the Legislative Yuan abolished the Publications Law which had enabled police to seize or ban 'seditious or treasonous' printed material.

The Chinese Association for Human Rights (CAHR) was formed on 24 February 1979 in the context of growing opposition to the KMT and at a time of US human rights diplomacy under President Carter. It is said that most of its active members were senior KMT officers and that it was created to pre-empt the formation of an opposition party oriented human rights group. It defined its main functions as:

- the promotion of the concept of human rights,
- the systematic protection of human rights in Taiwan and the Chinese mainland,
- co-operation with international human rights organisations and individuals for advancing the cause of human rights.

From 1980 it also played a role in supporting Chinese refugees from Cambodia who had fled to Thailand by assisting with the organisation of camps. This function became increasingly important until in 1994 a separate organisation, the Taipei Overseas Peace Service (TOPS), was launched to carry out these functions and to send volunteers to other countries including those outside Asia. The two organisations continue to share the same office. In 1997 there were ten people working full time in the TOPS section and five in the Human Rights section.

Between 1982–97 it offered free legal advice to the general public. This has now ceased and any enquiries are passed on to the Taipei Bar Association.

In 1995 it claimed 600 individual and thirty group members, including some companies. It co-operates closely with government: half of the money for the refugees programme came from the government and the Ministry of the Interior has provided funds for the conferences it has held. It has supported a number of international seminars and conferences on such themes as 'Human Rights Organisations in Asia and the Pacific' (1990) or 'Human Rights for the AIDS-infected' (1994) or 'Cultural Rights of the Indigenous Minorities' (1998).

The CAHR has campaigned against the death penalty for several years and had the rights of prisoners as its special project for 1995. It visited all ten prisons using a questionnaire to survey what prisoners think about their conditions.

Since 1991 it has produced an annual report entitled 'Human Rights Index in Taiwan, RoC for [date]'. Six areas of Human Rights are assessed: political rights, economic rights, social rights, judicial rights, educational and cultural rights and women's rights. A group of appraisers with a special interest in the field, most of them university professors, are asked to assess whether the rights situation has improved or deteriorated over the previous year and assign each aspect of the field with a mark ranging from five indicating the highest degree of protection to one the lowest. For example, in the report published in December 1994, to compile the section on Economic Rights a questionnaire was sent to thirty economists in universities and economic institutes in Taiwan and the results of the questionnaires put together by the CAHR. Despite the rather strange methodology adopted, the results are critical of the current situation. The overall status of women's rights is described as 'appalling', the state of judicial rights is 'in dire need of improvement', and 'social rights in the Taiwan region remains a serious problem'. In 1997 the topic of children's rights was included for the first

time and it is intended to supplement the survey of experts with a wider survey of public opinion.

In 1997 the CAHR moved to a different, less prestigious set of offices and although by then they seemed to be largely free from the direct control of the KMT, they take a 'conservative' line on rights, emphasising the need to 'properly' understand the meaning of rights and the limits of rights demands. They used the fiftieth anniversary of the UDHR to launch a campaign about human rights and seek to establish links both internationally and domestically as they do this.

Amnesty International Taiwan was first established in 1989 and became a 'pre-section' on 15 May 1994. It registered with the Ministry of the Interior in 1994. As of September 1997 there were 360 members and eleven groups. In Autumn 1997 it was upgraded to 'section' status. AI Taiwan has 1.5 full-time and two part-time staff in Taipei and it engages in the full range of AI campaigns including Country, Theme and Urgent Action campaigns. Its main challenges are to establish a positive image of both the organisation and human rights work in general in the public's mind. Still both in courts and in people's minds there is no presumption of innocence. This creates difficulties with the title of the group since the notion of 'amnesty' presumes some kind of guilt in the first place.

Finally there is the Taiwan Association for Human Rights (TAHR), which was formed on 10 December 1984 to demand freedom of speech and greater political participation. It had 180 members in 1997, mostly in the Taipei area, mainly from the same background as the DPP and many of them lawyers. At first its main activity was to support political prisoners and to help those who were blacklisted and wanted to return to Taiwan. After 1992, when most of these restrictions were lifted, the organisation changed direction and in 1999 it listed its five main interests as:

- human rights institution building,
- human rights education,
- abolition of the death penalty,
- accountability for abuses by police and military officials, and
- judicial reform.

Its main concern is with domestic issues (unlike AI), aiming to contribute to the promotion of human rights domestically, regionally and internationally in order to engage the Taiwanese community in the global movement for human rights. TAHR did not register with the Ministry of the Interior but in 1995 it registered with the Taipei City Administration and thus ceased to be a semi-underground organisation acquiring legal status that enabled it to have such things as its own bank account. Now its main organisational aim is to expand its web of support beyond the legal profession and DPP activists.

During 1997/98, a major campaign focused on the fiftieth anniversary of the Universal Declaration of Human Rights one of whose authors was a

representative of the Republic of China. They held an exhibition in the 2.28 Museum in the Peace Park in downtown Taiwan on the history of the human rights movement in Taiwan and campaigned both within central and Taipei city government to have human rights education included in school curricula. Human rights education, broadly defined, has always been a key aspect of its activities. It sponsors seminars and provides human rights training for professionals, including doctors, judges and lawyers. It publishes a newsletter, an annual *Taiwan Human Rights Report* which gives an overview of the human rights situation and a more academic *Taiwan Human Rights Quarterly*. It has lobbied the Legislative Yuan about creating a National Human Rights Commission and putting in place domestic legislation which will commit government to the same human rights standards as are detailed in the ICCPR or the Covenant on the Rights of the Child. Finally it conducts campaigns about specific issues such as the campaign against a national identity card or miscarriages of justice.

United Nations' treaties

The Republic of China was a founder member of the United Nations and it took an active role in creating its founding documents such as the UN Charter and the UDHR. The RoC government ratified one of the first UN Human Rights Covenants, that on Genocide, in 1949. It signed the two major covenants produced in 1967 but was expelled from the UN in 1971 when the PRC took over the Chinese seat on the Security Council and refused to allow Taiwan to maintain a UN presence as it would amount to the UN recognition of 'Two Chinas'. Thus Taiwan/RoC left the UN before the two human rights covenants had been ratified by the necessary number of countries and has not felt bound by its terms or the need to produce periodic reports. Taiwan's isolation from the UN has also meant that it has not become involved in the international human rights network as have the governments of Korea and Japan.

It is not necessary to be a member of the UN to ratify UN covenants; the DPRK ratified the ICESCR and the ICCPR in 1981, and the RoK both in April 1990, although they did not become members of the UN until 1991. The PRC opposition to anything which might be seen to amount to a 'Two China' policy made the other members of the UN and UN-related organisations unable to invite the RoC on Taiwan to ratify human rights instruments as it is not a state recognised by the UN. On the other hand until 2000 there was no initiative taken by the RoC itself requesting admission to any of the treaty regimes or volunteering reports on the human rights situation in Taiwan. One can only assume that government in Taiwan was quite relieved not to have the responsibility of making its human rights policies (or lack of them) open to international inspection. This also deprived the domestic human rights movements of a lever which they could use to criticise government policy.

In his inaugural address President Chen Shui-bian announced he would establish a National Human Rights Committee to bring Taiwan back into the international human rights system. A national human rights consultation task force was convened in August 2000 by vice-president Annette Lu including members of the TAHR, Amnesty International and other human rights groups. The following March the Ministry of Justice produced a draft of a Basic Law on the Guarantees of Human Rights, seventy-six articles which attempt to incorporate international human rights guarantees into Taiwan's legal system. Thus, at the time of writing, the government in Taiwan is starting to promote human rights with the full co-operation of human rights activists.

Conclusion

During the 1990s the party political structure democratised to the point where in 2000 the KMT lost control of the post of the President, a judicial system emerged which is increasingly able and willing to challenge the constitutionality of the government's acts and an increasingly active civil society grew as associations and groups were formed, which (among other things) represented the interests of sections of society to the state. The liberalisation and democratisation of Taiwanese politics and society is almost complete. A National Security Act remains in force but even this has been considerably weakened by recent judicial review.

The all-inclusive nature of the quasi-Leninist KMT supported by the security apparatus prevented the development of independent social movement groups until the end of the 1980s. During the 1990s, however, groups have been more or less free to form and campaign on behalf of their members' interests. The freeing of the legal profession from state control has been part of that process and once again we have seen how the younger lawyers have played an important role in the development of the human rights movement.

Meanwhile there continues to be a real threat from the mainland which has not ruled out the possibility of invasion. Finally, while the government on Taiwan has not become an active member of the international human rights regime, it has not been completely unaffected by it – as we shall see in the discussion of the implementation of the rights of patients and children.

5 Patients' rights

Just as all of us have been children so all of us have the experience of being patients and face the prospect of returning to that status at some stage of our lives. Given the universality of the condition of being a child or patient it is perhaps surprising that it is only recently that they have been considered as rights subjects. Only in the twentieth century has a discourse of child rights developed and only in the last fifty years has there been talk of patients' rights. One might argue that 'women's rights' is a similarly recent notion except that the idea that women were entitled to equal treatment emerges in a modern form in the 1790s in the writings of such pioneer feminists as Olympe de Gouges or Mary Wollstonecraft. It was more than one hundred years before attention turned to children's rights as children were regarded as being less than equal to a fully qualified member of society and therefore not entitled to make the same claims on society. In the case of children, it is because they are considered to lack the maturity, wisdom or knowledge that they are thought of as not entitled to respect as self-determining individuals. When you are ill, realising your lack of knowledge you consent to another – the medical professional – making decisions on your behalf. In that relationship you appear to have given up the right to self-determination and thereby voluntarily forfeit any claim to an entitlement to rights within the medical situation. If this was the case in the past there are many now who would argue that it is not a case that can be sustained any longer.

Japan, Korea and Taiwan enthusiastically embraced western medical science in the late nineteenth and early twentieth centuries although the indigenous medical cultures did not disappear as rapidly or as permanently as had been expected. By the 1990s medical practice in these countries was comparable to any in the developed world. Health insurance schemes provided affordable access to health care for the whole population. Many leading medical practitioners trained in North America or Europe. Interest in civil and human rights had stimulated discussion of the place of notions of respect for human dignity and autonomy with the medical encounter. Legal and social theorists began to explore what it might mean to say that patients have rights and patients' advocacy groups started to campaign for

government and the medical profession to take these ideas seriously. There was resistance to them, and the degree to which patients' rights are embraced by the general population, accepted by the medical establishment and supported by government varies greatly between countries. In this part of the book we will be concerned with how far East Asian medical practice, which was so open to the adoption of western medical techniques, has responded to demands for quite fundamental changes in the doctor–patient relationship.

We will begin with a brief description of the way in which the discourse of patients' rights has developed since 1945 and consider the international standards that have been devised. Then, in order to explore how our three societies are dealing with patients' rights, we will focus on two topics: attitudes to 'informed consent' among doctors and patients and how these health care systems treat those with mental disorders.

Development of modern medical practice

Until as late as 1940 the doctor–patient relationship involved a major act of faith. The patient simply had to trust the doctor to do his best. In fact the range of illness that doctors could cure was relatively narrow; invasive techniques were few and the number of effective pharmaceutical products quite limited. However ten years later the character of medical science had changed. The development of antibiotics enabled doctors to treat previously incurable diseases such as tuberculosis. Psychotropic products were changing the nature of the treatment of the mentally ill. In many fields families of drugs were developed that offered cheap and effective cures for both somatic and psychiatric disorders. Surgical science developed too culminating in the techniques of organ transplants that started in the 1960s.

However there was a dark side to this progress. First, a shadow was cast over the post-war development of medicine by the discovery that in Germany doctors had carried out barbaric experiments on captive patients. Debate began about what rights patients had in medical experiments. What limits should be placed on the discretion of doctors either in experimental or ordinary clinical circumstances? Second, the new drugs and new surgical techniques all carried with them a certain degree of risk. Few drugs were 100 per cent safe and effective for all patients. Most produced an adverse reaction in a minority. Surgery too entails risks. Was it still appropriate that patients should rely entirely on the judgement of their doctor? If not, how far should a patient participate in decisions about treatment, in the assessment of risk? How far should others, the patient's family for example, become involved in the decisions about treatment? Third, soon after the creation of the National Health Service in 1947 in the UK, most countries of the capitalist world devised health-care insurance systems that gave access to free or low cost medical treatment. In the socialist world too there was easy access to health care. Thus across the developed world health became a

massive service industry and in this process the pre-1940 model of the doctor as the trusted mentor of the patient and their family became increasingly anachronistic. Medicine became industrialised. In these new circumstances was the patient any more than simply a consumer of services and, if so, what kind of consumer rights did they have?

Theorising about patients' rights has developed alongside, sometimes informing, changing medical practice. In the next section we will briefly review some recent writing on patients' rights and then consider some aspects of the process that has led to the creation of international statements on informed consent and the rights of psychiatric patients.

Theories of patients' rights

The increased complexity of decision making in contemporary medicine has stimulated an extensive literature on rights in medical practice. Here I will review three examples of this. Sheila McLean has been a pioneer in the development of medical ethics in the UK and we will look at some aspects of her advocacy of the right of patients to be informed. Stephen Wear provides a description of informed consent as it has been developed in the USA. Finally we look to Peter Schuck to suggest a cautionary approach to informed consent and the use of the model of the consumer in the medical situation.

McLean starts by describing the 'traditional' view of medicine in which the patient made only one decision, 'to place herself in a given doctor's care, thereby delegating all subsequent authority to the doctor ... their expertise justified the doctor making decisions on the patient's behalf' (McLean 1989: 4, quoting Schultz). However, she argues that good medicine is more than technology. Thus a good medical act is one which respects the client's moral autonomy *and* is technically competent. As the technical capability of doctors increases, the need for communication becomes more important so that the patient becomes an active participant in health care. Patients come to expect, she says, an acceptable level of health care and illness (or the suspicion of illness) does not justify any reduced standing as a human being (McLean 1989: 21). One aspect of the respect for the moral autonomy of the patient is recognition of the need for adequate information disclosure, which will enable the patient to accept or reject therapy or chose between therapies. This will require two types of information disclosure – of therapeutic alternatives and of their risks and benefits. She suggests, 'the potential invasiveness and its social and political potential make it an area ripe for rights discourse' (McLean 1989: 25).

She does not underestimate the difficulties either in theory or practice. Can the doctor's duty to disclose, based on a patient's right to receive information, be tested independently of patient understanding? But, if a patient is unable to understand what is the point of disclosure? Would it make sense to place a duty on the doctor to ensure understanding? There are further

problems in determining the 'rationality' of a patient's decision – is it rational for the patient to reject the advice of her medical advisor? This is, of course, a particularly difficult conundrum in the case of psychiatric patients. However, separating the issue of respect for self-determination from the matter of a doctor's technical expertise, the requirement that a doctor should obtain consent is not peculiar to medicine but simply part of 'the standard of professional behaviour that it is reasonable to expect from any group possessing special skills and dealing with basic human rights' (McLean 1989: 81).

Enhancing patients' rights she sees as enhancing medicine's capacity to facilitate autonomy, but the legally sanctioned behaviour of doctors often actively denies the autonomy of some adult patients (McLean 1989: 162). This reluctance to recognise decision-making practices which respect the rights of patients, derives in part from a perception of the beneficence of medicine and a failure to distinguish between the technical and moral aspects of treatment. Patients have an interest both in the technical competence of the medical act and their own autonomy. In summary her argument is:

- medicine is more than a technical event, the system should acknowledge and foster the rights of patients by showing them respect individually and collectively,
- the fundamental element of showing respect is the honest provision of information which enables a patient to make a self-determining decision,
- law should prioritise rights and de-emphasise the weight of professional opinion.

However she is sceptical about the ways that have been developed so far to do this. Discussion of current doctrines in the USA has mainly been based on contractual remedies and the development of disclosure rules. English law does not recognise the term 'informed consent' and the quality of information disclosure has usually been judged on the basis of the duties of doctors not the rights of patients. In England no claim against the medical profession's failure to disclose information can succeed unless the failure is so gross as to amount to assault. The argument based on contractual remedy, used in the USA, is of limited relevance in the UK given that the majority of health care provision comes within the NHS. At least in the UK, informed consent has not widened the liability of the medical profession. She concludes, 'The ease with which any jurisdiction is capable of vindicating patients' rights depends as much on its history and jurisprudence as it does on its willingness to make appropriate modification or enthusiasm for change' (McLean 1989: 169).

This suggests the need to look both at the medical and legal culture and assess the impact on them of the forces demanding change.

Wear provides a detailed explanation of the notion of informed consent

starting from the position that it aims 'at both enabling and empowering a patient population that has traditionally been largely powerless and mute in the face of medical expertise and authority' (Wear 1993: 2). Informed Consent is a legal doctrine in the US which involves four elements:

- a diagnosis for which the investigation or intervention is proposed,
- a recommended intervention with an explanation of risks and benefits,
- a prognosis if no intervention is attempted, and
- an explanation of the significant alternatives with risks and benefits.

As the concept has developed there has been recognition of the exceptions to the requirement to obtain consent and discussion of the problem of competence to consent. This is a particular problem with children and those with mental disorders but even the 'average' person may have difficulty understanding complex procedures. There is, finally, the problem of how much information to provide: too little may not enable an informed decision, too much may confuse, the mentioning of the possibility of side effects in a particular intervention may make them more likely.

In general in the USA informed consent has been perceived as 'involving threats to which the clinician should respond, not as a vehicle for respecting and promoting patients' self determination' (Wear 1993: 9). Even where clinicians accept some patients are capable of autonomous decision making and that patient understanding is often desirable, even necessary, they still will usually reject the idea that *most* patients are capable of understanding, evaluating and making medical decisions. There remains a commitment to the paternalist notions of medicine as beneficent in which healing can be enhanced by accentuating the positive even to the extent of not mentioning possible side effects.

Wear suggests that the introduction of informed consent promises a number of potential benefits. It may eliminate or diminish the extent to which doctor and patient are moral strangers, partly due to the different sets of values they bring to their encounter, partly due to the 'assembly line character' of modern medicine, which often precludes personal relationships between health professionals and patients. Second, it will give the patient a more realistic appreciation of their situation. Third, the presentation of the possibility of non-treatment may reduce the patient's tendency to passivity. Thus he suggests increased doctor-patient communication will enhance any therapeutic encounter and give the patient the feeling of having taken responsibility for the choice of treatment. From this basis Wear goes on to discuss in some detail the 'informed consent event', the issue of competence and the exceptions to informed consent. We might note, however, that unlike McLean whose argument advocates that decision makers must proceed from the assumption of rights as a moral argument, Wear's view is rather one that proceeds on the basis of utility – there are goods or values that informed consent might capture which will outweigh any costs.

Schuck raises the question of whether in fact providing patients with information about risks, benefits and alternatives – informed consent – does improve treatment decisions. Moreover he shows that, in comparison with other produce or service providers, two onerous obligations are imposed on doctors. First, there is the duty of fiduciary care: their duty to prefer a patient's interests to their own, even within the context of informed consent, so as to empower the patient. Second, there is the problem of cost. In most cases the product or service seller can disseminate information about possible risk fairly cheaply but in medicine, even in a routine situation, the cost of information provision is likely to be high. Now that health care costs are a significant issue in the US as in most places, the need arises to re-examine informed consent in the context of other policies competing for resources. He doubts whether informed consent in action benefits patients and suggests that the doctor–patient relationship is largely immune to change in legal doctrine. This suggests to him a need to move away from theoretical discussion about informed consent and the need to do an analysis of its cost effectiveness, which might result in policies which would encourage patients to question more aggressively or to return to narrower standards of disclosure.

Most specifically Schuck advocates a re-conceptualisation of informed consent as 'a normative variable not an empirical constant' (Schuck 1994: 956). In place of a unitary doctrine the content of informed consent would vary according to the condition – from a time limited disorder with little or no risk to conditions where prognosis is dire and death likely – and according to the nature of the relationship with the medical profession – an ongoing relationship with the family doctor to the fleeting encounter with an anaesthesiologist. Not all patients want the same levels of information and to assume that they do exacts a price. Schuck suggests that where, as in the USA, there are group purchasers of health care, the law should permit them to contract with the providers over the features of informed consent as they do so about most other aspects of health care. Though Schuck does not suggest this, the notion of informed consent as a normative variable would also suggest that it has a cultural plasticity too. The implementation of informed consent should, and probably must, if it is to be effective, allow for changes in the way it is defined to attune it to the local medical culture. This was already hinted at by McLean.

The above, necessarily brief, discussion of three accounts of the theoretical bases of patients' rights and informed consent highlights three different perspectives, the argument from legal and human rights principles, a pragmatic approach to the implementation of informed consent in the USA and third, possibly in response to this difficulty, the suggestion that it may be more effectively implemented if it is contextualised. Schuck of course is thinking here in terms of the context of the illness or specific relation to the medical professional but it is not difficult to extend this argument to include consideration of a particular country's medical culture.

However, just as the development of human rights ideas in general within specific regions has been supported by the creation of an international human rights regime, mainly within the United Nations Organisation, so there have been sustained efforts to formulate internationally recognised standards for rights relevant to patients. In the next section we will trace some of these developments.

International trends

Informed consent

Medical practice throughout its history has not been sympathetic to either patients' rights or informed consent. The first step in the development of these sets of ideas does not occur until after 1945.

In 1945/46 the trials of those accused of crimes against humanity in Nuremberg revealed the extent to which German doctors had experimented on prisoners. This led to the realisation that there was a need for guidelines to govern the relationship between doctors and patients and that, at least in clinical trials, it was important to get the consent of the patient which was based on information provided by the doctor. Of course, even before this time most legal systems had recognised that an element of consent was required to distinguish surgery from assault but few if any legal systems specified the amount of information that doctors should provide patients. The 'Nuremberg Code' was set down in 1948 and made clear that in research on human subjects consent is absolutely essential and that this must be voluntary, competent, informed and comprehending. These ideas were developed in the 1950s and in 1964 the World Medical Conference held in Helsinki adopted a set of principles which would distinguish ethical from unethical research. A distinction is made between therapeutic and non-therapeutic research: in the former case the research is 'combined with patient care' and need not entail informed consent 'if this is not consistent with patient psychology'. Purely scientific research with no therapeutic value for the subject requires the 'subject's freely given informed consent' (Faden 1986: 155–6).

These codes provided the starting point for the formulation of ideas about consent in medicine, 'Nuremberg was the first code prescribed for medicine externally by a court system and Helsinki the first code prescribed internally by a professional body in medicine' (Faden 1986: 157). These codes have been developed further by the World Medical Conference (WMC) which recognised the Rights of the Patient in Lisbon in 1981:

Recognising that there may be practical, ethical or legal difficulties, a physician should always act according to his/her conscience and always in the best interest of the patient. The following declaration represents

some of the principal rights which the medical profession seeks to provide to patients.

Whenever legislation or government action denies these rights of the patient, physicians should seek by appropriate means to assure or to restore them.

- a) The patient has a right to choose his physician freely.
- b) The patient has the right to be cared for by a physician who is free to make clinical and ethical judgements without any outside interference.
- c) The patient has the right to accept or to refuse treatment after receiving adequate information.
- d) The patient has the right to expect that his physician will respect the confidential nature of all his medical and personal details.
- e) The patient has the right to die in dignity.
- f) The patient has the right to receive or to decline spiritual and moral comfort including the help of a minister of an appropriate religion.

(BMA 1984: 72–3)

Over the years the WMC elaborated on these principles on the necessity for informed consent even from minors.

New treatments were devised for previously incurable diseases. Some were very effective, such as antibiotics but others were less so and had dangerous or unfortunate side-effects as with radiotherapy or chemotherapy. At the same time it became clear that some alternative therapies or changes in life-style were as effective as conventional medical intervention in alleviating such conditions as high blood pressure. Thus there were choices to be made between different sets of treatments and the possibility arose that the values and priorities which guided the doctor or medical professional would not be considered important by the patient. Under these circumstances the pattern of the patient depending entirely on the doctor's discretion was brought increasingly into question.

Perhaps in part because medical technology advanced most rapidly in the USA, it was there that the demands for patients' rights and informed consent were first articulated clearly. The term 'informed consent' was coined in case law in the USA in 1957, which became a watershed year when the era of the 'beneficence' model of medical disclosure and consent-seeking began to be replaced by the 'autonomy' model. Whereas in the former model the doctor's primary obligation is to provide medical benefits and in his handling of information he should aim to maximise patients' medical outcomes, in the latter the primary and perhaps sole priority is given to the principle of respect for autonomy (Faden 1986: 59). However, after reviewing the literature on informed consent before the 1970s, Faden concludes that doctors, even in the USA, were only dimly aware of informed consent as an 'issue'. Moreover much of the response to the explosion of

interest in the issue in the 1970s was negative; doctors did not routinely inform patients when they had cancer and many thought the demands of informed consent impossible to fulfil (Faden 1986: 90–1).

Japanese accounts point out that at least until the 1960s US medical practice too was doctor centred. However during that decade there was not only the development of the civil rights and women's movement but also the rise of the consumers' movement. This led on the one hand to wider dissemination of the notions of the importance of human dignity and self-determination and, on the other, criticism of the consequences of the 'industrialisation of medicine'. Discussions of patients' concerns resulted in a number of proposals that used the language of rights of which the most influential was the Patients' Charter devised by the American Hospitals Association in 1972 and distributed to 7,000 hospitals in 1973 (Faden 1986: 93; Ikenaga 1994: 77). These had two aims: to reduce the incidence of malpractice claims by reducing the impersonality of patients' experience of the modern hospital and to meet the demands of consumer groups for more accountability among health-care providers. Even so it was not until 1980 that the AMA code for the first time acknowledged a doctor's obligation to respect patients' rights and in the following year it recognised informed consent as "a basic social policy" necessary to enable patients to make their own choices even if the physician disagrees' (Faden 1986: 96).

A US Presidential Commission on Bioethics produced a report in 1983 and this established the notion of informed consent and patients' rights as the main guidelines for medical practice in the US (Faden 1986: 96–7). However it would be incorrect to conclude from this that the ideas have been universally and unproblematically incorporated in the practice of medicine even there. Faden, writing in 1985, concluded that, 'The beneficence model is overwhelmingly predominant. Patients routinely acquiesce to medical interventions rather than autonomously authorising them' (Faden 1986: 100). Nevertheless by the 1990s more than twenty US states had legal definitions of informed consent and patients' rights, and these concepts had entered the discourse of legal thought in several European and Australasian countries too.

The rights of psychiatric patients

Patients with mental disorders may be confined against their will in circumstances very similar to imprisonment. Just as all countries have complex structures to ensure only those who have committed crimes are confined to prison, so many countries have erected a judicial or quasi-judicial framework to oversee psychiatric care. Most health-care systems have explicit rules to decide who may be confined to a psychiatric hospital, how they may appeal against the implementation of these rules and what criteria are used to decide the circumstances under which patients will be released.

Until the 1970s these criteria were set by each country and there were no international standards. At that time concern grew about the misuse of psychiatric hospitals for the confinement of political critics but there was also a new suggestion that 'admission to hospital and treatment genuinely intended for therapeutic purposes may violate minimal standards to human dignity and autonomy ...' (Gostin quoted in Gendreau 1997: 260). In March 1977, the UN Commission on Human Rights declared its concern about 'the consequences that advances in the field of neurosurgery, biochemistry and psychiatry may hold for the protection of human personality and its physical and intellectual integrity' (quoted in Gendreau 1997: 261). The Sub-Commission on the Prevention of Discrimination and Protection of Minorities was asked to study the question and they in turn in 1980 appointed a Special Rapporteur to prepare 'principles for the protection, in general, of persons suffering from mental disorder' (Gendreau 1997: 262). She produced a draft document that was developed by a working group and others over the next ten years before a final version was ready to be put before the UNGA. The UN expressed its concern that, 'Persons with mental illness are especially vulnerable and require special protection' (Gendreau 1997: 264). So, although the right 'to the highest attainable standard of physical and mental health' is guaranteed in ICESCR, article 12, and ICCPR articles 9 and 10 deal with deprivation of liberty, the UNGA agreed by resolution in December 1991 to adopt the 'Principles for the protection of persons with mental illness and for the improvement of health care' (UNGA resolution 46/119, hereinafter 'Principles'). These amount to the specification of how the international covenants apply to persons with mental disorders in much the same way as the CRC elaborates on the implications of children having rights.

The basic principle is that treatment of people with a mental illness should be based on respect for their inherent dignity. This is elaborated to specify a right to treatment in the community wherever possible and to the least restrictive environment if institutional treatment is deemed necessary. Within institutions patients shall have the right to freedom of communication, to facilities for education and rehabilitation and to access to an impartial review body that is independent of both the institution and the patient's family. Patients should have access to information about their rights, to their own records and to counsel to assist with appeals to review bodies, without payment if they are unable to pay. But, as well as the protection of persons with mental illness, another goal was to encourage the improvement of mental health care. The expectation was that although the Principles were not binding (in the way that a covenant would be) they might contribute towards the reform of national law and provide grounds upon which cases of abuse or violations of rights and freedoms could be denounced.

Gendreau comments on the emergence of two discourses in the course of the formulation of the principles: the first focuses on health as the principal

value while the other pays more attention to equality and autonomy; the medical/beneficence and the legal/autonomy models. The emphasis of the first is on the 'right to treatment', which may justify forced intervention based solely on a medical decision. In the latter view psychiatric patients are not necessarily incompetent to exercise their right to consent to, or refuse, treatment and a refusal to accept treatment should not necessarily be regarded as evidence of mental illness. From this perspective the decision to administer treatment to an unwilling patient should not be made solely within the framework of medical objectives. Moreover those who support this latter position advocate that the law should protect individuals from the coercive power delegated to psychiatric experts especially when they are deprived of their liberty. This latter was a minority viewpoint and it was the medical/beneficence orientation which influenced the final document supported not only by the psychiatric experts in the WHO and the World Psychiatric Association but also by the government of Japan, the only government to make explicit its opinion on the consent-to-treatment issue (Gendreau 1997: 269 n. 47).

Gendreau is not optimistic about the likely impact of the Principles, 'All in all, the UN Principles do less to increase the protection of the psychiatric patients against a coercive medical power than they do to formulate a series of means to justify the use of this power' (Gendreau 1997: 277).

Codification of rights in this context may unwittingly have done more to sustain power relations than assist the patients in their struggle against them, as Stammers suggested can happen. However elsewhere in the same article she concedes that the recognition that mental health interventions raise human rights concerns even when motivated by therapeutic aims provides the basis to address human rights issues in mental health treatment.

Conclusion

In the process of the formation of the concept of informed consent and the international principles on the treatment of psychiatric patients we observed conflict between two sets of principles that might guide the conduct of medical treatment: the beneficence/medical model and the autonomy/legal model. It is only in the context of the latter model that it is possible to talk about 'patients' rights'. It might be useful at this stage to enquire a little further on what rights might amount to in this context.

Let us start by noting the distinctions between different forms of rights as described by Hohfeld. In his pioneering work he argued that there are very different kinds of entitlements being talked about when we use the term 'rights', which we can label claim rights, liberty rights, powers and immunities. We can briefly indicate what is meant by each of these by saying:

- to have a *claim right* is to be owed a duty by another or others,
- to have a *liberty right* is to be free of any duty to the contrary,

- to have a *power* is to be legally empowered to effect some transaction, and
 - to possess an *immunity* is to be not subject to another's power.
- (Hohfeld 1919, Jones 1994: 12–25)

So we can talk of patients' rights in terms of, 'A combination of claims, liberties, powers and immunities that ensure the protection of the patient's dignity and moral autonomy.'

This then covers not only the claim that a patient might have against a doctor (and the duty of doctor to patient) but also clarifies such issues as access to medical records (empowerment), it includes protection from most kinds of unconsented treatment (immunity) and suggests that a patient does no wrong (has a right, is at liberty) to change doctor or to accept, reject or cease a recommended treatment. Put like this, the notion of patients' rights while remaining based on the legal autonomy model of treatment is defined in terms that go beyond the confines of a particular legal system.

Our review of recent writing on patients' rights suggested three perspectives on the issue. McLean argued the case for patients' rights based on the moral necessity of showing respect for the patient's autonomy. Wear, though as insistent in his advocacy of the need to respect patients' rights, did so on the basis of a calculation which suggested that the benefits would outweigh any cost. Finally, Schuck, taking this logic a little further suggested that there might be medical encounters where the cost of the full implementation of informed consent might be more than any benefit. In the sections which follow on patients' rights in Japan, Korea and Taiwan we will explore whether there are any aspects of local medical culture which have promoted or detracted from the implementation of rights ideas in the medical context and whether there have been any specifically East Asian elaborations of the arguments which were originally devised based on western practice.

In particular we will be interested in the way a jurisprudence has developed to deal with such issues as medical malpractice and the implementation of informed consent. Informed consent has been defined by the World Medical Association and absorbed into the legal thought of many anglophone and European countries. How much influence has it had in East Asia? Somewhat later the United Nations proposed principles to guide provision of mental health care which should both protect the rights of patients in psychiatric care and improve standards of treatment. What impact have they had? Have they bolstered the position of the mentally disordered patient or sustained authority relations?

6 Patients' rights in Japan

Patients' rights and informed consent have been topics of controversy for both the medical and legal professions in the 1990s. Perhaps predictably the lawyers have been urging the incorporation of rights-based standards into both the legal framework and medical practice while doctors have sought to ensure that when this occurs it does not undermine their professional autonomy and authority. We start with a description of the background to medical practice up to and including the Pacific War. Then we will briefly consider the structure of the health-care system as it was reconstructed after the war and look at the rise of patients' rights advocacy groups. Next we will present as case studies the development of attitudes to informed consent and the care of the mentally disordered. Finally we will comment on current trends and possibilities for the future.

The background

I wa Ninjutsu nari – medicine is beneficence

There is an idealised view of the doctor in pre-modern Japan as an individual who practised medicine out of a generalised feeling of benevolence towards his fellow men not charging any fee to his patients. Grateful patients might make suitable gifts to the doctor but, in theory at least, neither side would see it as a commercial transaction. Traces of this attitude remain and it is still common for patients to give their doctors presents as expressions of gratitude despite the efforts of MHW to suppress the practice.

In Tokugawa, Japan, doctors were private practitioners of medicine whose 'craft' meant they were assigned to the third of the four groups that made up mainstream society – warriors, farmers, artisans, merchants. The gratuity that patients paid for their 'free' service was called the *kusuridai* 'medicine fee', which was in part a euphemism but which also indicated that doctors not only diagnosed illnesses and prescribed drugs but also dispensed them – a feature of Japanese medical practice that continues today (Ohnuki-Tierney 1984: 169–71). The fact that many doctors were also Confucian

scholars who earned a living by practising medicine must also have strengthened the notion that doctors should be principally if not exclusively motivated by benevolence, as the master said, 'If one is guided by profit in one's actions one will incur much ill-will' (Confucius: IV.12).

The mainstay of health-care provision in Japan in the Tokugawa period was the private practitioner operating out of a small clinic in towns and cities who specialised in internal medicine, obstetrics/gynaecology, etc., mainly relying on *kampô* – traditional Japanese medicine of Chinese origin. In 1875 the new government declared that to practise medicine a physician must pass an examination in seven subjects of western medicine. Some thought that the older tradition would soon disappear, supplanted by western medical practice. Indeed formal recognition of biomedicine did push *kampô* into the background but it did not disappear. It is still practised in twentieth-century Japan and some aspects of its approach to disease continue to inform contemporary medical culture (Ohnuki-Tierney 1984: 91–102).

Ohnuki-Tierney tells us that the status of doctors rose in the late nineteenth century but health-care provision in major cities was poor and there continued to be a shortage of good doctors in Tokyo until the 1970s (Wada 1996: 19). The world economic recession of the 1930s affected rural regions with particular severity. Although doctors tried to maintain the impression that they provided their services more out of beneficence than for profit, when patients became unable to pay anything they closed their clinics in rural communities and moved to the cities. By the late 1930s one third of all small towns and villages had no resident doctor (Wada 1996: 21). Overall there was a shortage of physicians which meant that they were able to maintain their high status and substantial fees simply because there was such a high demand for their services. As the number of graduates from medical schools continues to increase it may be that attitudes to doctors change simply because of changes in market conditions.

The health-care system

The precursors of the health insurance systems that fund Japanese health care were created in the 1920s and 1930s. Company-based health insurance was made possible by a law of 1922 (enacted 1926), which provided health insurance cover for workers in the bigger companies funded jointly by employer and employee and managed by the state. Only about two million workers were covered by this system and the impact of the world economic recession on Japan severely affected the health of the bulk of the urban and rural population. This particularly manifested itself in the decline in the health of army conscripts. A policy of 'Healthy People, Healthy Soldiers' was devised, part of which was the 1937 Health Centre Act and the 1938 National Health Insurance Act. These provided health-care facilities and insurance organised through local government.

The system collapsed in the immediate post-war years but was gradually recreated, starting with the company-based health insurance schemes. By the late 1950s most of the population was covered by one of a patchwork of systems but the 1959 National Health Insurance Act completed the structure so that from 1961 all Japanese were covered by one of the insurance schemes. Broadly speaking there are two major groupings of sub-systems: employee health insurance for employed individuals and their dependent family members, and national health insurance for the self-employed, farmers, the retired, and their dependants. The cost of the treatment of the elderly (over seventy) is paid from a fund of contributions pooled from all the insurance schemes (Powell and Anesaki 1990: 131; Ikegami and Campbell 1995: 1296).

As can be seen from Table 6.1 the amount spent on health care in Japan increased rapidly after the early 1960s both absolutely and as a proportion of the GNP. Some of the health insurance systems are supported by state subsidy and the MHW has sought to contain the increase in the cost of health care by forcing down the price paid for drug reimbursement, increasing the amount of co-payment by the patient and substituting the simple fee-for-service system, which was the norm, for inclusive *per diem* payments for certain categories of patients (Ikegami and Campbell 1995: 1296).

Post-war policy was to encourage the growth of the medical profession and MHW set itself the target of 150 qualified doctors per 100,000 population, a target which was reached in 1983. However if nothing is done to restrict the number graduating from medical schools the figure will increase to 220 by 2000 and peak at 300 sometime in the first decades of the twenty-first century (Wada 1996: 22). This would not necessarily be as disastrous as some in the MHW seem to think; comparable figures for Europe show

Table 6.1 Changes in national medical care expenditure, 1955–97

	<i>Total</i> (¥1000M)	<i>Per capita</i> (¥1000)	<i>Proportion</i> <i>of GNP</i>
1955	238.8	2.7	2.69
1960	409.5	4.4	2.53
1965	1122.4	11.4	3.35
1970	2496.2	24.1	3.32
1975	6477.9	57.9	4.27
1980	11980.5	102.3	4.97
1985	16015.9	132.3	4.92
1990	20607.4	166.7	4.67
1992	23478.4	188.7	4.99
1995	26957.7	214.7	5.47
1997	29065.1	230.4	

Sources: Powell and Anesaki 1990: 121; Yakuji Handobukku 2000: 231

Germany with 340 (1995), Spain 410 (1993) and Sweden 310 (1995) (Ueda 1997: 103). Nevertheless such an increase in numbers is bound to have an impact on the health-care market.

Health care in Japan is provided by a spectrum of institutions, at one end of which are the clinics run by a single physician who specialises in an area such as internal medicine or dermatology, to the major university hospitals which employ several hundred doctors in a range of specialisms. Around the middle of this are hospitals run by local government or private bodies which may have from a few hundred to a few thousand beds.

Since the 1960s there has been a trend for patients to prefer to seek treatment in the first instance in one of the larger hospitals, ideally in a university hospital. Similarly there was a trend for newly qualified doctors to seek work in the larger hospitals rather than small or single physician clinics. Both doctors and patients were attracted by the possibility of access to high-technology medicine. There was a trade-off here. The doctors in private practice have hitherto had higher incomes – as much as twice those earned by those employed in hospitals – but hospital doctors have had higher status and the chance to provide speciality care (Ikegami and Campbell 1995: 1296). The patient forfeited the personal relationship in exchange for the chance of speedy access to specialist treatment. From the late 1980s the MHW has sought to create a system of primary care, one part of which was to revise the reimbursement system to reward the provision of preventive health measures and restrict the excessive use of 'high-tech' diagnostic measures. Powell and Anesaki suggest that there is now a trend for younger doctors to seek careers as general practitioners and family physicians (Powell and Anesaki 1990: 207).

The emergence of demands to respect patients' rights

A typical medical encounter in Japan involves a patient attending a hospital, waiting for up to three hours to see a doctor (there is no appointment system), seeing the doctor for about three minutes (no more than five) and leaving the hospital with four or five drugs prescribed and dispensed in the hospital. If the condition persists the pattern will be repeated at the latest four weeks later as doctors may not prescribe more than one month's supply of medicine. Doctors, in the case of a physician run clinic, or the hospital where they are employed, are reimbursed on the basis of a points system with the more complex or time-consuming diagnostic techniques or treatments earning them more points. Most of the payment for the treatment and drugs will come from the health insurer but an increasing proportion of the cost is born by the patient – typically 30 per cent. The doctor or the hospital pharmacy will usually be responsible for dispensing the prescribed medicine and, although the price charged is that set by the MHW the price paid for it is considerably less (on average 26 per cent less), giving doctors an incentive to prescribe more rather than less (Ikegami and Campbell 1995: 1296). Cash

earned from the sale of drugs can be a significant source of income for a practice, 7 per cent of revenue for hospitals, 12 per cent for single doctor surgeries (Ikegami and Campbell 1998: 148).

There is no time in their brief encounter for a doctor to explain much to the patient and there are no points for doing so. Drugs will often be dispensed in plain boxes so the patient may not even know the name of the drug he or she is taking. There are frequent reports of the doctor reacting with impatience and anger when patients attempt to question or ask for further explanation about the treatment with an attitude of 'if you do not trust me, change hospital'. Not only were possible side-effects rarely mentioned in normal practice, until 1990 it was not usual (and certainly not obligatory) for patients to be informed that they were taking part in the clinical trials of a new drug (Leflar 1996: 30–1).

If a patient is suffering from a terminal disease he/she will usually not be informed of this especially if it is a cancer, although members of the immediate family may be told. Up to the early 1980s doctors in university hospitals were not permitted to inform patients they had cancer and even in the early 1990s less than one in five cancer patients were told (Kato 1993: 135–49; Yamazaki 1996). A patient has no right to see the medical record and few doctors are prepared to allow them to do so mainly in order to enable them to conceal a diagnosis of a terminal illness. The medical profession argued that most patients are unable to bear the shock of knowing they have a terminal disease and informing the patient of their condition would shorten their lives. Even if they could see their records they would be unlikely to be able to understand them: a JFBA survey found 16 per cent of doctors used only Japanese in their case notes, most used a combination of English and Japanese with some using German as well (Leflar 1996: 34 n. 122).

Germany was not the only country to conduct inhuman medical experiments on human beings during the war. There is evidence of similar experimentation by Japanese doctors in the infamous Unit 731 in Manchuria and at Kyushu University. Some of the doctors involved were tried in the Far East war crime tribunals but these cases are much less well known than their German counterparts both internationally and within Japan. Mizuno suggests that if these atrocities had been better known in Japan there would have been a more critical view taken of the medical profession and the Japanese would have been better disposed to the Nuremberg principles (Mizuno 1993: 28). The medical profession has been able to resist demands for patients' rights mainly on the grounds that they are ideas based on a western individualistic approach to the contractual nature of the doctor–patient relationship which did not exist in Japanese medical culture. Indeed such an approach to medicine would, it was argued, result in an increase in litigation relating to medical incidents which in turn would lead to a rise in 'defensive medicine' which even many Americans were realising was a high cost to pay for patients' rights.

Despite the JMA's attempts to resist the acceptance of the idea of patients' rights, the situation in the 1990s has been changing rapidly and partly responsible for this is a sea change in Japan's medical culture caused by groups campaigning for patients' rights since the late 1970s. Before looking at the reception given to the core concept of informed consent, let us briefly consider the background to the formation of these groups.

Patients' rights advocacy groups in Japan

The oft-quoted Japanese reluctance to engage in litigation notwithstanding, there has been a constant number of around 400 medical malpractice suits being brought annually since the 1960s. Only 40 per cent of these cases ever went to court and only half of these were resolved by court decisions with the rest stopped following an out of court settlement, a much lower rate than usual in civil proceedings (Kato 1993: 25). The main problem has been the very high burden of proof placed on the appellant who has to demonstrate, first, that the doctor made a mistake or error of judgement and, second, that this was the direct cause of the subsequent damage to the patient's wellbeing. It has been difficult to get access to a patient's case notes and there was sometimes a strong suspicion that records were changed by the doctor or hospital subsequent to the complaint. In what appear to be independent responses to similar problems, groups were formed in the late 1970s to organise around these issues. There are reports, for example, of a Medical Malpractice Decision Centre being set up in Saitama in 1977, a Medical Malpractice Study Group formed in Nagoya in 1978 and a Medical Problem Research Council created in Fukuoka in 1980 (Kato 1993: 23; Ikenaga 1994: 21). These groups were mainly composed of young lawyers plus patients and a small number of doctors. One immediate result of the creation of these groups was that more cases of alleged medical malpractice came to light suggesting that the dominant medical culture and problems of the burden of proof meant that a large number of incidents of medical malpractice have gone unreported (Ikenaga 1994: 61–2).

Japanese accounts of the US patients' rights movement of the 1960s locate it in the context of the civil rights and consumer rights movements. US-based authors writing about the Japanese patients' rights groups note that they were formed at a time when there was widespread optimism about the potential that citizens' movements had for encouraging social change in Japan. The 'Big Four' environmental cases had shown how the judicial system could be used to protect ordinary citizens against the power of big corporations and the state (Feldman 1997: 223). Moreover these national level campaigns encouraged smaller groups to take action to affirm their environmental rights within their own communities. Such spontaneous activity by small groups across the country demonstrated that the idea of citizens claiming their (environmental) rights had become part of Japan's political culture. Rights were no longer 'remote alien and misunderstood

entities of a foreign legal system' (Feldman 1997: 224). Optimism about the reforming, perhaps even revolutionary, potential of the citizen's movement which was widespread in the late 1970s and 1980s proved unfounded. Bureaucratic obduracy and the slowness of the legal system often managed to exhaust the energies of citizens' groups before they achieved their goals. Even the most infamous case of environmental pollution in Minamata was only finally resolved when Murayama Tomiichi, leader of the Japan Socialist Party, unexpectedly came to power as Prime Minister in 1994 and was able to insist on a solution satisfactory to all, more than thirty years after the case was first taken to court.

Nevertheless the patients' rights groups, even if they have not achieved quick results, have succeeded in continuing to assert their case and have forced concessions from the JMA and the government. The individuals at the core of the most active patients' rights groups in Nagoya and Fukuoka are both lawyers, Kato Yoshio and Ikenaga Mitsuru respectively. Both have become specialists in medical malpractice cases and in part their campaigns aim to change the legal balance between the patient and the medical profession to make it easier for them to get redress and to speed up the process. Ikenaga describes how, as he took on more cases of malpractice, he began to realise that often the problem arose because of a lack of communication between the doctor and patient at an early stage in the treatment (interview, 12 June 1995). Apart from making the legal process fairer to the patient, another aim is to reduce the incidence of malpractice altogether. Both Ikenaga and Kato criticise the medical profession for not regarding the patient as the 'principal' (*shujin*) in the relationship. Thus they are not permitted or able to question doctors, they are not even permitted to see their own records. Indeed such was their unfamiliarity with the idea of asserting rights within the medical relationship that many people who became involved in medical malpractice suits would try to avoid that fact becoming known to other members of the family, company or neighbours (Kato 1993: 68).

In October 1984 a draft Charter of Patients' Rights was produced based in part on those devised elsewhere, borrowing concepts from Par. 12 of the ICESCR and Par. 13 of the Japanese Constitution. It is quoted here in full:

Patients' Declaration of Rights (Draft)

Everyone has the right to live in good health and with respect for their personality. It is a basic right for people to receive the best possible health care based on their own wishes and choices with the assistance and co-operation of medical professionals who will ensure improvement, support or return to good health.

However quite often patients receive medical examination and treatment without being adequately informed about its content, are treated simply as objects of medical intervention and their humanity

is not sufficiently respected. Moreover the medical treatment offered on a daily basis may not even sufficiently protect life and health as can be seen from the overuse of drugs and tests and the medical accidents which continue to occur. The main reason for this is that, in addition to the problems that exist in the circumstances which surround medicine, medical practitioners do not think of their patients as the principal actors in the treatment and patients themselves do not act as if they themselves were the main subjects.

In this situation we consider it very important to set out the nature of the rights possessed by patients.

Patients must defend these rights by ceaseless efforts. Further, medical practitioners bear the social mission to implement them and be their protectors.

We are convinced that this declaration of patients' rights is the first step towards uniting patients with medical practitioners in overcoming the political, social and economic restrictions that distort medical practice and we look forward to the realisation of even better medical treatment.

1 *Individual respect*

Patients, treated as subjects in the attempt to overcome their illness will have their lives, bodies and personality respected.

2 *Right to receive equal treatment*

Patients have the right to receive equal treatment irrespective of economic or social status, age, sex, or type of disease.

3 *Right to optimum treatment*

a Patients have the right to receive the best possible treatment.

b Patients have the right to request the assistance and support of medical practitioners whenever necessary.

c Patients have the right to select their doctor and medical institution and to change them. And, when they change they have the right to request information about examinations by previous doctors and to be provided with copies of their records.

4 *Right to know*

a Patients have the right to all the information necessary to understand their condition.

b Patients have the right to receive from their medical practitioner a fully comprehensible record of the course of their condition, both the nature and results of tests, diagnoses, examinations and treatment already provided and the aims, methods, content, risks and prognosis of tests and treatments to be carried out as well as possible alternatives.

c Patients, when they receive a medical intervention which has

- an element of research, experimentation or similar aim, have the right to an explanation of these aims.
 - d Patients have the right to ask the medical institution for access to records about their medical treatment and to be provided with copies of them.
 - e Patients have the right to know the name, qualifications and role of the main doctor and the medical practitioners who participate in the treatment.
 - f Patients have the right to receive a detailed report of the costs of treatment from the medical institution and information about the public subsidy of the medical costs.
- 5 *Self determination*
Patients, based on their own free will, have the right to select or reject tests, treatment or other medical intervention following the receipt of the information listed in the previous section and with the co-operation and advice given in good faith by medical practitioners.
- 6 *Right to privacy*
- a Patients have a right to privacy.
 - b Patients have the right that information about them should not be disclosed to persons other than those directly engaged in their medical treatment without their permission.

(Kato 1993: 70–2)

Broadly speaking these proposals were welcomed by the newspaper columnists but it provoked a predictable response from the representatives of the medical establishment who objected to the shift of emphasis from the doctor to the patient and the attempt to redefine the relationship of doctor and patient in terms of rights and obligations (Ikenaga 1994: 45–7).

By the end of the 1980s there were seven patients' rights groups spread across Japan and from 1987 demands emerged for a Patients' Rights Law which would give legal recognition to the principles outlined in the draft Charter. The medical profession produced a report in January 1990 which redefined informed consent in terms of 'Explanation and Agreement' which, as Ikenaga pointed out, was little more than a restatement of the law as it stood at that time (Ikenaga 1994: 76–7). In 1991 an Association to Enact a Patients' Rights Law was formed among patients' groups, lawyers, health-care professionals and academics. At this time there was widespread interest in the issue. There had been discussion in the 123rd session of the Diet (September 1992) on the right to information and self-determination within medical care. While some members of the Diet feared that creating mutual obligations would damage a relationship based on trust thus damaging the quality of medical care, others stressed that anything which improves patients' understanding of their own condition would reduce medical acci-

dents (Ikenaga 1994: 81). In 1992 the Third Administrative Reform council took up the issue of redress for victims of medical malpractice referring to patients' rights and in a judgement published in August the Tokyo District Court asserted the patient's right to a full explanation of treatment and prognosis (Ikenaga 1994: 83; JFBA 1992: 11). In May, Yamashita Tokuo, Minister of Health and Welfare, declared in the Diet that the time was close when informed consent would be introduced into Japan as a legal obligation (Ikenaga 1994: 64).

The JFBA Human Rights conference of November 1992 had as its theme 'Patients Rights – with special focus on informed consent'. There was detailed discussion of the meaning of the term, the attitudes of lawyers, patients and medical professionals plus a review of the situation in other, mainly western, countries. The conference discussed the case for the right of access to medical records, the implications of patients' rights and informed consent in the debate on organ transplants, disclosure of a diagnosis of cancer and the concept of a 'dignified death'.

Lawyers active in these groups have continued to involve themselves in medical malpractice suits. Thus the campaign for patients' rights is being argued at two or three levels: in the courts, within the political and administrative elites as they respond to these demands and among the public at large to the extent to which the media reports the campaigns of individuals and groups. Leflar reports that by 1991 there were over 400 grass-roots organisations addressing medical issues – patients' support groups focused on specific diseases, diabetes, arthritis etc., victims' groups, education and consciousness-raising groups, plus organisations seeking systemic reform – and many have been formed since then (Leflar 1996: 87). There is now a large constituency making demands for change within the health-care system and sympathetic to reforms that will shift the focus of medical provision from the doctor to the patient.

Although strictly speaking unrelated to these campaigns, the revelations in 1996–97 about the involvement of senior MHW officials in decisions that led to HIV-infected blood products being given to haemophiliacs in Japan both discredited the bureaucracy and generated still further distrust of the medical profession (Inoguchi 1997: 96–8). The patients' rights groups have succeeded in getting publicity for their ideas and there is an incremental acceptance of many of them. However, to consider this more carefully let us look at the process which has led to the virtual acceptance of informed consent in Japan.

Informed consent

Even before the war the Japanese courts recognised that consent and provision of information were important components of medical practice. Ikenaga quotes the ruling in 1930 of the Nagasaki District Court, which awarded damages to a patient whose ovaries had been removed without her

consent though she had agreed to the surgical removal of a small growth by her womb (Ikenaga 1994: 77; Maruyama 1991: 39). In 1934, judge Maruyama Masaji wrote that when using a new drug that might have severe side-effects or a new surgical technique, 'the doctor must obtain consent from the patient after explaining these facts in detail and ensuring the patient's full understanding' (quoted in Leflar 1996: 46). Like its European counterparts, Japanese law required consent prior to medical intervention such as surgery to distinguish it from assault. However it was not until 1971 that a court ruled in the case of an unconsented mastectomy that an operation of such gravity without specific consent based on a sufficient explanation of the patient's condition constituted an 'illegal invasion of the patient's body' (Leflar 1996: 47; Maruyama 1991: 39). There were also similar cases in which patients' claims that the doctors' failure to obtain consent was accepted by the courts so as to make them liable for damages. Later in the 1970s, courts extended this notion to impose liability on doctors who had obtained consent from a patient following explanations which were considered inadequate. What became important now was how much risk needed to be disclosed, how much information should be provided to patients, and whether a patient should be given sufficient information about possible alternative courses of treatment so that they could decide for themselves which course to take. After reviewing the cases up to and including 1990, Maruyama concluded, 'most Japanese courts are willing to recognise the inviolability of the patient's body but this willingness does not extend to the patient's right to self determination or autonomy with respect to the selection of treatment courses' (Maruyama 1991: 43). And Leflar comments on, 'the general tendency of the Japanese judiciary to defer to medical practice in matters of information disclosure' (Leflar 1996: 58).

At the JFBA conference in 1992 three types of problem were identified as preventing the implementation of informed consent in Japan: doctors, patients and the system. Doctors tend to expect patients to leave decisions to them and do not like to be asked questions. The JMA discussion of informed consent puts it into the context of the need to balance it against a doctor's discretion thus denying the idea of informed consent as a right. Doctors have a formalistic attitude to informed consent, many believe they already practise it, which reflects the inadequacy of medical education. Finally doctors may be unaware of recent research and therefore may not know of possible alternative courses of treatment. As for patients, many of them are prepared to accept the doctor's paternalistic approach and it may be that some of them are unable to understand sufficiently well the choices before them (though this may depend on the quality of the explanation by the doctor). Finally, the system does not allow time for adequate explanation as it is not rewarded by the 'points system' (JFBA 1992: 16-18).

Some support for the idea of informed consent came from an unexpected source in 1989/90 when the MHW gave its support to the introduction of Good Clinical Practice (GCP). As already mentioned, the informed consent

doctrine was developed in response to the human experiments carried out in Germany before 1945 and the 'Nuremberg principles' on research and experimentation that were adopted at the Helsinki conference of the World Medical Association in 1964. The Japanese pharmaceutical industry claimed to be working within the spirit of these principles but regulations requiring informed consent in clinical trials were not formally introduced until 1990 with the adoption of GCP. There had been several drug-related public health incidents in Japan such as those involving thalidomide and even incidents of the false reporting of clinical trials' data as in the Chemiphar incident of 1973. However the primary motivation for the introduction of GCP in 1990 was the perceived need to harmonise the standards for drug evaluation in Japan with those in the other two main drugs markets: the EU and the USA. When the process of harmonisation is complete data gathered in any of these three regions will be accepted by the other drug licensing authorities. Part of the FDA criteria for acceptability is that clinical test data must have been collected in accordance with basic ethical standards and one part of this is the protection of the human subjects. In addition, at about the same time, some western medical journals began a policy of only publishing research if it had been conducted in compliance with the Helsinki Declaration and prestigious Japanese journals quickly instituted a similar policy (Leflar 1996: 76).

There are some differences in the way the GCP policy is being implemented in Japan compared to the US. The Japanese regulations do not prescribe that consent to taking part in clinical trials be given in writing (though MHW suggest that this should take place) and there is no provision for the disqualification of clinical investigators who violate the rules (as exists in the USA). The pharmaceutical industry has been more interested in the consequences of the harmonisation of clinical trials regulations including informed consent principles on the development of the industry than with the interests of patients. Nevertheless writing in 1995, a commentator from the industry commented, 'Compared to other countries, GCP in Japan is in no way inferior in its intentions, but in terms of understanding and implementation from the point of view of human rights protection there seems to be room for improvement' (Noma 1995: 145).

However, as Leflar points out, even if the protection of patients' rights was not a major consideration in the introduction of GCP, because informed consent is so central to them the implementation of GCP rules will have an impact on patient care. Pressure from exposés in the media, lawsuits when the rules are violated and campaigns from the patients' groups will in the long run ensure that health-care providers pay more serious attention to informed consent-based principles (Leflar 1996: 85).

On the other hand, the JMA has put up considerable resistance to informed consent. Its bioethics committee report used the phrase '*setsumei to dōi*' (explain and agree) rather than the usual *katakana*-isation of the term and concluded that informed consent principles have already become part of the trusting doctor-patient relationship. However they reject what they

regard as the wholesale introduction of US ideas, 'We must consider our history, cultural background, national character and national feelings in creating a concept of informed consent appropriate for Japan' (quoted by Leflar 1996: 97). The report does not mention giving patients access to information about the costs of alternative treatments, including no treatment, and it specifies that cancer patients be informed of their diagnosis only if four quite precise criteria are met. Critics of the report argue that the report shows a nostalgia for a paternalism where a doctor knows what is best for patients and tries to get them to agree to that treatment (Wada 1996: 90–4). This does not amount to an acceptance of equality in the doctor–patient relationship, still less to empowering patients to practise self-determination by deciding between the options described to them by a doctor. Ikenaga is not convinced by the 'traditional medical culture' argument suggesting that there is no major difference between the US and Japan and that in either country an important medical decision should ideally be taken by doctor and patient acting together.

In 1994 the Japan Hospital Association which comprises 2,400 public and private hospitals recommended a notice be displayed in all hospitals and given to patients which sets out principles of equal access to necessary care, informed consent, expression of patients' wishes, privacy of personal medical information and explanation of alternatives to the recommended investigation or treatment (Leflar 1996: 98–9). Progress perhaps, but patients' rights groups criticised it for its silence on the issue of informing cancer patients, its caution on the issue of allowing patients access to their records and its careful avoidance of the term 'right'. Nevertheless the document was another important step towards an acceptance of informed consent in Japan.

The MHW set up a study group on informed consent in 1993 composed of eight medical professionals, two lawyers, a critic, a writer, a pensions expert and a pop singer. Already the previous year there had been an initial skirmish between the patients' rights advocates and the medical establishment when the former attempted to use the occasion of the revision of the Medical Services Act to have informed consent codified. They failed, but the law did require minor increases in the amount of information made available to patients and, in an appendix to the act, the MHW was directed to set up a study of informed consent. The report published in June 1995 went a long way towards recognising the importance of informed consent in medical practice but stopped short of recommending that it be given legal codification.

It suggests instead that an environment be created within which the patient wants more detailed explanation and the doctors want to explain more. Overall the introduction of informed consent is expected to improve the patient's quality of life by increasing the mutual respect of doctor and patient (MHW 1995: 2–3). It reports a growing consensus within the medical professions on the need for informed consent to strengthen the doctor–patient relationship and the growing weight of case law on the duty of doctors to provide more explanation. However there was no agreement

among the committee on the need for progress toward codification. The majority view was that the forced imposition of an obligation to explain could damage the doctor–patient relationship. A ‘Japanese’ approach to the introduction of informed consent through positive promotion in education and by health-care groups is contrasted to the ‘American’ approach which generates ‘confrontational aspects of patients’ assertion of rights and medical practitioners’ avoidance of liability’ (MHW 1995: 3) resulting in ‘defensive medicine’ which is widely accepted in Japan as being a ‘bad thing’. It may be that this presentation of informed consent as compatible with the much promoted image of Japan as a harmonious society and its implementation in a way which will further enhance that harmony is a persuasive argument. However, another way of looking at it would be to see this committee made up mainly of doctors as recommending that their scope for discretion is left largely unrestricted and that the medical professionals should be left to decide how best to implement informed consent with the support of the state and health promotion bodies.

Critics of the report point out that it avoided such controversial issues as a patient’s right to be told of terminal illness and the need to reform the point/fee system to reward doctors who take the time to provide patients with fuller explanations. There were also some criticisms of the closed, secret way in which the committee conducted its business and that only three of the panel were women when most carers in Japan are female. Still, while some argued the report showed Japan was ‘an undeveloped nation in medical ethics’ (Ikenaga 1995: 10), others accepted, albeit reluctantly, that this report was first evidence of a positive attitude to informed consent based on the approach of ‘how can we do it’ – a considerable advance on the negative attitude taken by the JMA in its 1990 report.

In April 1986, the MHW started to pay health-care providers for providing hospital in-patients with written information about their treatment and medicine (Leflar 1996: 103–4). The MHW pointed out in the 1997 Welfare White Paper that health care is a service industry and one in which the provision of services may soon start to outstrip demand if the number of doctors continues to increase. However, one might conjecture that an increase in the number of doctors will lead to greater competition in the ‘medical market place’. If so, doctors and hospitals may compete on the basis of the quality of their service, one aspect of which could well be their ability to create an environment in which doctors and patients would be able to discuss diagnosis and prognosis, the comparative risks and benefits of alternative treatments and the possible side-effects of drugs or surgery; the full implementation of informed consent.

Other issues

The main issue that the MHW report avoided was that of patients’ access to their records. As late as 1978 the AMA had argued it was not appropriate

for patients to see their medical records but they had changed their minds by 1984 and now most doctors in the USA give patients unconditional access to their records and some states give them legal right to that access (Wada 1996: 103, 112). There is of course no reason why an Asian country should follow the American route in the absence of domestic demands for change.

Before the introduction of western medical practice, medicines and remedies were often devised by Japanese doctors and the recipes passed down through the generations so it was important to keep them secret. This is not really relevant to the practice of medicine in contemporary Japan but secrecy still surrounds the topic of access to medical records. A number of issues are entangled in this apparently simple problem. First, the request to see one's record is considered inconsistent with the dependent attitude expected of a patient: it is a sign of lack of trust and doctors may fear it to be the start of action that will lead to a law suit. Doctors' attitudes may be more defensive. There may well be gaps and inaccuracies that patients may become aware of, or doctors may have falsely recorded tests or prescription of drugs in order to claim more points (Leflar 1996: 34–5 n. 123). The main problem, though, is that if patients had access to their records it would not be possible for doctors to avoid or disguise a diagnosis of cancer or a similar terminal illness.

One hospital in Fukuoka, where one of the trustees is a patients' rights activist, tried in 1994 to introduce a policy of giving all patients access to their medical records. The proposal was debated among the fifty plus doctors and in the end there was such strong opposition to it that the proposal had to be withdrawn – some doctors threatened to leave if it were introduced. Some of the objections were petty: doctors would have to write more neatly, they may have to censor what they write. Others suggested that it would change the nature of medical treatment by focusing on the doctor–patient link when a medical encounter in Japan involved a wider group of people including the patient's family. Some doctors clearly feared that their status would be diminished if the records were opened. Although the proposal to open the records was unsuccessful many of the doctors recognised that the debate had led to a greater awareness of patients' rights issues within the hospital. Even those who were opposed to full disclosure were persuaded to give more respect to patient self-determination. Interestingly there was strong support for the idea among the senior nursing staff (NHK 1994; interviews with doctors at Chiyobashi Hospital, Fukuoka, December 1995).

This is just one, possibly isolated, example but it does represent a debate which became more widespread in Japan in the 1990s and in which there has been growing support for open access to medical records. A survey of over 1,000 patients carried out late 1997 to early 1998 found that only 30 per cent of in-patients and 40 per cent of out-patients were satisfied with the explanations provided by doctors; over 70 per cent wanted to be able to see their records (*Yakuji News*, 15 May 1998: 3). In September 1997, the MHW

revised the health insurance co-payment system so that patients pay 30 per cent of the cost in many cases. It is likely that the more patients have to pay, the more they will take an interest in the quality of service. Moreover, as part of its long-term strategy to curb the growth of health-care costs, the MHW is urging patients to take increasing responsibility for their own health care. But if this is to be taken seriously, patients must have more information about their own condition and this too must lead to greater openness by the medical professions.

A MHW report of June 1998 suggested that both informed consent and access to medical records should be given a legal basis, and for the first time this recommendation had the support of the JMA (MHW 1998). It is unclear at the time of writing how long it will take for such a bill to be drawn up by the bureaucracy and passed through the legislature but it is likely that early in the twenty-first century most, if not all, of the principles set out in the draft Patients' Charter will be incorporated into law.

Already substantial reform has taken place at local levels. Several local governments have enacted versions of 'freedom of information' provisions for local administration and it has been a relatively simple step to extend this to medicine, especially given that most operate or administer their own hospitals. Yokohama city authorities interpreted its freedom of information rules to give patients access to their own records in 1993 (Leflar 1996: 93). Tokyo Metropolitan Government created a Medical Ethics Committee in 1994 which has issued guidelines to Tokyo hospitals. As more local authorities accept the principle of open access to medical records the pressure on national level government increases (interview with Ikenaga, 12 June 1995).

The discussion on the theory of informed consent has taken place in parallel with the national debate on the ethics of human organ transplants. This is a complex issue that involves consideration of some specific aspects of Japanese medical culture which are not relevant to the present discussion, however it has focused attention on the issue of consent to the procedure, both the consent of the donor and that of the recipient (for a discussion of the background to the organ transplant issue in Japan, see Mulvey 1996). Another minor victory for female patients against the paternalism of the medical establishment occurred in 1999 when the MHW, with the reluctant support of the medical profession, finally permitted the prescription of the 'Pill' for contraceptive purposes. Since the 1960s the medical establishment had insisted that it was acting in the best interests of Japanese women to prevent them from having free access to this form of contraception. In the end, the MHW was forced to change its policy following its decision to 'fast track' approval for Viagra when it was clear that men were obtaining supplies over the internet thus by-passing the Japanese retailers (doctors) and taking the drug without any medical supervision. Obstacles to the free use of the 'Pill' as contraception continue as it is expensive and not eligible for reimbursement under the insurance system but the principle that women may choose to use it is now established.

Thus there has been considerable progress in eliminating the obstacles that were identified at the JFBA conference in 1992 as preventing the implementation of informed consent. Meanwhile patients' rights campaigners have been actively involved in urging the application of rights principles in other controversial areas of medical practice such as campaigns for revision of the Leprosy Law and reform of the AIDS law which was modelled on the Leprosy Law. (On AIDS, see Feldman 1992, 2000 and on the Leprosy Law, Kyūshū Bengoshi Rengōkai 1996.) Each of these contain major issues of principle but there is no space to consider them here. Rather I intend to turn to look at another issue which has brought the medical profession into conflict with the legal profession: the application of human rights ideas to the treatment of patients with mental disorders.

Human rights and mental health

Japan faced international criticism for its treatment of psychiatric patients in the 1980s in response to which quite radical reforms were introduced. There was a momentum behind this reform process which was maintained by the legal profession and other patients' rights advocacy groups which resulted in further changes being made in the 1990s and there are suggestions that the reform process is not yet complete. Our main interest will be in how these reforms have incorporated human rights considerations and the extent to which international discourse has guided indigenous policy making. However before focusing on events in Japan we must make a slight digression to place the notion of mental disorder within an East Asian context.

East Asian attitudes to mental disorder

Three separate but related sets of ideas combine to create a conception of mental disorder in each of the East Asian societies we are interested in that put them out of step with mainstream 'western' psychiatric practice.

First, there is the concept of *chilki*, a system of energy which is in continual exchange with the environment. As Reilly puts it, 'The experience and control of *ki* is equated with the control of one's emotional state.' Some ailments that originate from *ki* 'imbalance' are manifested in bodily ailments, others produce psychological complaints (depression, neurosis) but the third case is where *ki* has undergone change resulting in psychosis. Whereas in the first two cases *ki* may be 're-balanced' in the third case 'there is no hope' (Reilly 1996: 144).

A second approach to mental health is the notion of inborn constitution or personality. Although emotional states might change personality does not. The appearance of a mental disorder suggests the constitution is and was flawed and that the state is permanent and even if not untreatable is likely to recur and may well be hereditary.

The final approach is related to Confucian notions of the need for order

and decorum. Psychotic illness is characterised by behaviour which pays no regard to social convention and yet the respect for social conventions and the maintenance of stability of the social order is one of the main functions of the family. Thus the mental disorder of an individual poses a threat to social order which may result in blame and therefore shame being attached to the family. A family's first response to mental illness in one of its members would be first to hide it and then to ensure that the individual was confined in such a way that he or she was unable to bring further embarrassment to the family. If this is not done successfully the family would find its unmarried members shunned in wedding arrangements.

Thus we have a set of related but distinct reasons which explain why mental disorders were traditionally considered untreatable and why families might not want to admit that a family member has been diagnosed with a mental illness. Such attitudes are still influential and one result is that doctors may use a 'disguised diagnosis' to avoid the suggestion of a mental disorder. This might be a diagnosis of a somatic illness that is considered the cause of (say) the depression, or the use of a term such as 'neurasthenia' which suggests a disease of the nervous system which is curable and which diagnosis implies no mental dysfunction. However, where a diagnosis of mental disorder is inescapable these traditional values and related social pressures justify a view of hospitalisation as being a means of containment rather than a stage in the delivery of curative treatments.

Reviewing the situation in Japan in the mid 1980s and comparing it with the USA, Munakata concludes, 'it can be safely argued that the American people's belief system that supports the way they deal socially with mental disorders is community health oriented, not custody oriented as is the case in Japan' (Munakata 1986: 352).

However, this view ignores the reforms that were made in US policy to mental illness during the post-war period, from a policy based on confinement in large hospital complexes to community-based treatment where appropriate. Will it be possible to change the way the Japanese health-care system deals with mental illness without a radical change to the Japanese people's 'belief system'? Is this appeal to the belief system more than just a conservative excuse for not reforming the care for the mentally disordered in a way that allows for their rights to be taken seriously?

Given the negative image traditionally accorded to mental illness it comes as something of a surprise to learn that mental disorder is the second most treated illness in Japan.

However, the number of admissions to psychiatric hospitals has been very low – Munakata quotes WHO data showing that Japan has lower rates of admission to psychiatric hospitals than nine European countries and the USA – but the average length of stay is very long. OECD figures indicate a mean length of stay in its member countries of 30.3 days while the figure for Japan was 325 days, though this probably underestimates the usual length of stay (OECD 1993: 215). In the early 1980s the average length of stay for

Table 6.2 Medical treatment rates for major disorders (per 100,000 population)

	1970	1980	1990	1996
<i>Hypertension</i>	343	473	555	587
<i>Mental disorder</i>	247	290	367	383
<i>Cerebro-vascular disease</i>	118	221	305	310
<i>Heart disease</i>	117	176	191	199
<i>Cancer</i>	114	136	160	208
<i>Diabetes</i>	64	103	150	189
<i>Liver cirrhosis</i>	51	90	136	88
<i>TB</i>	192	56	27	14

Source: Kawai and Suzuki 2000: 219

patients confined involuntarily was over eight years, moreover most patients were confined to wards locked 24 hours per day and subject to severe restrictions on their contact with the outside world with no avenue for protest or appeal about their treatment.

The historical context

To the extent that there was any concern about the mentally ill before the mid nineteenth century it was as a threat to public security and the family was deemed to be responsible for any confinement. The person was often locked in a barred cell or cage in or near the family home. This was regulated by the local officials but in most cases the mentally ill would live out their lives in these private cells (Salzburg 1991: 145). The only alternative to this was a small number of temples which took care of the mentally disturbed.

During the Meiji period there were a series of regulations introduced to standardise the police supervision of the home imprisonment system which culminated in the 1900 Law for the Confinement of the Mentally Ill (Oya 1995: 46; Salzberg 1991: 146). This codified practice enabling involuntary confinement at the request of a designated relative – the *hōgōgimusha*, guardian – plus a physician's diagnosis. Some psychiatric hospitals were built in the nineteenth century and more were built in the first part of the twentieth but as Table 6.3 shows the number of people in private cells was greater than the number in hospital until 1920.

The 1900 law was mainly concerned with protecting against social disorder with very little priority being given to patient care. One contemporary report describes the treatment of the mentally ill confined in private cells to be worse than people in prison and even those in hospital were badly treated, 'not a few patients died due to under-nourishment' (quoted by Oya 1995: 46–7).

Table 6.3 Number of mentally ill in hospital and private cells, 1906–97

	<i>Number in hospital</i>	<i>Number in private cells</i>
1906	2,542	4,658
1919	4,620	4,174
1930	11,080	6,356
1935	18,981	7,188
1940	23,555	6,097
1945	3,995	na
1950	17,686	2,671
1965	183,260	0
1975	281,127	0
1985	342,000	0
1990	349,000	0
1997	336,000	0

Sources: Reilly 1996: 149 and MHW figures

Politicians and bureaucrats were uninterested in the issue but some progressive doctors at the start of the period of 'Taishô Democracy' demonstrated the inadequacy of the existing system and persuaded the government to pass the Mental Hospitals Law in 1919. This was the first attempt to establish a system of publicly supported mental institutions for the purpose of treating rather than confining the mentally disordered. It set out admission standards, provided state subsidies for costs and laid down that each prefecture should build a psychiatric hospital. Unfortunately this was not the start of a medical policy for mental health but rather marked a high water mark of serious interest in the issue. Only five prefectural hospitals were actually built as the act also allowed prefectural authorities to designate a private institution in lieu of building one and there was a steady growth in the number of private institutions such that by 1935 84 per cent of those hospitalised with a mental disorder were in private institutions (Oya 1995: 48; Salzberg 1991: 147). This pattern continued into the 1990s when 82 per cent of institutions and 89 per cent of psychiatric beds were in the private sector.

The 1919 law also for the first time authorised the prefectural authorities to commit individuals to mental institutions, putting the finishing features to a regime of compulsory hospitalisation which was to remain until the 1988 Act.

The process of industrialisation and attendant urbanisation of the 1920s reduced the ability of the family to handle its mentally disordered members. Where private cells were out of the question the only alternative was a

private hospital. Hence the growth of private institutions remarked on above. The system came under great strain during the war. Many mental hospitals were bombed, many patients in mental institutions starved to death (Oya 1995: 36; Garon 1997: 58).

War and its aftermath led to an increase in the numbers of the mentally disordered but the occupation government reacted slowly; not until 1950 was the Mental Hygiene Law passed. This ended the practice of private confinement, it made some provision for the treatment of the mentally ill but the legal and institutional structure continued to be based on the custody and prevention model with its emphasis on the mentally ill as a threat to public order. The system developed as one in which patients were usually admitted without their consent and, once admitted, there were no effective mechanisms which could monitor their medical or physical treatment. Moreover following the creation of a comprehensive insurance system at the start of the 1960s the costs of treatment in psychiatric hospitals imposed very little financial burden on the family. There was then even less reason why an embarrassed family should enquire too closely about the treatment of someone in a psychiatric hospital still less to want to have them released into the community. During the 1950s and after, the improvement of psychiatric care was identified with increases in the number of beds in psychiatric hospitals.

Informed by international trends towards out-patient treatment the law was revised in 1965 to create Mental Health Centres in each prefecture but they did not become the main focus of psychiatric care. Indeed, cutting across this policy trend, a knife attack on the US ambassador Reischauer in 1964 by a youth who had been in a psychiatric hospital led to demands that regulations should be revised to make it even easier to commit patients (Oya 1995: 52). These demands were resisted but the atmosphere was such that there were strong pressures to confine patients rather than release them and little or no interest in their rights.

Psychiatric care was funded by health insurance systems which often did not make allowance for expenses not strictly related to medical care, thus it was not easy to support rehabilitative care. Moreover, just as the easy access to health care in general and fee-for-service system increased the length of time patients spent in ordinary hospitals, so the spread of the health insurance system reinforced the tendency to regard committal to a psychiatric hospital as a long-term if not permanent arrangement. In 1986 the average length of stay in a psychiatric hospital was 532.6 days. A 1981 survey of private hospitals found that 45.5 per cent of patients were hospitalised over 5 years, 57 per cent over three years and that those involuntarily committed by prefectural governors were confined on average for over 8 years (Salzberg 1991: 139). Munakata suggested that simple comparisons may exaggerate the seriousness of the situation in Japan since many elderly patients received treatment in psychiatric hospitals who in other health-care systems might be transferred to nursing homes. The reimbursement system made it financially

advantageous for families to have their elderly relations looked after in a hospital where fees were paid for nursing them rather than in a nursing home or in the family home where they would not (Munakata 1986: 356–7). Reforms in the organisation of health-care provision for the elderly in the early 1990s made it less likely that old people with no mental health problems would stay in long-term psychiatric hospitals but it may still be that those suffering from senile dementia are more likely to be cared for in hospital than at home or in nursing homes.

Conditions in these psychiatric hospitals came in for increased criticism in the 1980s. Surveys showed that most patients were kept in locked wards and were subject to strict control preventing free access to the outside world. Letters were routinely censored, it was not easy to get access to telephones. In addition most psychiatric hospitals have been located in rural areas where land is cheap. Given that in many cases the relations between patients and families were already strained simply by virtue of them having a mental disorder, anything which hindered contact between them and their relatives imposed further stress. One important criterion in assessing an individual's fitness for release has been whether he or she had somewhere to go. If a relative, most importantly the *hōgōgimusha* was not prepared to accept responsibility for the patient they would be kept in the institution.

Table 6.4 Mode of detention of psychiatric patients, 1983

<i>Open Wards</i> (over 8 hours)	25.4
<i>Half Open</i> (less than 8 hours)	9.4
<i>Locked</i>	64.0
<i>Seclusion</i>	0.7
<i>Unknown</i>	0.4
n=7,953	

Sources: Reilly 1996: 166, based on a survey by the Japanese Committee for Mental Health and Human Rights

Some specialists criticised the treatment of psychiatric patients but there was little public concern until 1983/84 when newspapers took up a case where former detainees at Uchinomiya hospital in Saitama brought a civil action against the government and hospital superintendent for violations of their human rights. Investigations revealed that: on at least two occasions patients in locked wards had been beaten to death by hospital staff, there were only three doctors for 944 patients, nursing staff levels were only 40 per cent of the legally required level, patient labour was used in companies owned by the hospital director, there was fraud with respect to claims for national health insurance money, mishandling and theft of patient money,

all patient correspondence going in or out of the hospital was read and much of it destroyed, and staff were present every time a patient met a visitor (Salzberg 1991: 141). There may have been as many as 222 deaths out of 1,000 patients in this one hospital over a three year period (Tolley 1994: 177).

It was just at this time that the UN had commissioned a study on the rights of the mentally ill by Erica-Irene A. Daes. Daes was in the process of drafting the set of principles which would assert *inter alia* the right of involuntary patients to have access to legal representation and a right of appeal to an impartial tribunal. Meanwhile Totsuka Etsuro, a lawyer, presented a paper to an international conference alleging the involuntary detention of the mentally disordered was in violation of article 9 of the ICCPR which Japan had ratified in 1979. This complaint was relayed to the UN and Daes reported the information to the UN Sub-commission on the Prevention of Discrimination and the Protection of Minorities in 1982. An article in the review of the International Commission of Jurists (ICJ) in 1984 exposed the inhumane conditions in Uchinomiya and similar hospitals to an international audience and the matter was discussed at the August meeting of the Sub-commission. The formal response of the Japanese government was to deny any widespread ill treatment of patients and to assert that their rights were adequately protected under the 1950 law.

The International League for Human Rights (ILHR) and the Disabled Peoples International both complained to the Sub-Commission and the ILHR wrote to PM Nakasone. When Nakasone ignored their requests, Totsuka, on behalf of the Japanese Fund for Mental Health and Human Rights (a group of patients' rights advocates), requested a fact finding mission and a group of three (two internationally known psychiatrists from the UK and USA plus a Chicago-based judge with knowledge of mental health law) spent two weeks in Japan in 1985 sponsored jointly by the ICJ and the International Commission of Health Professionals. During their time in Japan they made several visits to hospitals and received a large number of submissions. The report published in July concluded, 'the present structure and function of the Japanese mental health services create conditions which are conducive to inappropriate forms of care and serious health violations on a significant scale...'. They recommended 'a complete overhaul' of the 1950 Mental Hygiene Act 'taking into account the rights of mentally disordered persons and new techniques of psychiatric treatment' (quotes from Salzberg 1991: 143).

After initially ignoring the report, the MHW, possibly spurred by complaints from the ICJ to the MFA that Japan was in breach of the ICCPR, announced the 1950 law would be revised to promote the protection of the human rights of mentally ill patients (Tolley 1994: 178). Following a long process of consultation, a new Mental Health Act was passed in 1988.

The 1988 Act marks a substantial shift away from the focus on protection of the social order and towards one on medical treatment, though paradoxi-

cally it has weakened the power of doctors within the hospital. Concerns about human rights protection are used to justify reductions to the psychiatrists' clinical discretion. Under the new law there are three forms of admission, 'hospitalisation', 'consent hospitalisation' and 'voluntary admission'. This third category did not exist under the 1950 regime but the 1988 law aims to make voluntary admission the main form of psychiatric admission. 'Hospitalisation' is a form of involuntary commitment to a psychiatric hospital on the orders of the prefectural governor when a person is deemed to be mentally disordered and likely to cause injury to his or her self or others unless hospitalised. Once admitted the patient must be examined by two different 'designated physicians' who must agree with the original diagnosis. Even before the 1988 law the number of people committed under this procedure was falling from 30.2 per cent of all involuntary admissions in 1970 to 6.4 per cent in 1987 (Salzberg 1991: 150). The second form of involuntary admission is 'consent hospitalisation'; the consent referred to here is not that of the patient but the person legally responsible for the patient, the *hōgōgimusha*. This is the main form of admission and the guidelines for admission under this procedure are mainly unchanged by the 1988 law. The threshold criterion is that the person must be deemed mentally disordered, defined fairly loosely. There is no need to demonstrate likelihood to injure his or her self or others.

The key role played by the *hōgōgimusha* was first defined in 1900 and it reflects the way in which the family in Japan plays a central role in health care. Salzberg suggests that the decision to commit an individual to a mental hospital is, or at least used to be, one in which the patient ceased to be a member of the family and is put into the care of another group – the hospital. In such circumstances it was natural that a family member decided who would continue to be in the family (Salzberg 1991: 153; Munakata 1986: 362–3). However if the move into a mental hospital may amount to a severance of links with the family it becomes even more important to create facilities to enable a return to society and this was included in the 1988 law.

There were three sets of measures that were designed to reduce abuse of the kind that had caused such international criticism of Japan. First, the law introduced a rigorous and comprehensive set of requirements for obtaining the 'Designated Physician' status that is necessary for a doctor to be able to place patients in hospital against their will. This is particularly important in a country with no public or private system of certified medical specialisation (Salzberg 1991: 154). Second, this set of requirements includes the obligation to undertake study sessions in medical law, including human rights, within five years of the law's introduction and every five years thereafter or lose designated status (Oya 1995: 7). Third, hospitalisation is subject to review by a Psychiatric Review Board set up initially in every prefecture (see below).

The 1988 act included provision for a review of the system every five years and the UN Principles approved in 1991 provided an external standard

for reviewing the mental health-care system. Reforms were introduced as a result of this review, which were mainly aimed at improving the facilities to help patients to return to life in society. Plans were made to create a network of half-way houses and the government promised more aid for services provided to the mentally ill outside hospitals and there was even an initiative to promote greater awareness of mental illness in society as a whole. The report on which these reforms were based accepted that problems arose when the *hōgōgimusha* were themselves old or dependent on a low income and thus not in a position to look after their relative even when he or she was sufficiently well to be released from hospital (Oya 1995: 71–5).

Yet more reforms were introduced in 1996 with the enactment of the Law Concerning Mental Health and Welfare for the Mentally Disabled. On the one hand this strengthened MHW control of the hospitals where involuntary admissions occurred and on the other it sought to create a welfare policy that strengthened rehabilitation facilities. Changes were also made in the financing of care so that there was greater central government subsidy for involuntary patients. There was some criticism that the rehabilitation schemes were poorly funded and that problems surrounding senile dementia were not being seriously addressed but these eight years of reform represent a significant move in the direction of the normalisation of the treatment of mental illness and the establishment of the principle of 'from hospital to the local community'.

It remains to be seen how much further this process will develop and how much the local medical culture will hinder its implementation. Those who resist this programme point to the US and UK implementation of 'care in the community', where the mentally disordered have sometimes been released from hospital without effective rehabilitation, as good reason to retain the more custodial oriented policy.

Human rights protection under the new system

Doctors in psychiatric hospitals must now receive regular training in the legal and human rights dimensions of psychiatric care. Hospitals must submit regular reports on conditions and there is an inspection system. Most of the restrictions on access to the outside world by letter or telephone have been removed. But from a human rights perspective the most important measure introduced in 1988 was the creation of the Psychiatric Review Boards (PRB). Each of these is composed of five individuals, three doctors (usually 'designated physicians'), a lawyer and a generalist (Yahiro, 1996: 8). They receive reports on involuntary admissions at the time of admission and every six or twelve months thereafter. They may also consider requests for discharge or complaints about treatment from patients. Most prefectures have two or three active PRBs and since 1996 PRBs have been formed in each of the major cities. In Fukuoka each PRB meets monthly dealing with some 250 reports and two or three requests for release. Each year the PRBs

decide about thirty cases of hospitalisation to be unnecessary, about twelve or thirteen in the Tokyo region and ten in Fukuoka prefecture.

Many doubt whether the PRB system adequately protects psychiatric patients either from inappropriate treatment or unnecessary detention in hospital. The meetings are closed often even to the patient or his or her representative. The proceedings are dominated by health professionals and appointment to the PRBs is formally by the prefectural governor who is also the primary administrative authority within the mental health-care system. When the ICJ sent a small mission to make its third visit to Japan in April 1992 they found that though the PRBs were empowered to make recommendations for improved treatment even when the request was for release, there were few such recommendations, none in 1990/1 (ICJ 1992: 27).

Some argue that the PRBs lack the degree of 'third party' independence as stipulated in Par. 9.4 of the ICCPR (Oya 1995: 146) or Par. 17 and 18 of the UN Principles on the Protection of Persons with Mental Illness. The JFBA has been very critical of the structure of the PRB saying that they lack the attributes of a neutral judicial body. Those who have served on the PRBs comment that they are less independent review bodies and work more like parts of the local government bureaucracy. There is no redress for patients who are unlawfully hospitalised and the number requesting improvement of treatment remains extremely low – forty-eight in 1996, of whom one was successful (JFBA 1998: 116–17).

The PRBs are said to be modelled on the Mental Health Review Tribunals in the UK but one important part of the UK system was not adopted: the provision of legal aid for those who want their cases to be reviewed. The 1988 law did permit patients in psychiatric hospitals to consult a lawyer but few could afford the fees. In 1990 the Fukuoka Bar Association began to consider what role lawyers could play and by 1993 they had devised a scheme to provide free advice to patients in psychiatric hospitals who are seeking discharge. By 1996, 152 lawyers in the Fukuoka area had registered themselves with the scheme and they deal with about 100 cases per year (Fukuoka Bar Association 1998: 4). If the number of patients released in Fukuoka is high by national standards it is no doubt due to the better representation and advice to which patients in Fukuoka have access. So far these lawyers have provided the advice free of charge although the scheme was supported by a grant from the MHW of ¥4 million in 1997/8 to investigate whether it could be extended to other parts of the country. Yahiro estimates that in any year up to 600 patients may need advice and there may be sixty requests for release from hospitals in the Fukuoka area alone; the cost of providing such legal advice would be around ¥13 million (Yahiro 1994/5: 43).

A report based on the MHW supported research was published in 1998 and is broadly supportive of the scheme (Fukuoka Bar Association 1998). There are now plans to create similar schemes in the Hiroshima and Nagoya areas and to expand the scope of advice from simply appeals against

continued confinement to include help with formulating requests for improving the quality of care (interview with Uchida Hirofumi, 18 September 1998).

The PRB system continues to give priority to the medical over the legal profession, to the medical model of psychiatric care over the legal, even in Fukuoka, although the balance there may be slightly different. This is a priority which is certainly consistent with the way the mentally disordered have been treated in Japan throughout the twentieth century, even if the closed nature of the system and the lack of review procedures goes against the international standards that stress the need for an emphasis on patients' rights. It is of course legitimate to argue that different societies will interpret UN guidelines according to local conditions and no one would argue that the US or UK have got the balance right when so many with mental disorders end up living on the streets. Nevertheless even the MHW sources in the 1980s admitted that as many as 40 per cent of patients in psychiatric institutions could be safely released which raises questions about why more are not.

Tables 6.5 and 6.6 demonstrate that over a relatively short period of time there has been a significant change in the way the mentally disordered are admitted to hospital. Japan seems to be moving close to the target of having mainly voluntary admissions and the number of 'hospitalisations' is now very small though the number of 'consent' admissions is still quite high. There are now proposals to eliminate the *hōgōgimusha* system entirely.

It may be that considerations of cost rather than issues of human rights principles will tip the balance in favour of a more relaxed attitude to the release back into society of those who have had mental disorders since it costs the state much less to have an individual live in the community than in an institution. However the facilities for rehabilitation remain poor, in 1994 there was space for only 5,000 people compared to a hospitalised population of 343,126. And there is no clear evidence of dramatic reduction in the length of time patients spend in psychiatric hospitals. A major problem found by the lawyers in Fukuoka has been that even when a PRB has been

Table 6.5 Psychiatric hospitalisation

Involuntary hospitalisation, 1970–93 (section 29 Mental Health Law)

1970	76,532
1975	63,888
1978	52,491
1983	36,091
1988	16,756
1993	6,794
1997	5,394

Sources: Oya 1995: 79; plus figures supplied by MHW 1997

Table 6.6 Change in mode of admission 1988–97

	1988	1990	June 1990 (new admissions)	1994	1997
<i>Voluntary admissions</i>	0	51.5	63.8	64.3	68.6
<i>Consent admissions</i> (guardian's consent) – section 3	82.4	41.5	28.0	31.3	28.2
<i>Hospitalisation</i> (prefectural governor) – section 29	5.7	4.0	1.5	1.9	1.4
'Free'	11.9	3.0	6.7	1.5	1.8

Sources: Reilly 1996: 159; Yahiro 1996: 5; plus figures supplied by MHW 1997

convinced that there is no medical case for the continued hospitalisation of an individual, there may still be nowhere for him or her to go if there is no immediate family who will accept them. Outside the main metropolitan areas there are very few rehabilitation centres or half-way houses. Despite evidence of changing attitudes among the administrators of health care between 1988–97, laws and the changes in medical science that have produced pharmaceutical methods to control psychiatric symptoms, popular attitudes to mental disorder are slow to change.

Conclusion

Much more than is the case in the western medical tradition, Japanese medical practitioners after the war were working in a medical culture steeped in the ideas of the beneficent nature of medicine. Doctors were relatively few. Large sections of the population still had to pay for most if not all of their medical treatment and thus there remained a real sense in which the poor patients depended on the good will of the local physician. And even when medical insurance cover had spread to all of the population by the early 1960s, health care was introduced as part of the social welfare system that was developed in such a way as to limit the idea that people might have a 'right' to minimum living standards. The social welfare system was introduced supervised by the 'welfare commissioners' (*minsei iin*) who inherited the attitudes of the pre-surrender generation of local notables and routinely granted applicants assistance at levels well below what they were entitled to for fear that generosity would discourage self-reliance. The fact that one had to apply to someone who was virtually a neighbour rather than an anonymous official in the local office reduced the rate of claims as it required making a request for a personal favour, with the personal debts that that incurred (Garon 1997: 219ff.). One is tempted to digress at this point to remember that these *minsei iin* are precisely the same group of people who

were recruited into the Civil Liberties Commissioner system. Were they as concerned about not encouraging an excessively individualistic rights consciousness as the *minsei iin* were about not giving 'excessive assistance' to poor families?

This was, of course, a welfare system within a social structure in which the MHW was enthusiastic about managing society in a way that would promote and protect the interests of the companies seen as the pillars of the post-war state. In other words it amounted to the social policy of the developmental state.

Pressure has been exerted on government and the medical profession by rights advocacy groups led mainly by lawyers. Now, one could cynically say that this was simply the pursuit of self-interest by a profession that has the most to gain if there is greater use of litigation to resolve medical disputes. However, this is, I think, inadequate to explain the activities played by the legal profession in making the series of demands for a full recognition of 'informed consent' in Japan and in particular the support for the rights of patients in psychiatric care. It is rather related to the perhaps obvious preference among the legally trained to an approach to medical care which stresses the right to autonomy/respect for dignity over the right to treatment. It used to be argued that the teaching profession kept alive the liberal values of the occupation period in the face of the conservatism of the Ministry of Education; something which has been compromised by the *rapprochement* which has taken place between the JTU and the MoE in the early 1990s. The lawyers within the JFBA continue to play a similarly radical role asserting the continued relevance of the role of rights as set out in the Constitution.

A novel instance of this is the creation in summer 1999 of a campaign, again based in Fukuoka, which seeks to establish a national network of 'Patients' Rights Ombudsmen' to advise and work with those who had had problems with their medical treatment in order to resolve those problems. The aim is to develop this volunteer network into an organisation which can act as an independent third party in dispute resolution (Ikenaga 1999).

These lawyers have been supported in their campaigns by the development of international standards. In Japan the medical profession has chosen largely to ignore the standards devised by the World Medical Council and the UN to guide national health-care regimes, but the national and regional bar associations have urged they be taken seriously. Moreover, as these international standards develop it is likely that the JFBA will continue to insist that practice in Japan keep pace. For example, there is currently discussion of the creation of an international system to inspect psychiatric institutions to check they operate within agreed guidelines. One could imagine that being advocated by the JFBA (and resisted by the MHW and JMA) (Harding 1997).

The principal line of resistance to the possibility of the 'imposition' of international standards has been based on the importance of respecting local medical culture, which allegedly gives more respect to the role of the

family than that in the west. Anthropological accounts of health care in Japan do suggest that there is still a greater role played by the family in medical decisions (Ohnuki-Tierney 1984). Meanwhile of course, the government has sought to encourage the Japanese family (= women) to take care of the increasingly elderly population both by tax concessions and by publicising the fact that family-based welfare is a good 'Japanese' trait. This is, of course, in line with the government's desire to keep spending on health care as low as possible and ignores the general inadequacy of provision of care for the elderly in Japan compared to countries such as Sweden (Garon 1997: 226-7).

However while the 'naturalness' of family-based welfare for the elderly based on 'traditional' standards may be used by government to support policies which will keep the elderly out of institutional care, that which keeps those who have or who have had mental illness within institutions are the attitudes of families which are based on 'traditional' conceptions of mental health. Will the MHW and the medical profession be persuaded to try to change prejudices about psychiatric disorder in order to reduce the number of people held in psychiatric hospitals, or at least reduce the length of time they remain there? If, as Munakata suggests, the average length of time spent by patients in psychiatric institutions is so long because they are being used as *de facto* institutions of long-term care for the elderly then one might expect the policies to 'fit' together. There is no evidence of this so far.

If there is an attempt to justify the arguments of the MHW for cost constraint, or the JMA resistance to informed consent by arguments based on the value of Japanese tradition, there is no equivalent attempt by the patients' rights advocates to devise a distinctly 'Japanese' justification for their demands. There is nothing in the Patients' Declaration of Rights (1984) that would betray its Japanese or East Asian origin to an uninformed reader. They amount simply to elaborations of the ideas contained in the Lisbon Declaration quoted in the previous chapter.

Patients' rights groups activists in Japan rarely use moral or ethical arguments to support their demands. They are more likely to stress the benefits to the community of the implementation of informed consent or the early return to the community of those cured of mental illness. While there clearly are resource benefits to be had from changing the health-care system in this way, a more secure foundation for protection of patient dignity would lie in emphasising the moral dimension. There is a risk that this utilitarian strategy exposes any gains made to possible attack should circumstances change to create short- to medium-term savings from the (re)introduction of measures that would reduce patient choice or the need to inform patients. It would secure the long-term protection of patients' rights more surely to create a moral justification for them which is consistent with and can draw on both developing international practice and rooted in Japanese legal and medical culture.

To revert to some of the themes outlined in the introduction, there is clear evidence here of the formation and activity of what Inoue calls 'intermediary communities' in support of patients in their encounters with the medical profession. Moreover the legal profession which has been central to this movement has found inspiration in the internationally generated standards. What has been less evident so far is the extent to which local culture has informed or reinforced the patients' rights movement. The weakness pointed out in the previous paragraph concerning the high dependence on utilitarian arguments and the low profile of local versions of dignity and autonomy are a product of this. Patients' rights activists have been concerned to make demands that have challenged the power relations in the medical encounter. There is a concern though that this may just create a new arena for power relations between the lawyer and aggrieved patient. Given the hierarchical nature of Japanese society, is it possible that we are seeing ideas of patients' rights being used not to challenge the medical profession but to sustain the power of the legal profession?

7 Patients' rights in Korea

In Japan the freedom to develop an interest in human rights ideas combined with the rapid development of the health-care system from the early 1960s generated an interest in rights within health-care provision among a small but influential number of people in the 1980s onwards. The groups, which have been usually centred on law professionals, have been able to confront the health professionals and tip the balance in favour of the patient. South Korea was not tolerant of demands based on rights arguments until the 1990s and it was not until more or less the same time that the basis of a welfare system was created. There was no serious interest in patients' rights until the mid 1990s.

The state in South Korea has from its inception been constitutionally committed to providing its citizens with an adequate level of social security and health care. This developed from the simple statement in earlier versions of the Constitution that the 'State shall endeavour to promote social security' (Par. 30.1 1980, Constitution), to a more detailed commitment to provide social security and social welfare for women, the young and old and the disabled as well as to take measures to prevent injury (Par. 34.1–6, 1987, Constitution). Successive governments have talked about the importance of providing the basis of a genuine welfare society often, as Kwon notes, soon after the elite has violated constitutional rules or democratic procedure. Thus a voluntary health insurance system was unsuccessfully introduced in 1963 and in 1975, following the introduction of the Yushin political structure, there was a second attempt to create a comprehensive health insurance system. Welfare measures were introduced not so much in order to confer welfare rights but as concessions made to increase trust in the regime (Kwon 1998: 50–7).

In 1976, Korea started a programme to provide health insurance which by 1989 had achieved universal coverage. This was introduced in stages. First companies with over 500 employees were mandated to provide health insurance cover and over the next seven years the criteria were revised to include firms with 300+ employees (1979), 100+ (1981), 16+ (1983). By 1990, 37 per cent of the population was covered by one of the 154 health insurance societies and government and school employees were covered by a scheme which

covered another 10 per cent of the population. Meanwhile a Medical Aid programme had been introduced as a 'safety net', non-contributory system, which in 1995 provided cover for 3.9 per cent of the population, the poorest citizens. This left the farmers, the self-employed and those employed in small businesses. After some experimentation, a system of regional medical insurance programmes was devised where central government subsidises 50 per cent of the cost (Yu and Anderson 1992: 290–1).

A co-payment system was initially set up by which patients paid 20 per cent of in-patient and 30 per cent out-patient care. However changes in this were made to provide incentives for patients to visit health centres first and only go to teaching hospitals on referral. Patients who go to an out-patient department of a university hospital without a referral pay the full cost (Yu and Anderson 1992: 297). There may also be some parts of the 'hotel' costs of hospital treatment that are not fully covered. The amount a Korean pays for health care then will vary depending on the type of facility used but in 1990 51 per cent of health cost was paid by the patient and the patient burden can go as high as 60 per cent (Yu and Anderson 1992: 296).

There were a number of problems that this fragmented system faced. There was only limited pooling of risk categories and there was no redistribution possible so the opposition parties demanded integration of the health insurance funds. Kim Young-sam, President 1993–98, showed no interest in this but a measure to integrate the insurance system was passed by the National Assembly in 1998 and was fully implemented by 2000.

Concurrent with these reforms which ensured the steady growth in the demand for health care, there was a rapid increase in the supply. For example, between 1970 and 1994 the number of patients per doctor fell dramatically from 2,216:1 to just over 855:1 (Eccleston *et al.* 1998: 239). This also contributed to changing the nature of the health-care market creating increased competition for patients.

Patients' rights and informed consent

Traditionally relations between doctor and patient in Korea were regarded, much as in Japan, as a situation where the doctor provided treatment less as a service to the patient and more as an act of benevolence which the patient repaid with a gift if and when he or she could afford it. Medical practice on the peninsula was a Korean variant of Chinese medicine until that was challenged by western medical practice, which arrived in the late nineteenth century along with the Christian missionaries and the Japanese colonialists. Following annexation the trend towards the introduction of western medicine was strengthened.

Unlike in Japan there are no patients' rights organisations, few (if any) books on 'informed consent' and little general awareness of the issue. The basic need for consent to medical treatment to distinguish it from assault is accepted within the legal system but the medical profession has not

welcomed the introduction of informed consent as the concept has been developed in the USA and elsewhere. On the other hand, since the early 1990s there has been a desire among some doctors to codify what patients may expect from doctors and hospitals and in 1993 one major Seoul Hospital, the Yonsei Severance Hospital, adopted a 'Bill of Rights' for patients, which became a model for both other teaching hospitals and the Korean Hospital Association. This was followed by the introduction of a Medical Disputes Act to deal with disputes between doctors or hospitals and patients.

Medical malpractice

There was no encouragement to question the role of the doctor until the 1990s and the legal structure was positively protective of their position. However, there were instances of medical malpractice which caused some patients to sue their doctors. When change came it was not change made in the letter of the law. Until the early 1990s the litigating patient had to prove negligence on the part of the doctor which required the evidence of another doctor which was often hard to obtain. From 1990 onwards, however, the courts are reported to have changed their attitudes so that the balance of the burden of proof has shifted to make it less difficult for patients to prove their case (interviews with Lew Seon Ho and Yoon Ki-won, 30 June 1995).

During the 1990s there has been an increase in the number of medical malpractice cases which have found their way to the courts, up from 100 in 1990 to around 300 in 1998 (interview with Yi Un-son, 10 September 1998). It is not easy to use the law to seek redress for medical malpractice and it is not cheap. Even (or especially) the lawyers who specialise in medical law will only take on a case which has a strong chance of success; the basic fee will be W3–5 million (approximately £2–3,000, \$4–5,000 at 2000 exchange rates), in addition to which the appellant will need to pay the costs of medical evaluation or autopsy plus a down payment to the court of 0.5 per cent of the amount being claimed. Around W7 million (£4,000, \$6,000) will be needed before the case starts so that a claim has to be for over W10 million (£6,000, \$9,000) before it is worth starting the process. Since compensation granted is usually calculated on the basis of lost earnings there is no point in making a claim for a person aged over sixty. Because of these difficulties and the cost of using a lawyer it is usually a last resort. Some doctors are willing to apologise and make an out of court settlement. Where this does not happen some patients have used 'third parties' (a.k.a. gangsters) to demand apologies and compensation. Not surprisingly perhaps this has tended to result in defensive medicine – doctors working in small clinics tend to pass on tricky cases to major hospitals.

In 1994, a law on mediation in medical disputes set up a system of mediation councils both at the national level and to work in the regions and major cities. Twelve of these medical disputes committees were set up composed of

people with a law qualification, each serving for three years and assisted by medical specialists and consumers. The system came into operation at the start of 1996. It has not worked effectively and a more robust system was introduced in 1998 in which a panel of experts will consider all cases of alleged medical malpractice in the first instance and decide which should go to court and which should be dealt with through a conciliation process. The medical establishment would like to reduce, and perhaps eliminate entirely, the number of cases that go through the court system. The legal profession has reservations about this. On the other hand the creation of a system which makes it easier for those who allege malpractice to have their case reviewed by an independent third party may well increase the number of cases which go forward (interview with Kim Yong-ik, 10 September 1998). But it is the view of those involved in these cases that a better appreciation of patients' rights might well contribute to the reduction of the incidence of medical malpractice. Often the problem arises from the poor relationship between doctor and patient. Improve this and the number of cases will fall (interview with Yi Un-son, 10 September 1998).

The patients' rights bill

The first organised demands for a patients' bill of rights came from the consumer groups around 1987 but they were strongly resisted by the medical profession which regarded the demands as an insult. However, the first hospital to adopt a bill of patients' rights was Yonsei Severance Hospital. This is the oldest hospital in Korea and while Professor Il Soon Kim was Vice President of Medical Affairs he decided to try to change the nature of doctor-patient relations in the hospital to make it less authoritarian. Once a consensus for accepting the bill had been formed among the doctors it was displayed on posters throughout the hospital. His proposals met very little resistance from his colleagues and so in 1993 the following Bill of Rights for Patients was introduced:

We profess that we will perform medical practice based on the principle of providing quality care to patients causing no disadvantages, respecting the maximum autonomy and practising social justice. Specifically the following rights will be respected:

- 1 Every patient has a right to be concerned and respected as a human being.
- 2 Every patient has a right to receive sincere treatment from medical staff.
- 3 Every patient has a right to know about the speciality of the medical staff in charge.
- 4 Every patient has a right to be informed about his or her disease, present conditions, plans for treatment and prognosis.
- 5 Every patient has a right to decide whether to try a new medical

- therapy or participate in the education on the disease concerned.
- 6 Every patient has a right to be informed of medical procedures such as treatment, diagnosis, operation, hospitalisation etc.
 - 7 Every patient has a right to have his or her medical record inaccessible to any individual except medical staff in charge or legally authorised persons.
 - 8 Every patient has a right to be secured of privacy regarding the treatment.
 - 9 Every patient has a right to be secured of privacy regarding his or her body even when undressed for the purpose of treatment.
 - 10 Every patient has a right to know about specification of the medical expenses.

In the same year Seoul National University Hospital set up a Patients' Rights committee and the Korean Hospital Association established a Centre for Patients' Grievances and devised its own version of a bill of rights (interview with Kim Il-soon, 11 September 1997).

The bill does not go as far as it might. There is no unequivocal right of access to one's own medical record. Patients are not accorded the right to consent to, refuse or cease to receive a course of treatment. There is only indirect reference to notions of patient autonomy and self-determination. Patients' rights remain covered in a patina of paternalism. This is quite clearly a bill of rights devised by doctors and not lawyers. Indeed it may have been a pre-emptive move by the medical profession to reduce the risk that lawyers might create a more thorough-going charter.

The MHW seems to have viewed these developments favourably. In 1994, a Medical Service Law was introduced which formally established the idea of informed consent in Korean law. This established that doctors had a legal duty to make clear the nature of the proposed procedure and they may find themselves liable for damages if they do not.

It is hard to be precise about the patient's right to access to their medical records under Korean law. In interviews lawyers who had taken on cases of alleged medical malpractice told me that it was only possible to get access to a complete medical file with a court order (interview with Kim Chul-Young, 30 June 1995). Bureaucrats and doctors stressed that patients have a right of access to the results of X-rays and tests performed on them, both so they can see them for themselves and so they can take them with them should they decide to change their doctor or hospital. Doctors in Korea, as in Japan, have substantial discretion over the disclosure of serious diseases such as cancer and often decide to tell the family before or instead of the patient. This suggests that patients do not in fact have free access to their own records. Although patients' rights are not yet regarded by it as a serious issue, the Korea Medical Association in 1998 was in the process of devising a new medical code which may include some reference to it (interview with Kim Yong-ik, 10 September 1998).

There has been some discussion about the content of the medical record that may be the prelude to it being made more easily available. In the past a mixture of German and English was used in writing medical notes, recently a mixture of English and Korean is more usual. There have been demands that only Korean should be used so that the records are more readily comprehensible to patients. Doctors object that there is no generally agreed set of terms in Korean, that the main textbooks are written in English and that it would take longer to write in Korean (*Kenrihō News*, vol. 44, 20 March 1995: 11–2). None of these arguments are persuasive. Reform of the Medical Services Act may permit a greater right of access to medical records.

One senses a trend towards the opening up of health records driven by 'market forces', not opposed by the MHW and only resisted by the medical profession on the grounds that it will make it more difficult to conceal the onset of such terminal illnesses as cancer. It is possible that a right of access to medical records may be included in the forthcoming reforms to the health insurance systems and the medical service law (interview with Kim Yong-ik, 10 September 1998).

Patients' rights in psychiatric care

Traditional Korean attitudes towards the mentally disordered have been to try to isolate them from society, to avoid communicating with them and generally not to treat them fully as human beings. Often if kept at home, they were locked away. The introduction of a health insurance system made it easier, or at least more affordable, for them to be hospitalised and this is reflected in the number of psychiatric beds which has grown from 14,456 in 1984 to 45,194 in 1997, at a time when the population as a whole grew from just over 40 to nearly 46 million (MHW statistics). However care needs to be taken when assessing the statistics. Kim Cheon Bong reports that in 1991 the Korean government estimated that there were 907,000 people suffering from mental illness, of whom 105,000 were considered to be in need of hospitalisation (Kim 1993: 179). Later in the same article he quotes from Ministry of Health and Social Affairs figures to suggest that there are over 1.9 million mental out-patients but only 10,803 beds for 37,698 in-patients (Kim 1993: 184). This suggests that there is some inconsistency in definition, possibly confusion between the category of mentally handicapped (permanent disability) and mental illness (a temporary condition which nevertheless might need hospitalisation). It is of course possible that the 'East Asian' attitude towards mental disorder is in part a cause of this confusion.

Whatever the precise extent of the incidence of mental disorder in South Korea there is abundant evidence that those kept in institutions are poorly treated. Kim Cheon Bong reported that in 1989–90 there were over 3,000 mentally disabled held in institutions where they 'lead a concentration camp like life that is near to maltreatment'. Moreover he suggests that there are

10,000 mentally disabled held in concentration camps for young vagrants where they endure 'maltreatment rather than humanistic treatment for cure'. Meanwhile approximately 18,000 were held in sanatoria, often 40–50 to a room with no access to a doctor, 'in prison-like circumstances, enduring animal-like living with cruel violence and surveillance' (Kim 1993: 184).

However this is not a topic that has been of much concern to human rights groups, at least not until 1998. The 1992 'Counter Report' issued shortly after the government's initial report to the UN under its obligations under article 40 of the ICCPR, expresses some concern about the 17,000 mentally disabled people housed in seventy institutions where there is no access to a full-time psychiatrist (Minbyun 1992: 107). Three years later the Counter Report to the government initial report under its obligations under the ICESCR devotes the whole section on The Right to Physical and Mental Health (article 12) to a discussion of the law on environmental protection regulations. Patients' rights issues were not mentioned (Minbyun 1995: 67–71).

Until 1995 there was no unified mental health law in Korea. Psychiatric and mental health care was covered either by the Medical Service Law or the Social Welfare Law. Although there was also a Social Safety Act which permitted the use of court orders to place individuals with mental disorders into custody to protect 'community life' (Yoon 1990: 81–2). Mental health was treated mainly as a social order issue.

There had been attempts under the military regimes to reform the mental health-care system but these reforms were resisted by the medical profession among others who feared that psychiatric hospitals might be used by the government to silence dissident critics. Such fears apparently disappeared following the election of Kim Young Sam's 'civilian' government in 1992. A Mental Health Law was approved in 1995 and came into effect in March 1997. At the same time a Mental Health Policy Division was created within the MHW and this began operating in June 1997.

Psychiatric patients are to be found in five different kinds of institutions: the psychiatric wards of general hospitals (20.5 per cent of those in institutional care); national, public and private psychiatric hospitals (with 5.3 per cent, 7.5 per cent and 24.9 per cent of the hospitalised); and finally institutions that the MHW refers to in its documents as 'Psychiatric Asylums' of which there are seventy-eight which house 41.8 per cent of those committed to mental hospitals (MHW documents, September 1997). In addition there are reports of a large number of 'unlicensed' institutions where there are between 5,000–10,000 individuals with mental disorders who have been placed there by relatives and who are undergoing whatever treatment they receive unsupervised by trained psychiatrists (interview with Kim Byung-hu, 11 September 1998).

The system for admission to mental institutions was reformed by the 1995 Act. Around 80 per cent of admissions are 'admissions by relative', which requires the request of a relative and the agreement of one psychiatrist. Ten

per cent of admissions are 'voluntary' and the remaining 10 per cent are 'emergency admission'. The final category, 'compulsory admission', is hardly ever used as it requires the presence of two psychiatrists and an administrative officer, usually a policeman. Although the system has been reformed in theory, the practice of psychiatrists remains largely unchanged by the new law (interview with Kim Byung-hu, 11 September 1998).

Bureaucrats in the MHW accept that there is a tendency for psychiatric patients to remain in Korean hospitals for longer than usual in the west but they claim it is not possible to provide statistics which would enable comparison with Japan or Taiwan. Kim Cheon Bong quotes figures for 1989 suggesting an average length of stay of between seventy-seven and 107 days, an average of ninety-four days. But there is reason to believe that these are underestimates. The maximum length of stay in a national institution is six months and, where an individual or family is paying the full cost, the length of stay in a private hospital is only three months. Informal estimates suggest that where there is funding through the national health insurance system patients stay, on average, four years in private hospitals and seven years in the 'psychiatric asylums' (figures provided by Kim Byung-hu).

Overall the number of psychiatric beds has been increasing rapidly in the 1990s to reach 98 per 100,000 population by 1997 (still much lower than the level in Japan which reached 290.5 in 1993). The number of beds in the private sector, both the hospitals and the asylums, has more than doubled since the 1980s. One aim of the new law is to alter this costly trend by promoting the development of rehabilitation units so that patients can be returned back to the community much faster than in the past. A community mental health service system is planned to be introduced over the next few years. Starting with five built in 1997 the aim is to have 210 social rehabilitation centres for the mentally disordered running by the end of 2003 – forty will have to be opened each year in the period 2000–2003 if the plan is to be fulfilled. This is an ambitious target and there must be doubts whether it can

Table 7.1 Trends of psychiatric beds in Korea

	1984	1987	1990	1993	1997
<i>Mental hospital</i>					
– public	1,930	2,663	3,708	4,280	5,779
– private	1,022	2,542	4,964	5,763	11,255
<i>General hospital</i>	3,155	4,370	5,437	6,872	9,252
<i>Psychiatric asylum</i>	8,349	12,538	17,432	17,696	18,908
<i>Total</i>	14,456 (100)	22,113 (152)	31,541 (218)	34,615 (239)	45,194 (313)
<i>Population of RoK</i>	(100)	(103)	(106)	(109)	(114)

Source: MHW documents 1997

be met in the face of public indifference and the financial crisis which has affected public spending in Korea (interviews at MHW, 8 September 1997 and documents). As of 1998, there was no sign that the rate of increase of admission to psychiatric hospitals had been reduced.

The 1995 Mental Health Act defined the rights of the mentally ill and the extent to which hospitals may restrict a patient's rights. Definitions of mental health workers – nurses, psychologists, social workers – and mental health institutions – clinic, hospital, long-term hospital – are made clear. Most important was the decision to promote mental health through health centres in the new community rehabilitation centres, which suggests a rejection of the traditional attitudes to mental disorder. Finally, a tribunal-based system has been established which will consider requests from patients for their release or the improvement of their care (interviews at MHW, 8 September 1997).

However conditions in most psychiatric wards are poor and have not improved since the implementation of the act, except perhaps in the wards attached to general hospitals. Most wards are closed and crowded. Treatment takes place without patient consent. Patients do not have free access to the outside world by telephone or uncensored mail.

A Mental Health Review Tribunal (MHRT) system now exists with fifteen people sitting on a central committee and twelve regional committees with twelve members each. They conduct a paper review of the circumstances of all those not admitted voluntarily and may hear appeals from patients about alleged illegal detention or poor ward conditions. However, as of September 1998, no one had made use of this appeal system. The MHRT based in the Seoul area announced in autumn 1998 its intention to visit some mental hospitals in the capital, which may be a sign that it wishes to play a more pro-active role. So far, though, the system has been ineffective in enabling mental patients to challenge the decisions of medical professionals.

The Yang-gee village incident

In July 1998, Park Jong-moon escaped from an institution called the Yang-gee village in Ch'ung-ch'on province. He went to Seoul and contacted the Inkwon Sarangbang. The Sarangbang group put together a team consisting of two human rights workers (from Sarangbang and the Catholic human rights committee), a psychiatrist and a member of the National Assembly, which went to investigate conditions in this community. Accompanied by a few others they arrived at the gates of the 'village' at 7.30 am and forced their way in. What they found was two buildings; one used to house homeless vagrants who had been taken forcibly off the streets and the Song-hyun Won, a 'facility for mental recuperation', which held 320 people. Further investigation revealed a series of illegalities including compulsory solitary confinement, forced labour for low or non-existent wages, compulsory medication, violent treatment by the guards and evidence of embezzlement of

government subsidies (*Korean Human Rights News*, Monday 27 July 1998, interview with Suh Joon-sik, 7 September 1998).

The issue was taken up by other human rights NGOs. Representatives from PSPD and *Minbyun* co-operated with a professor from Chonju University to produce a detailed report on the background to the incident. The publicity forced the MHW to initiate its own investigation. The director of the facility, Noh Jae-joong, was charged with illegal kidnapping and illegal detention. A campaign began to create a systematic 'civil watch' which could monitor the operations of such institutions.

The report produced by PSPD/*Minbyun* shows that this is not the first such incident. Since 1987 there have been reports of twenty-four institutions where there has been alarm at the use of corporal punishment, sexual abuse, forced labour or financial mismanagement. Not all these incidents took place in psychiatric institutions, some occurred in children's homes, homes for the disabled or institutions for the homeless. The same report shows that in addition to the forty-two facilities which house 13,370 vagrants, mostly plucked off the streets, there are 17,944 people in seventy-five 'psychiatric recuperation institutes' (which I assume are the same as what the MHW calls asylums) plus other similar institutions which house former prostitutes. Most, probably all, of these are privately run with only minimal supervision by the MHW (interview with Yi Chan-jin, 10 September 1998; Baek Chung-man *et al.* n.d.: 6–7). Not all have strict rules preventing inmates from freely leaving the premises or communicating with the outside world (as was the case in the Yang-gee village) but all have the power to adopt such rules if they so wish. Reports of mistreatment in these institutions are not new. What makes the Yang-gee village incident different is that the resulting campaign has involved human rights NGOs and the problem is being defined in 'human rights' terms.

The campaign criticised the failure of the MHW which is supposed to supervise these institutions through its local representatives. At the very least it would seem that the MHW local representatives were members of the same local elite as those who ran the institutions and reluctant to enforce the regulations. At worst, it was suggested, the local MHW representatives receive money from the directors of these institutions in return for turning a blind eye to physical and financial abuse. The campaigners sought a reduction in the use of such institutions and the recognition that enforced detention in such places raises human rights issues. Finally, they argued that if it really is necessary for there to be institutions such as these, mechanisms need to be put in place to ensure an element of 'due process' in the course of admission, to ensure protection from abuse while within them and to allow appeal to a third party to enable discharge (interview with Yi Chan-jin, 10 September 1998).

This could well prove to be a turning point in the discussion of the rights of the mental patients in Korea in the same way as the Uchinomiya incident was in Japan. The three most active and well-supported human rights NGOs

– PSPD, *Minbyun* and *Inkwon Sarangbang* – are now engaging with the issue and seem likely to continue to develop the campaign.

Although there has been a small patients' advocacy group (membership of 1,000 with no more than fifty active at any one time) it has been more concerned with the rights of the family members and the need for more cheap institutions than with the promotion of a community-based approach to psychiatric care or the protection of the rights of psychiatric patients in hospital. This is the first time that there has been a serious interest in the problems faced by the mentally disordered.

Conclusions

There can be no doubt that the reforms of 1995 were introduced in the spirit of the UN principles, possibly directly informed by them. Whether they are successful in changing attitudes will depend on a number of factors. First, it will be costly in the short- to medium-term to set up the community-based mental health-care system as new personnel will have to be trained and new facilities built in urban areas. Second, Korean mental health-care professionals are currently oriented towards hospitalisation rather than rehabilitation so there is also the need to re-train the existing professionals. Third, the problem remains of public attitudes towards mental health. The largest category of admissions is admission by relatives who do not want them at home and may not want them back. On the other hand the trend towards the long-term hospitalisation of the mentally disordered, which has accelerated since 1970, especially when the health insurance system made it affordable for most families, is an expensive option. Once more it seems that the human rights promoting option is more likely to find support when there is a congruent economic case.

The malpractice cases that came to court did not create the basis for groups interested in patients' rights or reform in the health-care system as happened in Japan, or at least they have not yet. Lawyers do report some change in the balance of forces within the legal system so that they are no longer so heavily tipped in favour of the medical profession. The medical malpractice tribunal may make it easier for patients to have their complaints heard and this may increase the number of cases coming forward but the system still seems to be under the control of the medical establishment.

Certainly it has been the medical profession that has kept control of the agenda relating to patients' rights. The Bill of Rights produced at Yonsei hospital has so far precluded the possibility of a more radical document being produced, which would incorporate a right of access to medical records or to refuse treatment. At best this amounts to no more than a clear statement of the immunities of patients, it does not recognise or create new powers or claims that they might be able to exercise over the medical profession. It may be that some change may take place as market forces enable patients to seek out those medical services most suited to their needs and

this may include recognition of the patient playing a more active role in the treatment process.

In the area of psychiatric care there is no perceptible change of policy or of trends within the system. Despite the implementation in 1997 of the new Mental Health Law there have been no changes in the process by which patients are consigned to institutions. No changes seem to have been made in the right of patients to remain in contact with the outside world. No effort seems to have been made to close down the unlicensed institutions or to insist on basic humanitarian standards of treatment in them. There is no effective system of appeal that can enable a patient to get release or improvement of treatment.

South Korea seems almost untouched by the international standard setting that has taken place in medicine. Although many Korean doctors, particularly those who work in teaching hospitals, have experience of training in the west, mainly the USA, there has been very little interest in introducing such rights-centred ideas as informed consent. Although the 1995 Mental Health Act may have been created in the spirit of the UN principles there is very little evidence of them in the operation of the act. Certainly there are none of the procedural safeguards prescribed in the act and the evidence available from the Yang-gee village incident suggests that many facilities do not comply with the basic standards set out in the UN principles.

There are some glimmers of hope that the situation may improve. Recent suggestions that the MHRT in Seoul may play a role inspecting mental health institutions may force them into making improvements. Meanwhile the development of interest by human rights NGOs following the Yang-gee incident may add to the pressure for improvement.

Nevertheless it is hard to avoid the conclusion that in Korea the medical profession has retained control of the situation and has been able to resist the small amount of criticism that has been made of it. What might be a stimulus to change would be the emergence of the view that Koreans have a right to high-quality health care, something that might emerge in the near future as changes take place in the structure of the health insurance system. Similarly the government has committed itself to a system of care for the mentally disordered based on community facilities. One could imagine individuals and groups making demands on the system to deliver these promised facilities, trying to enforce the benevolence promised by the government. However that would require a change in the public's attitude to mental illness and there is no sign of that happening yet.

8 Patients' rights in Taiwan

The medical systems in Japan and South Korea have resisted, with some success, the attempts that have been made to empower patients so that they are able to make claims against medical professionals. Nevertheless there has been a perceptible change in the role played by patients within the health-care process as, on the one hand, benefits of the health insurance system spread throughout the population and the currency of rights ideas circulated more widely. As we shall see a comprehensive health insurance system was introduced into Taiwan in 1995 and the aftermath of democratisation has created a general interest in human rights. How, then, has this affected the ability of patients in Taiwan to ensure protection of their dignity when undergoing medical treatment?

The health-care system

Japanese colonial rule provided the context and a set of values for the development of the health-care system in Taiwan. As in pre-war Japan, doctors in Taiwan were accorded high social status. After 1945 the arrival of the 'mainlanders' enabled them to control many of the key political and administrative posts blocking paths for advancement for indigenous elites. Taiwanese families in the 1950s, therefore, tended to encourage their children to enter the medical rather than the legal profession. Later, when the KMT adopted the 'Taiwanisation' policy, it sought to recruit precisely these social groups. In this way the identification of the medical profession with elite status, which began under the Japanese, was reinforced in post-war Taiwan. We might note that this is quite different to the situation in mainland China where medical culture accords much less respect to the doctors and patients are much more likely to argue with or criticise a doctor (interviews with Sun Sen-yen, 6 November 1995; Huang Mab, 8 November 1995; Lee Sheng Long, 4 October 1997).

Before it was forced to cross the Taiwan straits, the KMT had committed itself to a social policy designed to establish a welfare state as a tactic to outmanoeuvre the Communists. However, social policy has always played a role subordinate to and supportive of the KMT's priority on consolidating

Taiwan's security via economic growth. Social insurance programmes developed in a patchwork-like manner: three programmes were created in the 1950s and 1960s, nine more in the 1980s. By 1995 there were fourteen main programmes covering 59.7 per cent of the population and responsibility for them was spread among central and provincial governments (Kwon 1998: 45; Ku 1998: 126). The 40 per cent without cover were mainly people over 65 or under 14 (Yang 1997: 26).

Although no longer a member of the UN, the RoC government remained sensitive to pressures from such organisations as WHO and UNICEF. In response to WHO's year of 'Health for All' the Prime Minister, Yu Gow-haw announced in February 1986 that a National Health Insurance system would be introduced by the year 2000 (Kwon 1998: 48). Over the next couple of years the DPP emerged to lead the opposition movement and included demands for the early implementation of the NHI scheme in its policy bundle. Responding to this, the government agreed to have the system operating five years earlier than the original schedule, by 1995 (Kwon 1998: 49; Ku 1998: 121). By the end of 1997, 97 per cent of the population was covered by the system (Ku 1998: 126).

This replaced all the pre-existing systems and covered practically all the population for illness, injury and child delivery plus some aspects of health promotion. Treatment for patients suffering mental disorders is not a benefit provided by NHI but such patients can claim government resources through schemes set up by the 1990 Mental Health Law (Ku 1998: 129).

A co-payment system is built into this structure but in order to minimise public resistance this was suspended by administrative order when the system was introduced. Similarly a plan is in place to base payment to health-care providers on the basis of Diagnostic Related Groups (DRGs). This was regarded as restricting the clinical freedom of the medical professionals, and likely to cause accounting problems at first so this too has been suspended to reduce opposition (Yang 1997: 29). Nevertheless there is no doubt that both will be introduced and will work to effectively contain health-care costs. For the moment health-care reimbursement is on a simple fee for service basis but even without the introduction of the DRG system, the medical profession in Taiwan since 1995 has been under much tighter administrative control than ever before.

As Ku comments, 'The system is designed to promote a maximum market mechanism in which every doctor and hospital must rely on providing a better service to attract customers' (Ku 1998: 126). Moreover at the same time as the creation of health insurance was making access to health care cheaper, more doctors were being trained: the number of patients per doctor decreased from 1:2,300 to 1:950 between 1963 and 1988 and further to 1:837 by 1997. Meanwhile the proportion of doctors working in small clinics has gone down from 83 per cent to 47 per cent, 1963–1988 and to 39 per cent by 1997. Just as in Japan and Korea, in the absence of a primary-care system

many patients prefer to be treated in a large hospital. Hospitals are either publicly owned by central or local government (ninety-seven of them, most quite large) or privately operated (653 altogether) with the public:private split being 13:87 (Yang 1997: 22).

During the 1990s the conditions were created that we might expect to lead to demands for patients' rights. The 'industrialisation' of health-care provision, cheap access to the system for practically the whole population, the need for hospitals to compete for patients on the basis of the quality of service and the possibility that good profits could be made by even less than scrupulous physicians.

Patients' rights and informed consent

Yang Hsiu-I writing on informed consent in 1997 concluded, 'For most Taiwanese physicians and lawyers ... it is an unheard notion and rarely invoked' (Yang 1997: 42). The notion of patients' rights rarely surfaces in the minds of all but a few specialist lawyers. Until 1986 there was no legal requirement that a doctor had to have the patient's formal consent, even for surgery. Where they did get consent it was mainly to have the patient waive any right to redress should things go wrong.

In 1986 a Medical Care Act was promulgated which aimed among other things 'to upgrade medical care quality, to ensure patients' rights and to promote national health' (Par. 1). That, however, is the only time the act makes any reference to patients' rights and most of the act is designed to establish basic definitions of medical institutions. A crucial section for our purposes is Par. 46, which stipulates:

When performing a surgical operation a hospital shall obtain the consent of a patient or his/her own spouse, relative, or related person by asking him/her to sign a letter of agreement for operation and anaesthesia. Before the signing a physician shall explain to the patient or his/her spouse, relative or related person the reason of the operation, the success rate or the possible complication and risk.

(DoH translation n.d.: 9)

This seems to require informed consent and yet, as Yang points out, the purpose is not to improve patient autonomy. A number of people can give their consent and as long as one of them does so the obligations of the hospital are fulfilled. The 1995 Department of Health version of the consent form includes a note that it should only be signed by someone other than a patient when the patient is a minor or unable to sign, but it is not clear whether in law someone can give valid consent to surgery against a patient's express objection (Yang 1997: 42–3).

Medical malpractice

However the topic of patients' rights has not been completely ignored. A Consumers' Foundation was established in Taipei in 1980 and during the 1980s it established fifteen committees, one of which was concerned with medical care. It was never very critical but nevertheless it was the only forum for criticism of the medical profession apart from launching a full lawsuit for medical malpractice. Most of the members of this fourteen strong committee are medical professionals, two are lawyers. It has tended to act as an agency for conciliation. When it receives a complaint the senior doctors who serve on the committee may be able to get access to the patient's records and resolve the particular dispute. Each month the committee will look at an average of ten cases, a hundred in the course of a year. However it has no power. If a hospital refuses to co-operate or ignores its recommendations all it can do is to suggest to the patient that he or she use the court system (interview with S.L. Liu, 9 October 1997).

After several years of campaigning, in 1994 a Consumer Protection Law was introduced. Article 7 of this states that those: 'designing, producing, manufacturing or furnishing services shall ensure that there are no safety or sanitation dangers of their furnished goods or services' (Consumers' Foundation translation n.d.: 4). The Consumers' Foundation argues that this should apply to the provision of medical care too, although this is not accepted by the medical profession. It is the basis however for the continuing activities of the Medical Care committee though it remains the case that the in-built majority enables the medical profession to maintain control over the patients' rights agenda.

In December 1997 a Taipei court ruled that a hospital had a no-fault liability in a case that relied on the above-mentioned article of the Consumer Protection Law. In fact the key issue here was the lack of the patient's informed consent but the young judge (aged twenty-six) was not familiar with that concept so the court used the no-fault liability clause in the Consumer Protection Law to provide compensation for the plaintiff. The judgement has been criticised as too protective of the medical profession as there were grounds for considering the medical staff to have been negligent, but the case has caused great concern within the medical services industry. Hospitals have looked very carefully at the content of their consent forms. In a separate case in early 1998 a court found a doctor criminally negligent and sentenced him to eighteen months in prison – a length of sentence significant in that sentences over twelve months cannot be commuted into suspended sentences (interview with Yang Hsui-I, 22 September 1998).

From 1962 until 1986 the responsibility for dealing with cases of alleged medical malpractice lay almost entirely with a Medical Disputes Reviewing Committee (MDRC) which was composed of between 7–11 doctors and funded by the Taiwan Physicians Association. Almost every case that was taken to the courts was referred to this committee for an 'expert opinion'

which was later accepted by the court. Prior to this, courts had made decisions based on the judges' assessment of the often conflicting testimony. This was disliked by the medical profession as the resulting court decisions were unpredictable.

Growing public dissatisfaction with the MDRC led to the inclusion in the 1986 Medical Care Act of proposals to create Medical Review Boards (MRB) in both central government and local health authorities, which have a broad remit to review medical technology, experiments on humans, the promotion of medical ethics, the approval of plans to build large hospitals and 'matters concerning the examinations entrusted by juridical and prosecuting organisations' (Par. 73.4). So as before, when a court encounters a case of possible medical malpractice, the judge will refer the case to the central MRB for an 'expert opinion'. This board is still dominated by the medical profession of various specialisms, ten of them, but there are five others, presently two professors (law and sociology), a judicial official, a legislator and a social worker (interview with Chang Ly-yun, 9 October 1997).

The central MRB meets each week considering up to fifteen cases each session. Its decisions are not binding on the court but it is reported that 80 per cent of the time the court will accept its conclusions. Of the cases that it considered between April 1987 and November 1995 it found clear evidence of negligence of the provider in 10.2 per cent of the cases, possible negligence in 6.9 per cent and no evidence of negligence in 59.7 per cent of cases (Yang 1997: 59). These figures do not give much encouragement to those few lawyers who take on cases for patients. The MRB does not hear cases in public. There is no opportunity for the representative of the patient to question the evidence provided for the MRB or even to question the representative of the MRB who delivers its conclusions to the court (interview with Lee Sheng Long, 4 October 1997). One cannot conclude that this system has the protection or promotion of the rights of patients as its main aim.

One key issue in medical malpractice disputes which has much wider significance is that of access to medical records. Hospitals have been obliged since 1986 to keep 'clear, detailed, exact and complete' (Medical Care Act 1986, Par. 48) medical records but they do not and, some suggested to me legally may not, show them to the patient. Patients only have a right to 'a summary of the medical record' when he or she is discharged or moves to another hospital (Par. 50, 51, 52). In medical disputes the court may allow access to the full medical record but this is a slow process which gives plenty of time for doctors and hospitals to amend the records, illegal though this is (interview with Lee Sheng Long, 4 October 1997; Yang 1997: 60).

The burden of proof in such cases is on the patient to prove negligence or lack of medical care. Until 1989/90 medical records were poor, often incomplete, but gradually the courts and the MRB have adopted the assumption that if something is not mentioned in the medical record then it was not

done and the quality of the medical records has improved. This may be a direct result of there being non-medical professionals serving on the MRB. Moreover since 1995 there has been increased state supervision of the health-care system as the state monitors medical practice to prevent fraud and abuse. This should improve the quality of records and make it more difficult for doctors to hide clinical mistakes but it will do little to improve the quality of patients' rights if they have no access to their records. The Department of Health began to revise the Medical Care Law late 1999 and the new law will include a provision which will give patients right of access to their full medical records.

Patients' rights

Demands for patients' rights do exist. On 10 December 1995 a small group, led by the lawyer Lee Sheng Long, launched the Declaration of Patients' Rights in Taiwan:

- 1 Medical Care is a matter of social welfare, not a commodity.
- 2 Health is a basic human right: all registration fees should thus be paid by the government.
- 3 Patients have the right to photocopy all or parts of their medical records.
- 4 All medical records should be written in Chinese so as to allow patients to exercise their right to know.
- 5 Patients have the right to participate in the decision-making process concerning their own health and the suggested medical treatment; their wishes and desires should be respected in all cases.
- 6 Patients have the right to request referrals as well as to be discharged against advice.
- 7 Before receiving treatment, patients have the right to be informed about the details of their condition, the treatment to be applied, as well as possible complications following the treatment.
- 8 Patients have the right to inquire and be informed about the names, the titles, and the capacity of the medical staff responsible for the prescribed medical treatment or services.
- 9 Patients have the right to file civil, criminal and administrative lawsuits against all cases of medical injustice and malpractice.
- 10 Patients have every right to a humanistic and dignified medical care.

Lawyer Lee specialises in medical malpractice disputes and, like his counterparts in Japan and Korea has concluded that a major factor in the process that leads to medical accidents is the lack of information made available to patients. However, so far there has been very little interest in or reaction to his proposal. Although there is increasing competition between doctors and hospitals as the number of doctors increases, this has not led to hospitals

adopting patients' rights charters as happened in Korea. Market-oriented medicine has not led to the promotion of patients' rights.

Although there are some 'self-help groups', for example of diabetics, there are no patients' rights organisations. The nearest thing to such a group is the Consumers' Foundation mentioned earlier. Despite the fact that many senior doctors have studied in the USA or are familiar with US medical practice, there has been little or no interest in American attitudes to patients' rights. In the absence of interest among the medical profession and without any organised patients' movement it seems unlikely that proposals such as those from lawyer Lee will get very far.

Mental health care

The first mental hospitals were established in Taiwan in the 1920s with a government funded hospital set up in 1930. The first chair in psychiatry was created at Taiwan National University in 1947 and was taken up by Lin Tsong-li who was trained in Japan. He proposed a plan which would have created an integrated mental health service combining in-patient psychiatric care with a system of community-based care in which most treatment and counselling took place in facilities which aimed at rehabilitation. This initial orientation towards care in the community was quite different to that in Japan and is said to be the reason why Taiwan did not create a large number of long-stay hospitals (Salzberg 1992: 43–4; interviews with Drs Hu Weiherng and Chen Chiao-chicy, Taipei City Psychiatric Centre (TCP), 8 October 1997).

Traditional attitudes to mental illness are, however, similar to those in Korea and Japan. Families will delay seeking psychiatric care for as long as possible preferring to have the problem treated as a somatic illness or to use traditional healing methods. One consequence of this is that by the time the patient does receive psychiatric care the symptoms will often be severe. Families delay the possibility of having a family member labelled 'mentally ill' as that would, among other things, label the family as potentially unacceptable as a source of young adults for marriage (Salzberg 1992: 46 n. 18).

The community-based system proposed in the late 1940s was never implemented as the government placed mental health at the bottom of its priorities in welfare provision. Moreover the biggest public health-care insurance scheme, Labour Insurance, which in 1988 covered 5.98 million people did not include psychiatric care until March that year. Two events in the mid 1980s focused public opinion on the mentally disordered. One involved a young male schizophrenic who entered a primary-school classroom and poured sulphuric acid on twenty pupils. The other was the fatal stabbing of a senior official in the Ministry of Finance by his wife, a delusional schizophrenic. One, almost immediate, response was that from July 1985 the city of Taipei instituted a policy-free psychiatric care (Salzberg 1992: 51).

Up to this time the state of psychiatric care in Taiwan was poor. Private hospitals were built to supplement the paucity of public provision but many of these were not controlled by a qualified psychiatrist. Many chronic psychiatric patients either in public or private institutions were covered by social welfare payments which were only sufficient to pay for care, leaving nothing to cover the cost of treatment. They were at best 'long term holding facilities for the chronically ill', at worst 'human warehouses' (Salzberg 1992: 53 n. 51). The 1980 law to protect the rights and welfare of the handicapped excluded mentally handicapped patients (Yeh 1993: 453).

In 1981 the government began to take an interest in mental health policy and the Mental Health Association (MHA), a professional body composed mainly of mental health-care professionals, was asked to draft a legal framework for psychiatric practice in Taiwan. Until that time there were no regulations on admission procedures, patient care or discharge from hospital. There was no programme of inspection or supervision of hospitals. A great deal depended on the attitude of the family or was left to the discretion of the doctors.

The Mental Health Association draft was completed in 1983 but the project was then set aside for four years as both psychiatric manpower and facilities were inadequate to operate the proposed system. In 1987 a task force was created in the DoH to provide for the development of a Regional Psychiatric Care Network which seems to be modelled on the plan first set out in the late 1940s (Salzberg 1992: 51). A law was approved by the Legislative Yuan in November 1990 and came into operation the following month.

That at least is the 'official' account of the background to the creation of the 1990 Act. An alternative account suggests that the KMT had committed some political prisoners to lifelong treatment in mental institutions and the DPP members in central and local government were keen to prevent that kind of abuse. Second, because the formally registered psychiatric institutions had grown very slowly, there had been rapid growth in the number of semi-legal sub-standard institutions. Reform was therefore required to establish regulations for the future and to legalise the situation of existing institutions (interview with Lee Sheng Long, 4 October 1997).

The 1990 Act seeks to create a system in which 'Each level of government will establish or encourage the private sector to establish psychiatric treatment institutions, psychiatric rehabilitation institutions and mental health guidance institutions' (Par. 12.1). Crucially the law stipulates that the private health insurance schemes operating in 1990 shall pay for the entire range of psychiatric services set out in article 25 of the Act, i.e. not only the actual hospitalisation but also 'community rehabilitation and at home treatment'. The new law creates two categories; 'ill persons' and 'severely ill persons'. While the former have an illness, the latter is not only ill but 'unable to manage his own affairs or is clearly likely to injure others or himself ... and

who has been so diagnosed by a specialist physician' (Par. 5.2; Salzberg 1992: 63). Family members are obliged to get medical attention for an 'ill person'. A 'caretaker' is assigned to the 'severely ill person', usually an immediate relative, who is responsible for having the patient receive medical treatment, to assist in hospitalisation and responsible for the prevention of harm to others. The Act only deals with 'compulsory hospitalisation', which can be effected by two specialist physicians for admission initially for seven days 'evaluation', then after thirty days, and at six month intervals thereafter (Par. 21 and 23).

The act specifies that a psychiatric care institution, 'shall explain the nature of the illness, the plan of treatment, the prognosis, the reason for hospitalisation as well as the rights of the ill person and related matters, to the person concerned and his caretaker' (Par. 27). Special treatments may only be carried out when the ill person or their representative has given written consent (Par. 31, 32). There is a full chapter entitled 'Rights of Ill Persons' which begins, 'The personal dignity and legal rights and interests of ill persons shall be respected and protected and they shall not be subjected to discrimination, cruel treatment or unlawful uses' (Par. 36). There are further guarantees to personal privacy, to the right to freely communicate with the outside world and to meet visitors.

How effective this law is will depend on the effectiveness of the system in moving people out of full-time hospitalisation and into rehabilitation facilities. There is no independent appeal system. The law allows for complaint that a patient's rights and interests have been violated to be addressed to 'the organ having authority with respect to health at any government level' (Par. 39.1). But there is no equivalent of the UK Mental Health Review Tribunal or even the Japanese Psychiatric Review Boards. The psychiatrists' opinions are fundamental and final to the decision of involuntary hospitalisation at both the admission and review. At the end of a six-month period, the patient or his (her) caretakers can 'informally' apply for discharge as can other voluntarily admitted mental patients. If the hospital permits such a discharge request, it will file a 'discharge brief' with the Department of Health (DoH). Since the DoH does not have particular rules regulating such discharge decisions, whether to grant a discharge request seems purely at the attending psychiatrists' discretion. Theoretically speaking the patient or caretaker could use the complaint procedure to request a discharge but this has never been done and may not be used to try to overcome the decision of psychiatrists to commit an individual to hospital (Yang Hsui-I, personal communication, July 1998). Those who would defend the practice of psychiatric medicine in Taiwan emphasise the extensive use of regular peer reviews of the personnel and facilities in hospitals for the mentally ill. However much this may maintain the quality of health-care provision in Taiwan, it does nothing to protect patients' rights or empower the patient within the system.

There is also an assumption that the interests of the caretaker and the patient will always coincide. Yet the experience of Japan suggests that

caretakers like the *hōgōgimusha* may often be the people who want the patient to be kept in hospital for fear of the social disgrace or social disorder that may be caused if she/he is discharged from the hospital to live at home. If the rehabilitation facilities are created and the appropriate staff trained this need not be a problem. Tables 8.1 and 8.2 illustrate the growth in psychiatric care provision since 1985.

While these figures can be presented to demonstrate rapid growth, in absolute terms the number of community-based facilities and the number of patients being treated in them remains quite small. The DoH has a plan to increase the number of in-patient beds to 20,000, suggesting that this is the maximum number of beds required. (Calculated on the need for ten beds per 10,000 population or on the epidemiological basis of an incidence of 0.3 per

Table 8.1 Psychiatric manpower provision in Taiwan, 1985–97

	1985	1991	1996	1997
<i>Psychiatrists</i>	202	454	629	705
<i>Nurses</i>	832	1,292	1,832	2,146
<i>Clinical Psychologists</i>	48	103	170	203
<i>Social Workers</i>	35	112	187	202
<i>Occupational Therapists</i>	79	163	204	229

Source: Department of Health figures, 1997

Table 8.2 Psychiatric care facilities in Taiwan

	1985	1991	1996	1997
<i>Facilities</i>	79	112	160	177
<i>Beds</i>	11,066	11,935	14,045	15,318
<i>Patients in day care</i>	179 11 units	559 18 units	1,895	2,277 55 units
<i>Provincial/Municipal hospitals with outpatient services</i>	5	22	28	28
<i>Patients in community rehabilitation facilities</i>	0	461	945	683
<i>Number of half-way house beds</i>	18	71	359	519

Source: Department of Health figures, 1997

cent of psychotic patients in the population (=60,000) of whom one third will need hospitalisation at any moment in time).

There are proposals for the reform of the 1990 Mental Health Act. On the one hand, some psychiatrists seek to reduce the amount of written patient consent at present necessary prior to the use of electro-convulsive treatment (interviews at TCPC, 28 September 1998). On the other hand, the Mental Health Association, a group of psychiatric health professionals and representatives of families with mentally disordered patients, wants to remove the legal responsibility of the family or caretaker for the patient in order to reduce the reluctance of families to having the patient back home. At the same time they want to change section 21 so that it is no longer necessary for a person to be so severely ill that he/she is 'likely to injure others or himself' before being committed for full-time in-patient treatment. It should be possible to have someone hospitalised before the situation becomes so acute (interviews at the Mental Health Association, 23 September 1998).

Another aspect of the proposed reform is that the proportion of acute:chronically ill patients in hospital be changed from 25:75 to 50:50 which suggests that more of the chronically ill will be released from hospital. This seems to imply that some training will be given in social skills to those who are going to be released and support provided for them when they leave hospital. However there is no suggestion in any of this discussion that mechanisms be created to empower patients to challenge the decisions of medical professionals and ensure equity in the release of patients from closed hospitals.

Old attitudes to mental health remain strong. Despite the fact that the Mental Health Law was introduced in 1990 and that this provided access to public funds to pay for mental health care, there remains at least one large, 'traditional' asylum for the mentally disordered, Long Hwa Tang. Taiwanese psychiatrists are embarrassed by this, one described it to me as a Taiwanese equivalent of Bedlam (interviews at TCPC, 8 October 1997). It is a Buddhist temple complex where as many as 700 patients with severe mental disorders are housed. Families pay a sum of between NT\$180,000–300,000 (£3,500–6,000; \$6,000–9,500 at 1998 exchange rates) to dispose of embarrassing family members for life. No modern treatment is attempted, there are reports of patients being kept in chains, mortality rates are said to be high (interview with Chien Ching-piao, 7 November 1995).

It is a puzzle why this complex is allowed to continue. Certainly if the 1990 law were interpreted strictly the 'caretaker' or responsible family member has an obligation to 'take steps with regard to hospitalisation' although the law does not set out penalties for failing to do so, only making the caretaker responsible for compensation should the 'severely ill person' cause any harm. Central and local governments through the Mental Illness Prevention Deliberation Committees have the power under the 1990 law and the Medical Treatment Law to set standards for the treatment of the

mentally disordered and could presumably close down Long Hwa Tang if they so wished. That they do not do so may be explained in a number of ways. There remains a shortage of beds for chronic patients, if Long Hwa Tang closed there would be nowhere for its patients to go and the rest of the system would be placed under greater strain. There is strong support from among the families of patients in Long Hwa Tang, which makes it politically difficult to close down. The management of the temple has close links with the KMT which enables them to over-rule the demands from the medical profession that it close. Indeed a close reading of the 1990 act suggests it is designed so that families and institutions may breach the spirit of the law since Par. 42.2 in the chapter on penalties states, 'If the failure to provide medical care or assist in seeking medical care arises from the consent of the family, the penalty may be lessened or eliminated' (Salzberg 1992: 74).

The available statistics suggest that the average psychiatric patient still spends a long time in hospital. Patients with acute problems stay thirty-nine days; the average stay for patients with chronic problems is 709.3 days, with the length of stay in some hospitals being 2,180.6 days with bed occupancy in these hospitals being over 100 per cent (DoH figures, 1997). These figures are very similar to those found in Japan. So, despite the apparent commitment in the 1990 act to create a system of 'community psychiatry to reduce confinement and segregation of patients' and to promote positive cure and rehabilitation, attitudes have changed little and the basic facilities to produce this change have not yet been built.

Conclusions

The idea that patients have rights that entitle them, for example, to participate in the decision-making process concerning their own treatment is not one that so far has much currency in Taiwan. Only in the late 1990s have doctors or hospitals felt it necessary to pay any attention to patients' rights either for reasons of promoting clinical trust or commercial success. Unlike in Japan there have been no demands from groups of patients or lawyers that patients' rights be taken seriously. The activities of the Consumers' Foundation seem to have acted as a spur to the development of a formal mechanism for the resolution of disputes about alleged medical malpractice but both the Consumers' Foundation committee and the MRBs remain under the control of the medical profession. There is very little scope to challenge the decisions made by doctors.

The steady increase in the number of medical malpractice cases has not led to the creation of a more organised movement. There has been some evolutionary progress towards a regime that gives some independent review of cases of alleged malpractice but the systems remain controlled by the medical profession. When the first patients' rights charter was created it was done by a lawyer and it includes reference to rights of access to patients' records, to participate in decisions about treatment and to information.

Having said that when changes have been made to laws affecting doctor-patient relations it has not been as a result of pressure coming from concerned social movement groups, however small.

On the other hand, five years after the introduction of the National Health Insurance system there are reports of the beginnings of an awareness of access to medicine as a right and an increased willingness to criticise the medical profession. Reports of fraud and abuse by doctors are even said to be creating an 'anti-physician' atmosphere. This might well be the context in which advocates of patients' rights ideas can be heard and the increasingly competitive market for medical treatment will make doctors take them seriously (Yang Hsiu-I, personal communication, August 1999).

Greater attention seems to have been paid to patients' rights in the sphere of mental health. The 1990 Act, full of references to the desire to safeguard the rights and interests of the ill persons, makes explicit reference to the importance of written consent to treatment and devotes a chapter to rights issues. However it makes no provision for the independent review of a decision to subject a patient to involuntary hospitalisation and gives substantial authority to the 'caretaker' and the family, even to the extent of being able to condone their failure to provide medical care. There is no provision for those occasions when the caretaker acts contrary to the interests or wishes of the patient. Finally, although there seems to be a long-held view of the importance of creating a rehabilitation oriented, community-based system of psychiatric care, insufficient resources have so far been made available to make that system workable. There is no evidence of the change in public attitudes to mental illness that would be necessary to realise this.

The length of time spent by patients in psychiatric hospitals is not much different to that in neighbouring Japan and South Korea. The RoC will have to be careful that, as its population ages, the 'fee-for-service' reimbursement system does not generate incentives particularly in private hospitals to detain patients longer than necessary. That there is a strand of medical culture that would support such a development is evident from the continued existence of Long Hwa Tang.

Just like their counterparts in South Korea, many Taiwan-based physicians and psychiatrists have spent time working in the USA and are therefore familiar with notions such as informed consent and yet few of them have tried to import them into their Taiwanese practices. Although there was some attempt to keep pace with the WHO agenda on health service provision there has been practically no influence of the world medical standards on informed consent. Similarly the 'UN principles' on the treatment of those with mental illness seem not to be known on Taiwan and they have had no impact on the implementation of mental health care.

Meanwhile in the area of mental health care, the decision to have more of the chronically ill returned to live in the community will necessitate the creation of a mechanism to decide who should leave. Is it too optimistic to

expect that patients or their advocates will demand to play a role in that process?

Unfortunately the answer to this question is that it probably is too optimistic to expect this in the absence of groups independent of the medical profession which can insist on the application of rights-oriented medical practice in ways that unequivocally benefit the patient. The legal profession in Taiwan so far does not seem interested: what other group could form the kernel around which active and dissatisfied patients could organise?

9 Patients' rights in Japan, South Korea and Taiwan – comparative aspects

Our discussion of the development of rights ideas in the context of health care in Japan, Korea and Taiwan has revealed several elements of similarity but also some differences. What general comments can be made about this East Asia pattern?

First, it should probably come as no surprise that the health-care systems created by governments in each of these states should allow little space for the practice of rights. White and Goodman, for example, note how one of the key characteristics of East Asian welfare systems is that they tend to subordinate welfare to the over-riding priorities of economic efficiency and growth, reflecting the political logic of conservative domination and/or authoritarian institutions (White and Goodman 1998: 17–18). One would not expect such systems to encourage models of health care based on respect for the autonomy of the subject. Nevertheless, now that authoritarian ideas are in retreat in each of these states and all citizens in them expect low-cost access to high-quality medical care as an entitlement, it may not be too long before the notion arises that there is a right to dignity enhancing care.

The technical competence of health professionals in these three countries lags little, if at all, behind that of anywhere in the developed world. Indeed most leading specialists have trained and sometimes practised in the west, usually the USA. However there has almost been a conspiracy of silence among these doctors about patients' rights issues once they have returned home. There may be a sociological explanation here: that the structure of medicine in these countries is a highly hierarchical system. If a doctor felt inclined to give his support to such ideas as patients' rights, he or she would be easily dissuaded from carrying them out by senior elements within the hospital on whom the young doctor would rely both for assistance on a day-to-day basis and for promotion later in their career. One suspects that this is what is being referred to by doctors when they talk about 'traditional attitudes' preventing the introduction of patient-oriented practice.

To the extent that there is an enthusiasm for patients' rights ideas within the health-care systems it is not one that is based on notions of the moral status of the patient, rather it is developing on the basis of the utility of such concepts as 'informed consent' in improving the technical quality of care

and/or cutting costs. Although the three states are not short of religious movements, some of which even support hospitals, there has been no evidence of demands for patients' rights being supported by arguments which address the necessity to consider the dignity or moral autonomy of the patient. By and large doctors have not sought to enter this discursive arena, it has usually been lawyers who have written about these subjects and they have chiefly been concerned to demonstrate that medical accidents would be avoided if patients were more involved in the decision making or that it would be easier to protect the interests of patients if the law clarified their claim rights on the professionals or their power to, for example, have access to their medical records.

Woodiwiss has argued persuasively that the reconfiguration of labour rights in post-war Japan took place in a social structure where 'the virtuous company replaces the virtuous *Tennô* (Emperor) at the core of the Way of Loyalty' – a process he characterises as the hegemonic succession of *Kigyôshugi* – 'companyism' (Woodiwiss 1998: 64). This structure was hostile to the emergence of an autonomous and assertive trade union movement. I have no intention of rehearsing let alone criticising Woodiwiss' case here in full. It is sufficient for my purposes to point out that within a social structure that supported and reproduced these and other similar attitudes of the pre-war period it is unlikely that 'modern' individualist-based attitudes towards doctors would emerge. Essentially pre-war attitudes towards the medical situation remained intact in Japan after 1945 and traditional medical culture has prevailed in South Korea and Taiwan until the 1980s.

However Woodiwiss suggests that even though it can be shown that some aspects of Japanese labour rights have been reduced, these have been mainly in the areas of 'liberties' and 'immunities' but there has been almost compensating expansion in the areas of 'powers' (the representation of labour in the decision making of the company and the state) and 'claims' (to training, security of employment and social programmes). 'In sum ... these developments in Japanese labour law represent an instance of how the obligations inherent in the Confucian concept of benevolence have been made legally enforceable ...' (Woodiwiss 1998: 68). The Confucian concept of benevolence was clearly dominant within the doctor–patient relationship, is there any evidence of it becoming legally enforceable in Japan, or indeed Taiwan or Korea?

There is a minimal concept of the notion of a claim right in the sense that there is a duty of care of the doctor to the patient which if ignored opens the way to legal measures to compensation if things go wrong. However, the number of cases that find their way into Japanese, Korean or Taiwanese courts is small and there are a number of social pressures which keep these numbers down. One of the reasons for the rate of litigation remaining so low is that patients have very restricted access to their records. Patients are kept in a very dependent state, frequently not even being told what drugs they are being prescribed, and still usually not being informed if they have a

terminal illness. This is changing in Japan. It is reported that doctors are more willing to inform patients of terminal illness and the 1998 MHW report on access to medical records makes it possible that patients soon may have a right of access to information about themselves. No such trends can be seen in the RoC or RoK.

If there is one area where these patients are freer than, for example, their UK equivalent it is in their liberty to select their own physician, there is freer 'market choice'. So far this has resulted in patients preferring to go directly to those institutions with most specialists and most 'hi-tech' equipment. However as the health-care market becomes more 'mature' both in terms of the number of service providers and the age of the patient, it is easy to imagine the situation where patients will prefer the continuity of care that can be provided by a localised medical practice to the impersonality of a big centralised institution. There is already the start of a trend in this direction. The demand for open access to medical records in Japan may be replicated elsewhere, and it may only be a matter of time before the medical profession concedes the case. In this respect it is liberty-rights rather than claim-rights which seem likely to drive change in patient–doctor relations in the foreseeable future rather than reforms which will enable patients to 'enforce benevolence'.

Woodiwiss shows that one can construct a human rights regime based on patriarchalism as an alternative to the two projected by the liberal and social democratic discourses. In particular he suggests that the 'new patriarchalism' which can be observed in Asia in the late twentieth century is one in which though social relations remain distinctly hierarchical the content of benevolence is democratically decided and its delivery legally enforced (Woodiwiss 1998). The democratic reforms introduced in Korea and Taiwan have not greatly weakened the hierarchical structures created in the 1950s and the medical profession has proved to be a bastion of conservatism in all three states. However, the opening of access to medical care to the whole population and the rapid increase in the number of doctors and other health professionals has done much to reduce the exclusivity of the medical elite and to encourage competition within it. Meanwhile the state has finally been persuaded to establish standards of care within legislation, which creates at least the possibility that citizens, either individually or within specialist groups, might attempt to enforce their implementation, even if that has not happened much yet. There is no evidence here then to support the Woodiwiss case, although that is not to say that, if and when patients' rights advocacy groups become more active, they will not develop strategies designed to 'enforce benevolence'.

International standards have played differing roles in the changes over the 1980s and 1990s. In Japan, NGOs such as the legal profession have sought to use international standards as leverage to have human rights accepted by government and they have not been averse to inviting foreign groups such as the ICJ to inspect institutions in Japan. Korean and Taiwanese groups, even

those few with an interest in patients' issues, have not been too interested in international standards whether these be created by the physicians' organisations or the UN and they have not sought to attract international attention. Cost may be part of the explanation. The expenses of ICJ 'inspectors' are paid by those who invite them. Who in Korea or Taiwan would have paid them?

Governments in both Seoul and Taipei have energetically tried to generate strong feelings of national pride in their populations and it may be felt that to attract attention to embarrassing aspects of their medical culture would be to act in an unpatriotic manner. Japanese lawyers suggested to me that this explained their reluctance to become directly involved in international campaigns until the 1980s and it is a plausible explanation for the lack of activity of Korean and Taiwanese NGOs in the 1990s.

As a range of groups such as *Minbyun* or PSPD in Korea or the TAHR in Taiwan are created which present a challenge to the activities and values of the developmental state, one can imagine either part of these groups or others – young doctors? – taking up patients' rights issues, devising strategies which resonate with the local medical culture while introducing the international standards. The area of the care of psychiatric patients presents the major challenge for such a strategy. The international standards are clear about the importance of establishing explicit rules to decide *who* may be confined to psychiatric institutions, *how* they may appeal against the implementation of these rules and *what* criteria are used to decide the circumstances of a patient's release. Moreover they stress that the process should not be monopolised by the medical profession.

However, this conflicts directly with local practice that has given almost complete control of the system to doctors and has put families in a position of having to make decisions on behalf of the person with a mental disorder on the assumption that all such persons cannot be responsible for their own decisions. The legal system gives support both to the rights of the medical profession and the rights of the family leaving the patient with no clear entitlements. In theory each of the three systems allows for the hospitalised patient to appeal against continued incarceration or to request improvements in treatment. Even in Japan where the appeal system has been operating longest, it has been used sparingly and only where the legal profession has given it support in areas such as Fukuoka has the process functioned in any way to meaningfully enhance patients' rights. So far in Korea and Taiwan the administrative process which permits some scope for appeal has not been developed to allow patients to challenge the decisions of the psychiatrists or to put the wishes of the patient into conflict with the desires of their family.

The problem here then is not simply the development of a discourse of rights that redefines the boundaries of the state and civil society but that this process involves a redefinition of the relationships and responsibilities of family members. Although the social and architectural trends of the second

half of the twentieth century have been to support the development of nuclear families, there remains within the medical culture several of the assumptions of the previous era of family responsibility for health care. Under earlier circumstances these arrangements may have provided the best available guarantees for the interests of the individual but within an urban-based industrial society with resources to provide both extensive hospitals and community care, it is no longer necessarily the case that the decisions of families either on aggregate or in specific cases will be in the best interests of the patient. Furthermore it is not necessarily the case that doctors can in all circumstances be depended on to do what is best for the patient. Their power to have people kept in hospital has increased enormously over the last forty years, as the use of long-term hospitalisation has become more common, and that power is supported by law. The, as yet poorly developed, demands for patients' rights challenge the exercise of that power and the medical profession has been able to resist or subvert that challenge. It is unlikely that change will occur in practice unless and until internal actors adopt and champion international standards and then root them in local culture. That this can happen is shown by the Japanese case though this is not to say that it will or even could happen in the same way in Taiwan or South Korea.

10 Children's rights

At the time of writing the United Nations Convention on the Rights of the Child (CRC) has been ratified by every country in the world apart from Somalia (which has no effective government), the USA and the Republic of China on Taiwan (which is not recognised by the UN). Thus within ten years of its entry into force (2 September 1990) the CRC can be said to have practically universal recognition although, perhaps needless to say, there are problems with the implementation of the terms of the convention. Not every government has been eager to publicise the content of the covenant or even to fulfil its reporting obligations. Still, the world-wide acceptance of this convention makes it particularly useful for comparative purposes, especially under the circumstances where Taiwan has not been able to ratify it. If the RoC on Taiwan had ratified the CRC would the rights of children on the island be better protected?

The almost universal acceptance of the CRC might at first seem to suggest that there is no problem in the domestic implementation of the product of this international standard setting process. And yet we know that there is no consensus on answers to such basic questions as, what is a child? The boundaries of childhood are inconstant and often contradictory. They operate and change within broader socio-political structures. It is often suggested that the values which inform the instruments devised by the UN are inevitably based on western concepts and that this very fact makes them not easy to implement in non-western societies. In examining how the idea of children having rights has been received and implemented in three states of Asia we are also forced to confront the argument about the universal, particular or relative nature of rights ideas. In an important sense then this section is a case study in the process of international standard setting and their domestic implementation.

However, before considering how the idea of children having rights has been interpreted in the three East Asian states, we must first sketch in the background to the development of the idea of the rights of the child in general and how the concept of children's rights has been developed by western social theorists. Following that we will discuss the process which led to the drafting of the convention before moving on in subsequent

chapters to describe how these ideas have been absorbed into and developed within East Asia.

Children and childhood

Children are always with us but the notion of childhood has been constantly in flux. Western writers on childhood can point to evidence from the earliest times of a tradition which either on the one hand stresses the importance of the education of children – as in Plato's Republic – or, on the other hand, the almost absolute rule of the father who within Roman family law had the right to kill, abandon or sell his children into slavery.

Jenks has constructed two 'mythological images' of childhood in the western tradition which date from the early modern period but which continue to exist synchronically and are 'competitive to the point of absolute incompatibility' (Jenks 1996: 70). One she labels the 'Dionysian child' who enters 'the world as a wilful material force ... impish and harbouring a potential evil'. The parent and adult collectivity must ensure that such children do not fall into bad habits or bad company by all means possible. This is a severe view of headstrong children who must be punished, sometimes severely, for their own good. This view of child rearing is informed by Puritanical notions of original sin which the child itself is too weak to overcome and therefore needs the 'help' of the parents and adult society. John Wesley urged parents to break the will of their children.

The 'Apollonian child' on the contrary is angelic, innocent, untainted by the world it has recently entered. It has a natural goodness and a clarity of vision that must be encouraged, enabled, facilitated, not crushed or beaten into submission. Locke attacked the idea of infant depravity and preferred to think of the new-born child as a *tabula rasa*, later Rousseau, a contemporary of Wesley, in *Emile*, makes the clearest statement of the view that children 'have natural virtues and dispositions which only require coaxing out into the open' (Jenks 1996: 73). It is moreover Rousseau who makes the first coherent case for the view that children are different from adults and as such deserve special treatment and care.

These are the two images, neither of them complete, which compete as explanations of the 'normal' child in the process of transition through 'modernity', the development of capitalism and the capitalist state which was in its infancy in Europe at the time Wesley and Rousseau were writing. Hendrick has described the development of images of British childhood based on four themes:

- the change from urban/rural split and class division to uniformity and coherence,
- the rise of a 'domestic ideal' among the nineteenth-century middle class,
- the evolution of a compulsory relationship between state, family and welfare services, and

- a political/cultural struggle to universalise this concept of childhood.
(Hendrick 1990: 35)

He then lists a series of 'constructions' of childhood that have emerged since around 1800. The first, the Romantic child and the evangelical child roughly correspond to the 'Appollonian' ideal described earlier. But then, during the nineteenth century different images of children emerge as social conditions and society's concerns change. Campaigns against child labour, concern with the 'factory child' in the 1830s result in the Factory Acts which restricted the employment of certain types of children and the declaration of a Royal Commission in 1833 that at age thirteen 'the period of childhood ... ceases' (Hendrick 1990: 42). By the 1850s the focus had shifted to the 'delinquent child' as juvenile delinquency was seen as a serious social problem for the first time. Here the concern was not only how to deal with children who broke the law but how to provide care and protection for working-class children. In part this was a result of the middle-class discovery of working-class life whose reality challenged their images of childhood. How, then, to create a society which would not be threatened by the chaos and immorality of the working class (child)? The answer was partly to use education to force civilisation downward in society and from this came the discourse of the 'schooled child' and from the 1880s the 'psycho-medical child' as compulsory schooling made possible the surveying of children and the development of child psychology. Meanwhile there was more generally in Europe and North America the emergence of the 'child protection movement' which aimed at the prevention of cruelty and neglect of children and thus the development of the 'welfare child'. Together these strands generated a slightly different set of 'expert' (but still class bound) definitions of children and childhood which combine after 1918 to create the 'psychological child' – a 'modern' definition of childhood in relation to medicine, psychology and welfare. Finally in the post-war period there has been a new emphasis on the importance of the home environment and the 'natural family' – a 'family child' to be contrasted with the 'public child'.

If there is a more recent academic view of childhood, it is a non-essentialist one which emphasises the problematic present in the idea. '[T]he idea of childhood is not a natural but a social construct and as such its status is constituted in particular socially located forms of discourse' (Jenks 1996: 29).

These views of children and childhood were devised on the basis of British history since 1800 but they are not untypical of the development of ideas about children in Europe and North America against which background ideas of children's rights have developed.

Aspects of the debate on the rights of the child

At the level of international law there has developed a consensus of the importance of establishing agreed standards to protect the rights of children

but alongside the discussions on how child rights ideas might be introduced into international law there has also been academic discussion on what it might mean to say that children have rights. The range of this discussion is too wide to be adequately summarised here, but I will nevertheless try to suggest some of the main themes in the debate since this will highlight some of the issues that lie at the core of what children's rights are and which we will want to follow up when we look at the influence of child rights ideas in East Asia.

Let us begin by looking at Campbell's review of some of the problems of thinking about children as having rights. He suggests that we can think of rights as powers or interests, or as being intrinsic or remedial. 'Power theories' regard rights as a normative capacity that the bearer may use to further his or her interests and projects by invoking/waiving/enforcing rights. If children cannot be said to have the relevant volitional capacity, if they are unable to exercise practical rationality and self-determination, rights cannot be said to apply to them. Interest theories regard rights as rules which require others to behave in certain ways which respect interests, arranging and enforcing the duties of others to meet these requirements. Neither of these approaches to rights are easy to apply to the position of children. If the power theories can support children's rights it can only be in relation to their position as near or future adults, which is only a partial view of what it is to be a child. If we accept that children having interests have rights, is it possible to say that they have distinctive interests that generate distinctive rights?

Campbell also distinguishes between intrinsic and remedial rights. By the former he means rights whose justification does not depend on their role in securing some other goal and which therefore are logically prior to legal reasoning. Instrumental rights are either instrumental in securing intrinsic rights or serve to remedy rights which have for some reason been violated. In this case, to suggest that children have moral rights is to argue that they have an independent intrinsic value which places them on a par with other human beings and which justify the imposition of duties on others. Few would want to dispute this, but it still leaves open the question of how far the interests of the present child can be downgraded for the sake of the future person or the sake of society as a whole. In some cases we might be happy to see children not granted the same rights as other (adult) human beings and support restrictions on their right to marry or vote. On the other hand we might want to argue their right to health or to a name is the same as any human. But are there any rights that are special to children, such as the right to play, or are there any spheres of decision in which we might want adults as parents or as part of the collectivity of society to normally be able to exercise substituted judgement? (Campbell 1992).

One writer takes this matter of the difference between children's rights as powers or interests further. Onora O'Neill claims that 'children's fundamental rights are best grounded by embedding them in a wider account of

fundamental obligations, which can be used to justify positive rights and obligations'. Moreover, she goes on to suggest that 'we can perhaps go further to serve the ethical basis of children's positive rights if we do not try to base them on claims about fundamental rights' (Freeman 1997: 25–8; O'Neill 1992). Her argument is based on the observation that unlike most other groups who have demanded rights, children, especially young children, are inevitably dependent and that although the language of rights has helped force concessions from the powerful, there is only a loose analogy between the child's dependence and that of other oppressed groups. At the end of the day the remedy to the child's problems is to grow up and most adult practice aims to end the childish state of dependence at some stage. Rather than look to fundamental rights we should improve children's rights by identifying what obligations parents, teachers and the wider community have towards children.

Freeman seeks to establish the moral grounds for the recognition of children's rights. Following an examination of the writing of Dworkin and Rawls, he argues that children from the age of seven or at least ten are able to think of themselves 'as a being with a future and a past, a subject of experiences, a possessor of beliefs and desires' (Freeman 1997: 32) and thus a person whose autonomy is as morally significant as anyone else's. Dworkin argues that, if persons have moral rights to something, they should be accorded those rights even if a utilitarian calculation shows that utility would be maximised by denying it to them. This is a view of rights as 'trumps' which will over-ride mundane consequentialist reasoning. But why are rights important and why do children need them? Freeman argues that a society without rights might be benevolent but it would, first, be morally impoverished and, second, there would be no cause for complaint if standards were to fall. Dworkin's argument is based on the notion of human dignity and political equality in which, Freeman argues, it is necessary to take account of the normative value of autonomy to create a view of people who 'have a set of capacities that enables them to make independent decisions regarding appropriate life choices'.

To see people as both equal and autonomous is to repudiate the moral claim of those who would allow utilitarian calculations ... to prevail over the range of significant life choices which the rights thesis both facilitates and enhances.

(Freeman 1997: 90)

But this need not, and perhaps, should not include children. Rights may be important but other values such as love or altruism or benevolence, particularly in the context of the family, may be more apposite than rights. Indeed to accept children's rights may create conflict or at least the basis for conflict. In an ideal world serious conflicts between family members would not exist, but the world is not ideal. The idea that children have rights may

make life difficult for adults (parents, teachers, police) but it gives protection to children. Where parents love and care for children, rights may be superfluous, even otiose, but it is not the case that adults always and only consider the best interests of children, a view which idealises the adult-child relationship and in particular the child's status within the family. Similarly, a view of childhood as an age of innocence in which rights can play no part is simply a myth which is not true for children who endure poverty, disease and exploitation. Those who can claim rights (or for whom rights can be claimed) have the necessary pre-condition to having their interests and dignity respected: this includes children as much as any other member of our communities.

Nevertheless Freeman notes the obvious point that, though we need to begin by regarding children as persons entitled to equal concern and respect, this entails a need to have both their present autonomy recognised and their capacity for future autonomy safeguarded. This, he argues, justifies a limited paternalism – an interference with autonomy justified by a 'future oriented consent' – an intervention that the child would agree with given the knowledge he or she now has as a rationally autonomous adult. There are difficulties with this. What facts 'count'? How can hypothetical preferences be considered? There is a need to accommodate plural versions of the good and to allow the right to make mistakes as long as the consequences are not enormous and/or irreversible. Freeman here steers the tricky path between the child savers and the child liberators, children's rights requires serious consideration for both protection and self-determination, preserving children and their rights.

Finally I want to briefly consider a feminist approach to children's rights, that of Martha Minow. She begins by pointing out the inconsistencies in the legal treatment of children. She takes examples from law in the USA, but few legal systems are completely consistent in how they treat children. This is not, she says, because the 'line drawing' has gone awry but rather because children are not the real focus of the laws that affect them. When laws are made which affect children their needs and interests are submerged beneath other societal interests. Moreover the public-private distinction assigns child-care responsibility to parents, avoiding public responsibility for children. She shows how in the USA the legal treatment of children has emerged as a result of two competing legal principles: that of individual rights and that of shared interest. This contestation is based on the idea that it is necessary to make a choice between seeing children as basically the same as, or different to, adults. The care and custody of children by adults serves the interests of both. In this case individual rights may not only be unnecessary but may be damaging – an argument quite similar to that of O'Neill. But this approach obscures the possibility that the same child may need protection and care for one purpose and autonomy and self-determination for another. Minow argues that the problem lies in a conception of rights, which runs only between the individual and the state, 'that rights only mark

and preserve distances between people. Instead, rights could be part of legal arrangements that permit, not to mention promote, relationships ...' (Minow 1986: 17). Children are doubly dependent, linked legally and daily to adults entrusted with their care, a dependency defined by legal rules and in their lives as lived. In this context 'rights' amount to protections from the neglect or abuse by parents entrusted with their care, or protection from the state which enhances parental authority. It may involve the state 'lifting' the child from parental authority while restraining its own power by empowering the autonomous child. In this latter case the state would be enabling and extending the child's choice making. Rather than debate whether children are entitled to liberty or custody, Minow urges enquiry that:

adduces the inter-relationships and tensions between rights for children that constrain abuses of power by their parents and by the state, and rights for children that promote their abilities to form relationships of trust, meaning and affection with people in their daily lives and their broader communities.

(Minow 1986: 24)

There is here then clear reflection of the feminist concern with the importance of care taking and social relationships.

This is by no means comprehensive but it does indicate the breadth of the current English language discussions of the children's rights which encompass developments in contemporary social and political theory.

Children and rights – the beginnings

The classic liberal statements on rights were silent about children. The first article entitled the 'Rights of Children' was probably written in June 1852 by one Slogvolk. Then, in the aftermath of the Paris Commune, Jean Vallès advocated children's rights in a book entitled *L'enfant* (1878) and in 1892 K.B. Wiggins published *Children's Rights* (Freeman 1997: 84). The main theme of the times though was the 'child saving movement'; the creation of orphanages, the development of schooling and even separate schools for orphan children. However, these notions of 'child protection' were not considered by the founder of the New York Society for the Prevention of Cruelty to Children inconsistent with 'a good wholesome flogging for disobedient children' (Freeman 1997: 48).

At the end of the century there was a change in attitudes towards children and their legal status that developed out of the implementation of child labour laws, the introduction of compulsory education and changes in the status of women. One key text, which became a best seller world-wide, was that written by the Swedish feminist Ellen Key, *The Century of the Child* (1900). Although its emphasis is on the importance of the role of the mother in the rearing of children, even to the extent that school should not be neces-

sary, the book encapsulated many current ideas which emphasised that 'saving the child' was of the most fundamental political and social significance (Cunningham 1995: 163–4).

In 1924 the League of Nations adopted 'The Declaration of Geneva' following concern about what had happened to children who became caught up in warfare. This was not so much a declaration of the rights of children to an equality of consideration as a summation of the concerns of the child saving movement of the previous century. In its preamble it states that, 'mankind owes to the child the best it has to give' and its five principles urge attention be given to the protection and welfare of children; the requisite means for their normal development, food and medicine; relief in times of distress; protection against exploitation, and socialisation to serve others (Freeman 1997: 49). Nevertheless it was a significant milestone in that it was the first international statement of concern about children at a time when the only other international human rights instruments were about slavery.

Discussion of children's rights re-emerged at the end of the 1950s and led to the creation of a UN Declaration on the Rights of the Child on 20 November 1959. This extended the coverage of the Geneva declaration to include protection from discrimination, the right to a name and nationality and entitlement to free and compulsory education. It also includes the principle that in the enactment of laws to provide for the healthy development of children, 'the best interests of the child shall be the paramount consideration'. However, the emphasis is still on protection and welfare, there is no recognition of a child's autonomy, the importance of a child's views or any appreciation of the concept of empowerment.

The formation of the ideas of the 1959 Declaration took place well before the rising tide of interest in rights which swept across the world in the 1960s. The women's movement, the civil rights movement and more radical departures such as the Black Power movement provoked activity and thought in the USA, South Africa, Northern Ireland and Japan. As we have seen, in 1967 the UN finally adopted the two international rights covenants, even if they were not to be effective until 1976. The extension of these ideas to children came somewhat later.

The 'Children's Liberation Movement' of the 1970s as articulated by John Holt and Richard Farson argued the case for:

- the child's right to exercise choice in his own living arrangements;
- a right to information that is accessible to adults;
- a right to choose belief systems including to educate oneself;
- a right to sexual freedom;
- a right to economic power including the right to work;
- a right to political power, including the right to vote;
- a right to responsive design;
- a right to freedom from physical punishment;
- a right to justice.

John Holt even argued the case for allowing children access to whatever drugs their elders use (Freeman 1997: 51–2).

Later advocates of children's rights have pulled back from these somewhat extreme frontiers in the face of evidence of the predatory activity of adults seeking child sex or to sell addictive drugs. However, the main contribution of these writers was their focus on the importance of the autonomy of the child, the notion of self-determination and their recognition that the protection of children and protecting their rights to autonomy was a false dichotomy. This mainly academic discussion paved the way, at least in the English speaking west, for an appreciation of the Convention on the Rights of the Child (CRC).

The Convention on the Rights of the Child (CRC)

Its creation

The initial proposal to have a Convention to replace the 1959 Declaration came from the Polish government and the first plan was simply to use the text of that document. The basic premise of the discussion was that the existing treaties did not adequately defend or protect the rights of children and the creation of a convention and a committee to oversee its implementation would allow the development of a child-related jurisprudence. The year 1979 was designated the 'International Year of the Child' and this marked the start of the process of re-examining the UN Declaration. This debate on the rights of the child became somewhat complicated by Cold War rivalry. The 'west' led by US President Reagan was unhappy about the emphasis in the original proposals on welfare and social rights and insisted on the inclusion of clauses relating to civil and political rights. Meanwhile the East European governments sought to promote the CRC in the face of Reagan/Thatcherite objections to deflect criticism of their human rights record.

In the course of the 1980s twenty-two meetings of the preparatory committee took place involving at any one time between twenty-seven and forty-seven states. All decisions were reached by consensus but only five issue areas caused serious division in the drafting committee. The article on freedom of thought, conscience and religion had to be carefully drafted to meet the concerns of the Islamic countries, which, if not met, would have prevented it from gaining broad acceptance. There were objections to the proposals on inter-country adoptions from both Latin American and Islamic countries. Discussion on the status of the 'unborn child' pitted mainly Catholic countries against the representatives of the mainly Protestant countries of northern Europe. Senegal was particularly keen to include reference to the duty of children 'to respect parents and maintain them in case of need', which forms part of the Charter on the Rights and Welfare of the African Child (Par. 31) but it was feared that this might be used as a justification for child labour. Finally there was considerable diffi-

culty with how far to insist on 'abolishing traditional practices prejudicial to the health of children' which is primarily a reference to the practice of various forms of female circumcision in African states. The CRC refrained from making explicit reference to this and rather than condemning it outright urges its elimination 'progressively'.

The final document was adopted by the UNGA on 20 November 1989 and the convention came into force on 2 September 1990.

Meanwhile there had also been discussion on how children should be treated within legal systems. Article 40 of the CRC covers the rights of children alleged as, accused of, or recognised as having infringed penal law. Though quite detailed the purpose of the clause is 'to ensure that children are dealt with in a manner appropriate to their well being and proportionate to their circumstances and the offence' (article 40.4). In parallel with the drafting of the CRC, discussion took place about the development of standard minimum rules for the administration of juvenile justice and the care of juveniles. This process was initiated at the Sixth UN Congress on the Prevention of Crime and Treatment of Offenders. A meeting was held to discuss the draft rules in Beijing in May 1984 and, after the UN Standard Minimum Rules for the Administration of Juvenile Justice were adopted by the UNGA on 10 December 1985, they became known as the 'Beijing Rules'. They provide a framework within which a national juvenile justice system should operate and a model for states of a fair and humane response to juveniles who find themselves in conflict with the law (Van Bueren 1993: 170). This body of thirty rules is not binding on members of the UN *per se* although some parts of it became binding when they were incorporated into the CRC. However, the UN took the view that it was necessary to go even further and provide guidance on policies which would help prevent children coming into conflict with the law. The 1985 General Assembly noted the need to develop strategies 'for the prevention of delinquency among the young' and in 1990 it adopted the UN Guidelines for the Prevention of Juvenile Delinquency, known as the 'Riyadh Guidelines' (Van Bueren 1993: 196–7).

Several parts of the Beijing rules are not binding on states and the Riyadh guidelines have even less binding status in international law. However, the guidelines for the periodic reports to be submitted by states party to the CRC invite states to report on the steps they are taking to make all those involved with the system of juvenile justice aware of international instruments including the Beijing rules and the Riyadh guidelines. Moreover in its comments on the reports made by state parties the Committee on the Rights of the Child has suggested measures in line with the guidelines. In its concluding observations on the UK report, for example, the committee commented, 'The Committee also wishes to recommend that the State Party take the necessary measures to prevent juvenile delinquency as set down in the Convention and complemented by the "Riyadh Guidelines"' (Lansdown and Newell 1994: 333).

Thus these supplementary sets of rules are being adopted by the Committee as providing a more detailed account of the rights that are set out in the CRC proper.

The main features of the CRC are that it seeks to spell out the rights that children should have respected and creates a committee 'of high moral standing and recognised competence in the field' who, in the process of receiving and commenting on regular reports from the state parties, are developing a child-related human rights jurisprudence. The general standard that underpins all matters concerning children is set out in article 3.1: 'In all actions concerning children ... the best interests of the child shall be a primary consideration.'

It covers both the areas of civil and political rights and economic, social and cultural rights although with regard to the latter they shall be implemented by state parties 'to the maximum extent of their available resources' (article 5). Of the thirty-eight articles ten, mostly relating to civil or political rights, had never been previously recognised for children in other international documents, for example those recognising freedoms of expression, thought and privacy (articles 13, 14, 16). Article 12 commits states to giving due weight to the view of the child in any judicial or administrative proceedings. Article 31 recognises the right 'to rest, leisure, to engage in play and recreational activities appropriate to the age of the child ...'. While recognising the need to take into account the importance of traditions and cultural values there is also, as noted above, a commitment to 'abolishing traditional practices prejudicial to the health of children' (24.3).

State parties also undertake to make the principles and provisions of the Convention widely known to both adults and children. There is a commitment to submit 'reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made on the enjoyment of those rights'. The initial report is to be submitted within two years of the treaty entering into force and every five years thereafter. The Committee on the Rights of the Child has now established a procedure whereby following submission of the government report and any supplementary reports by NGOs, a preliminary meeting is held with the representatives of the government to ask further questions and a date is set for the meeting at which the government representative formally presents the report and replies to questions from the members of the committee. Somewhat later, perhaps a week or so after this meeting, the committee will make its concluding observations in which it will highlight matters of concern. Not only is the state party obliged to make the content of the Convention known to its child and adult population, but also to consult with interested parties in the process of preparing the report and publicise the comments of the committee.

As we have seen, the process of drafting the CRC was long and often tortuous as the drafters sought to ensure that its terms were acceptable to all members of the UN and yet still offer some kind of protection for children.

It was a very clear example of the UN engaging in standard setting, to create universals which could be implemented in any country of the world.

Its critics

However there are those who argue that this standard-setting process in general and the attempt to redefine children's rights as universals in particular amount to 'not an extension of rights or the universalisation of rights, but its opposite; a shattering of the shell of legal equality – the infantilisation of society and the degradation of democratic rights' (Lewis 1998: 93). His argument is embedded in an approach to law which begins with a notion of a subject which has a historical and social existence as a rights-bearing subject whose existence is logically prior to its legal character. But international law, particularly as it emerged in the post-war period, is based on establishing the sovereign state as the rights-bearing subject. This created the inevitability of conflict between international law in which the rights-bearing subject was the state and the notion of universal human rights which required the individual to be the rights-bearing subject (Lewis 1998: 88). He argues that in the post-war world the most powerful states, by which he means the USA, use human rights discourse to legitimate and perpetuate the existing set of power relations domestically and internationally.

The CRC according to this account is based on two fundamental fallacies: the fallacy of children's rights and the fallacy of universal childhood. For Lewis the bottom line is that children are legally incompetent and that there is a conflict within the CRC between the view of children's welfare rights and children as incapable of self-determination. This redefines the rights of children in terms of the state acting to care or protect. Second, he claims that the CRC is premised on '[A] standard of childhood specific to the condition of western society ... which becomes a global standard of measurement' (Lewis 1998: 94). He generalises this argument by claiming that this creates a western model of childhood which becomes the standard by which 'southern' societies' are judged. This will then lead (if it has not already) to demands for children's rights which require changes to the social structure and an allocation of resources according to an externally constructed set of priorities. Ultimately, 'what advocating children's rights means in this context is giving up the right to national self-determination' (Lewis 1998: 97).

Now this argument is vulnerable to criticism on a number of levels. It leaps straight from a review of the origins of the United Nations to the creation of the CRC, assuming that the USA was equally active and dominant in both processes, whereas as we have seen the CRC was drafted in the face of considerable opposition from the USA and its allies. It assumes an undifferentiated view of the nature of rights that we have earlier suggested can be cured by application of the distinctions suggested by Hohfeld, so that it can make sense to talk about rights in the sense of the immunities or

liberties of non-competent legal subjects such as patients, children or even certain animals. More specifically, it seems to ignore, or not be interested in, the fact that the implementation of rights in these areas rarely, if ever, takes place without the mediation of, or prior advocacy of, rights ideas by local groups.

Nevertheless Lewis' articulation of these arguments from his radical, international perspective is of interest as being remarkably similar to those of the 'Asian values' theorists. His critique of the CRC, based on the fact that children are not competent legal subjects capable of exercising equal rights, is reminiscent of Campbell and O'Neill's rejection of the language of rights as the best way to defend the interests of children. Moreover his explicit recognition of the problems of the use of standards derived from western experience in 'the South' is equivalent to the problems that one might anticipate in the introduction of western ideas about children in East Asian societies..

In the following sections we will be interested to see to what extent the experience of implementing children's rights supports the approach taken by Lewis. To what extent is there a coherent view of 'childhood' in these states and how is it changing? Is any observable change due to changing demographic patterns, changes in the economic stage of development or to international standards of child protection or empowerment? What has been the impact of the CRC on thinking about children in these three states and their legal apparatus? Is it resulting in changes in social structure or resource allocation that are not appropriate for the countries concerned? Are there any 'Asian' characteristics to recent developments or indications that future theory or practice will diverge from any emerging international consensus?

11 Children's rights in Japan

In contrast to the cases of Taiwan and Korea sufficient work has been done by Japanese scholars to enable us to provide an account of the development of the idea of children and childhood in Japan equivalent to that in the previous section on the background to the development of ideas about childhood in Europe. Just as in Europe, the notion of childhood and the view society has taken of children has changed in response to the priorities of the social environment. As we will see, the idea that children have rights has circulated in Japan for almost as long as it has in Europe although it probably has not been so influential, at least not until the 1990s.

Having sketched out this background, the next section will consider the formation of the groups advocating the formal recognition of children's rights in Japan. By the 1990s it was possible to speak of a loosely co-ordinated movement which was demanding early ratification of the CRC and, following ratification, the full implementation of specific parts of the covenant. These groups were later active in producing reports for the UN CRC for consideration alongside the government's initial report which was submitted in 1996. In the final part of this section I will consider some current issues that children's rights advocacy groups are taking seriously.

Children and childhood in Japan

Children of the village

Before the mid nineteenth century, peasant custom in Japan was to regard children under seven (which, because of the custom of counting age by calendar years survived, could mean as young as five by western calculation) as belonging more to the world of god than the world of man. They were not regarded as fully human, how they were treated was up to the family, social sanctions did not apply, they could act freely. Many children had their hair done in a top-knot so the gods could pluck them from this world more easily. Their death, it is said, was treated lightly. From the age of seven however they had to start learning to work and from the age of fifteen, when

they were regarded as mature and economically able to support a household, they were accepted as adults. At the other end of the scale, men over the age of 60 were no longer regarded as full members of society and the older they got the more venerable they became until by the age of 80 they were almost gods (Iijima 1996: 8–10; Yamasaki 1995: 15–17).

There is evidence of a legal distinction being made between children and adults in the *Taihō* legal code of 701 but children were usually treated as extensions of the parents – when the parents committed a crime children were regarded as guilty by association, when they were defeated in war their children were killed too. However as Japan entered the early modern period – say from the mid sixteenth century – some changes can be observed. When children under a certain age were found guilty of a crime their punishment was less than that of an adult, in matters of succession to family headship a guardian or provisional successor could be appointed, younger people were not expected to play a full role when required to perform forced labour. Although there was some variation across the country, children under thirteen were generally treated differently from adults during the Tokugawa period (Ishikawa 1977: vol. 4, 288–9).

Some suggest that this view of children emerged with the breakdown of the extended family management of agriculture and the development of an independent peasantry based on smaller (almost nuclear?) families. However these families were closely linked to the village community both as a productive unit and the basic structure of social control (Iijima 1996: 19–20). There was a broad community interest in the welfare and up-bringing of the village children and, with the development of an early commodity economy involving the use of contracts, basic literacy and numeracy became important. Temple-based schools (*terakoya*) were set up in many villages to teach the peasant children. Each daimiate had its castle town, its administrative headquarters, which would often also be the location of an academy for the sons of the former warrior class who manned the bureaucracies of the Tokugawa regime. These towns had links with the major cities of Edo, Kyoto and Osaka and a commercial publishing industry developed to serve this urban population both with textbooks and child-raising texts, often written by Confucian scholars.

The population grew rapidly in the seventeenth century but regular censuses carried out after 1720 demonstrate that the population increased hardly at all over the next 130 years. Abortion and *mabiki* (neo-natal infanticide) were common and help to explain this. In some areas the local lord would initiate 'child protection' measures to forbid these practices. Women were ordered to report each pregnancy to the local authorities and to report by the age of three whether the child had died, remained with the family or where it had been taken. In some areas regulations strictly forbade the abandonment of children, and parents in difficulties were urged to consult with the village or town authorities for help. Towards the end of the Tokugawa era some authorities, in Hiroshima and Saitama for example, provided a

cash sum at birth and a bringing-up allowance to poor families. However these anti-abortion, anti-abandonment policies were not founded on humanitarian considerations. They were introduced with most enthusiasm by those local governments which felt the need to increase the size of the local population to maximise the product of the land. And, since village communities were taxed as a unit, these measures would easily get support at the lower levels of administration too.

Relations with parents were complex. Many children relied on 'parenting' from those other than the natal parents as well as belonging to peer group organisations for 'children' (age 7–11) and 'adolescents' (age 11–15) (Yamasaki 1995: 17; Iijima 1996: 73). However what this suggests is that children were not the members of 'private' families which were the basic units of society but that they were instead, or as well, members of the 'public' unit, children of the village, and it was not difficult to move from regarding children as belonging to the village to belonging to the state (Ishikawa 1977: vol. 4, 288–97).

Children of the state

The Meiji period, 1868–1910

The main concern of the Meiji statesmen was to create a state structure strong enough to resist the military, economic and cultural might of the imperialist powers who were active in the waters around Japan in the mid nineteenth century. One major problem they encountered was that there was little or no sense of national identity, at least in the mass of the population. Peasants identified with their village, samurai were loyal to their lord, there were some scholars who were conscious of and writing about a national culture, but patriotism was uncommon. The creation of an education system, one of the first national policies of the Meiji government, was designed to rectify this situation.

In 1872 attendance at elementary school for four years from the age of 7 became compulsory. By the mid nineteenth century the *terakoya* system was providing an estimated 40 per cent of boys and 10 per cent of girls with basic literacy and numeracy but what they were taught varied widely and depended on what they were thought to need to fulfil their station in life. In the new system there was a gap between what was needed for everyday life and what was taught at school. History and moral education which transcended class and district was intended to create feelings of national unity but it was not perceived to be of much value and it was not easy to persuade peasants to send their children to school. Police had to be used to persuade them in some areas (Yamasaki 1995: 22–3). School attendance rates were only 50 per cent in the 1880s but soon rose to over 90 per cent by the mid 1890s. However, schools were less places to learn than places to create dependence on the state structures and to impose uniformity (Yamasaki

1995: 24–6). Prospective teachers were selected for college on the recommendation of a local government official, trained through an almost military programme and obliged to work for at least five years after graduation in the prefecture which sent them. Where they returned to teach in their own village there may have been a period when traditional educational patterns and the new state education were mixed but this did not last for long. Traditional melodies and rhythms survived in children's play until the 1940s but within schools the Ministry of Education introduced western martial music in the 1890s which soon drove indigenous tunes out of the curriculum.

Reforms of the political and legal structure included reform of the civil code. The early attempts to adapt the Code Napoleon for Japanese use were dropped and in the 1890s conservatives insisted on the adoption of the 'traditional' Confucian family form as the basis for the new civil code. Respect and obedience were required from those of lower rank, from children to parents, from wife to husband, and in general from the young to the old, all wrapped in notions of parental benevolence and family solidarity. The committee which recommended the adoption of the revised civil code investigated prevailing customs and were shocked to discover that, '90 per cent of commoners practised anomalous (e.g. not conforming to "Confucian rules" as they understood them) forms of marriage, kin reckoning and household formation' (Smith 1996: 168). There was little basis in the assertion that the values of the civil code were founded on Japanese tradition but the Confucian trained elite nevertheless was eager to impose them on the population of Japan.

Some of the ideas of child protection taken up by the Meiji government were continuations of policies previously practised in some daimiates. Abortion and *mabiki* were banned. Support for foundlings by towns and villages hitherto up to age ten was extended to age fifteen in theory, and in practice to age thirteen (Furukawa 1993: 213). From 1873 the government began granting poor families cash payments of ¥5 on the birth of the third child (Garon 1997: 33). If there was a change, it was that these policies were not so much aimed at increasing the population as encouraging unification and perhaps demonstrating to foreign observers that Japan was a civilised society (Furukawa 1993: 214).

A reformatory law was introduced in 1900 which should have established one reformatory in each prefecture to which children would be sent by courts or local administrations. The system grew slowly such that by 1907 there were only seven reformatories housing 117 children. The system only developed following the introduction that year of a revision to the criminal law which made the age of criminal responsibility fourteen and allowed the head of the reformatory to exercise parental rights over the children (Furukawa 1993: 225–6). The main concern was not so much the interests of the child as ensuring social stability.

But these were not the only ideas about the position of children in society that were circulating in Japan. Ueki Emori (1857–92), an influential member of the *Jiyu Minken Undō* (People's Rights Movement) argued that the individual, not the family whether nuclear or extended, should be regarded as the basic element of society and that children should be regarded as individuals in their own right. He criticised the contemporary system which exaggerated the rights of parents and paid too little attention to the rights of children, 'children exist for themselves, not for their parents' (Tanaka 1995: 27; Furukawa 1993: 220). The 1880s and 1890s were the first period of interest in child rights' ideas and a small 'Child Research' movement emerged. Kutsumi Kesson stressed that children were only in the temporary custody of their parents and they had a right to an upbringing and education which society had a duty to provide if the parents could or did not (Furukawa 1993: 228–31). The short-lived Social Democratic Party of 1901 included in its manifesto the child's right to education paid from public funds (Tanaka 1995: 27).

The first book with the title 'Children's Rights' (*Jidō no Kenri*) was published in 1911. The author, Tamura Naooomi states that at a time when many western countries are accepting the idea of women's rights and Japan has adopted laws against cruelty to animals, there should be no difficulty in asserting the rights of children. Tamura was a Christian, a founder member of the YMCA in 1880, and he argued the case for children having rights from a Christian position, although one which is closer to that of Rousseau than Wesley. Children should be placed at the centre of the family as Jesus placed them at the centre of his ideas. Children learn religion from observing the love and respect in the actions of their parents but he thinks that unfortunately even the Christian church is ignoring children's rights and certainly the mainstream thinking about children in Japan is concerned with care for children from the point of view of creating good citizens rather than protecting their rights. Children require rights but not, he says, complete equality with adults – to dress children in adult clothes would not be to give them respect. Tamura noted the contribution of child psychology which has raised the status of children in a way that is good not only for children but also for society as a whole.

Like many Christians of the late Meiji period he was interested in social revolution and he linked the protection of children's rights to that wider project. Ellen Key's work on children had been partially translated in 1906 and he quotes her vision of the twentieth century as being the 'century of the child' noting that without children's rights God's world will never be realisable in this life (Matsudaira and Nakano 1993: 232–42). Key's book was later serialised in full in 1916/17 in *Seitō*, the journal of one of the pioneer feminist groups *Seitōsha* (Blue Stocking Society) and published as a book in 1916. Ideas of children's rights developed along with the women's movement (Furukawa 1993: 238).

Taishô and early Shôwa, 1911–45

Japan like much of the world was swept by a rising tide of interest in liberal and socialist ideas after 1918, which worried the establishment and inspired its critics. In fact the ruling elite never lost control of political events or social life and by 1930 the government had strengthened its powers over dissident groups and the education system in what in retrospect were preparations for mobilisation for total war in the late 1930s. However there was a variety of critical ideas swirling around in Japan from 1918 onwards in the era known in Japan as 'Taishô Democracy' and many of these ideas had implications for views of children and childhood. This period was one in which there was contestation between the state-centred policies for children and the liberal ideas about childhood of the urban middle class. We begin by sketching the development of government policy.

After 1918 the *Naimushô* (Ministry of the Interior) became more proactive in the development of child-oriented policies which were being put forward by the women's movement. Proposals for a juvenile court system on the US model were initially rejected by the Social Affairs Bureau but in 1923 a Juvenile Trial system was created. A Relief and Protection Law passed in 1929 following the onset of the economic recession and effective from 1932, designated as potential recipients those over sixty-five, under thirteen, pregnant women and the mentally or physically disabled, although the ministry was very concerned that unemployment relief services would encourage an unwelcome consciousness of rights (Furukawa 1993: 256; Garon 1997: 57). Reform of the legal treatment of children under fourteen was introduced with the *Shônen Kyôgohô* (1933), which set up a system of reformatories and specialist advisers for young offenders. In the same year a law to prevent child cruelty prohibited parents from having their children sell goods on the street, beg or do dangerous work. The main aim of this was to prevent impoverished peasant families, especially those in Tohoku, from selling their daughters into service or prostitution but it had little effect (Furukawa 1993: 259–61). In 1938 the newly created Ministry of Health and Welfare established a Children's Bureau (*Jidôka*) but this interest in children's health had less to do with child protection for its own sake and more to do with the fact that in 1935 400 out of every 1,000 young men were failing the military health screening (Furukawa 1993: 270). Towards the end of the 1930s mobilisation plans required the production of more healthy children – couples were encouraged to marry earlier and to have five children. Some of the reforms may have had an element of child protection in them but by the end of the decade the interests of all Japanese, including children, were subordinate to the ends of the state.

Part of the growing urban middle class was sympathetic to the liberal ideas of the post-war world and in reaction to industrialisation, urbanisation and the militarisation of education, which was weakening traditional children's culture, attempts were made to record and publish traditional chil-

dren's songs and fairy tales. Several compilations were published in attempts to preserve and define Japan's traditional children's culture.

There was also the emergence of a 'Taishô Free Education' movement which emphasised 'whole person' education. Some private schools adopting this approach were set up and their ideas had some influence on the public sector too. However this interest in imported education ideas did not last long. It reached a peak in the 1920s and by 1933 it was reported to be waning such that words like 'individuality' though not actually banned were starting to sound passé (Uno 1995: 36). During the 1930s not only did radio spread very quickly (a million sets in 1932, five million in 1940) but there were more mass-circulation newspapers and magazines including some produced specifically for children. Several of the most popular such as *Shônen Kurabu* (Youth Club), which had related publications for girls and younger children, were firmly based on the ideas of the Meiji Constitution. One writer remarked,

if the child culture of Meiji was saying, 'Children, you can't be childish forever, quickly grow up' and the child centred Taishô period was saying, 'not at all children, never forget your pure childish hearts' the *Shônen Kurabu* was stressing 'as children you are future servants of the state'.

(Uno 1995: 40, quoting Sato 1964)

And, of course, this was only the start. From 1937, society was transformed from mass consumerism to state-controlled rationing and the education system went from seeking to create little citizens able to fight, to training little soldiers. During the war years children were drafted to work in fields and factories with the luckier ones being evacuated from urban areas (Uno 1995: 45–8).

By the 1930s few were talking about rights, to do so in public risked arrest by the police or harassment by right-wing gangs. However, during the 1920s several authors were writing about children's rights. Nishiyama Tetsuji published a book in 1918 entitled *Educational Issues and Children's Rights* (*Kyôiku Mondai Kodomo no Kenri*) in which he criticises the uniformity of Japanese education, its curriculum, textbooks and even school architecture. He suggested that children have three main rights: the right to be born well, the right to be brought up well and the right to an education, but with special emphasis on the latter (Matsudaira and Nakano 1993: 243–55). Shimonaka Yasaburô in a book on education reform published in 1920 (*Kyôiku Saizô*) talks of the child's right to play and argues the case for full equality of opportunity in education and educational autonomy from the state through the election of local education committees (Matsudaira and Nakano 1993: 256–64). Noguchi Jutarô in *The Century of Education* (1925, another reference to Key's book?) talks of children's rights as natural rights and their right to make demands on teachers and parents which should be

respected (Matsudaira and Nakano 1993: 267–73). As a final example we can point to the list of rights produced by the socialist Kagawa Toshiko in a speech made three months before the League of Nations produced its ‘Geneva Declaration’ in which he talks of children having ‘the right to eat, the right to play, the right to sleep, the right to be scolded, the right to request parents to stop arguing and the right to demand they stop drinking’ (Matsudaira and Nakano 1993: 274–81).

Kagawa was a Christian, Nishiyama had studied in New York, all of these writers – and there were others interested in children’s issues – belonged to the dissenting tradition that had its origins in the *Jiyū Minken Undō* but which vanished from view when the state drove it underground from the late 1880s to 1918. This suppression of the critical elements happened once more from the late 1930s but it did not eliminate them, so when the Americans arrived in 1945 with their ideas for political and educational innovation there were many Japanese who were sympathetic to their ideas and objectives and were eager to help.

Children of the company

According to a survey of 1948, 1,260,000 children lost their father during the war and over 120,000 children lost both parents. Many of this latter group were looked after by their relatives but there were still a large number of orphaned children on the streets of Tokyo and other big cities who were regarded as a serious problem in the immediate post-war months and years. Local governments were given the responsibility to look after these children but no extra resources to enable them to do so. In March 1948 the Children’s Bureau was recreated in the Ministry of Health and Welfare (MHW) to co-ordinate policies on child protection, in particular the implementation of the Child Welfare Law passed the previous year (Furukawa 1993: 277). This was mainly concerned with the welfare of orphaned children and allowed no scope for taking the view of the child into account.

Reform of Japan’s education system was high among the priorities of the US Occupation government. The new structure was patterned after that of the USA: nine years of compulsory education, six in primary school, three in junior high school to be followed by three years of high school and four years at university. All children, apart from those with special educational needs, would attend their local primary and junior high school, thus the complex post-primary school system which placed pupils on academic and different kinds of non-academic pathways was abolished. Control of textbooks was taken out of the hands of the Ministry of Education and entrusted to locally elected school boards. Teachers were encouraged to adopt child-centred teaching methods and ordered to abandon the old textbooks and militarist methods. None of these ideas were completely new to Japan, many of them had been advocated by the ‘free education’ theorists of the 1920s.

In June 1949 the Central Child Welfare Council (*Chuō Jidō Fukushi*

Shingikai) set up a committee to produce a 'Children's Charter' to act as a 'social contract' between adults and children. The charter was proclaimed on 5 May 1951. It is based on the general principles that 'the child be given respect as a human being' and 'be given due regard as a member of society', however the document does not use the language of rights. Japanese society appears to benevolently promise to ensure adequate nourishment, education and protection from exploitation without children being given any means of redress should it fail to live up to these promises (Van Bueren 1993: 463–4; Furukawa 1993: 279).

By 1955 the Japanese economy had recovered such that by most indices it had exceeded pre-war levels. This growth moreover was distributed relatively equally so as to benefit most sectors of society. From this time, policy towards children moves, albeit slowly, away from 'protection' and towards a 'welfare' mode.

On the other hand, soon after the end of the US occupation, the Ministry of Education supported by the conservative parties in power re-asserted its control over the structure and content of education. Many radical educationalists were purged from the profession in 1949 when in the 'Red Purge' over 1,000 teachers and professors lost their jobs for suspected communist sympathies. During the 1950s there was a return to the pre-war system of government control of textbooks, locally elected education boards were abolished in 1956 and their powers transferred to bodies appointed at prefectural level that tended to dutifully follow central government orders. A teacher efficiency rating system was imposed in 1958 which gave government effective control of education right down into the classroom. Also in 1958 the use of the MoE's national curriculum became mandatory.

There was a major debate about the structure of secondary education which came down to three options: no selection until eighteen, selection at the age of fifteen-plus to decide on entry to an academically or vocationally oriented high school, or selection at twelve-plus for entry into different types of six-year high schools. In the early 1950s the MoE seems to have preferred the first option but big business consistently sought a system that provided different types of education according to ability; training to meet the needs of the economy. In 1960, Scholastic Achievement Tests were introduced in part to further strengthen MoE control over teachers but mainly to link education and manpower training policies. During the 1960s the idea of a single track for high-school education was abandoned and technical high schools were created as part of education policies targeted at economic growth (Okada 1998: 167–77).

Nakai argues that the rapid urbanisation and industrialisation led to a re-formation of the notion of childhood within Japan. He recognises that there had been a notion of 'childhood' among the middle-class intellectuals of the inter-war period who collected songs and folk tales but this had not affected nor represented the bulk of the population as the necessary economic affluence was not present. Rapid economic growth in the 1960s spread that

affluence throughout society. This coupled with the changes in the nature of education and the number of children staying full time in school until the age of eighteen – up from 57.7 per cent in 1960 to 91.9 per cent in 1975 – meant that the nature of the years before eighteen changed. As Nakai puts it: they lost nature, work, friends and the link with the community and in their place they gained material wealth, mass-pleasing media, exams as the purpose in life and the nuclear family. Moreover as the family unit became increasingly concerned, not to say obsessed, by educational performance, the family started to function as the link between school and work. Children in this process were freed from work (at least until eighteen) but not from consumption and they became merely the ‘half person’ of a pupil (Nakai 1995: 86–101).

If in the pre-war period the education process functioned to produce citizens and later soldiers who would willingly serve the state, from the 1950s onwards the education system was moulded to serve the needs of industry. We have here another example of what Woodiwiss calls the development of *kigyōshugi* (companyism) that characterises post-war Japan and this same *kigyōshugi* was to dominate the MoE's approach to education until well into the 1990s (Woodiwiss 1998: 64).

There are many that have opposed this process. The Japan Teachers Union (JTU) welcomed the reforms of the occupation period and resisted, for the most part unsuccessfully, the MoE's attempts to reassert its control over the education system. A broader coalition of groups which included teachers formed the Japan Association to Protect Children (*Nihon Kodomo o Mamoru Kai*) to oppose the attempts to increase the nationalistic component of education. Some groups sought to counter the increased emphasis on exam passing and vocational education by creating cultural opportunities for children such as the Children's Theatre (*Kodomo Gekijō*), which started in 1966 in Fukuoka and now has groups in most areas of the country.

There is consistent criticism of the extent to which children's lives are dominated by the examination system; some from their pre-school years, most between the ages of ten to eighteen. Pressure on children has increased. Between 1962–72 the content of school textbooks increased around 150–200 per cent forcing teachers to move more rapidly through the curriculum. A survey in 1976 found that teachers would move on to the next topic when around 50 per cent understood the topic (Iwasa 1997: 130). Simply in order to keep up, many children needed to buy supplementary materials or attend supplementary classes – *juku* – in the evenings or at weekends. Indeed in order to win a place at a ‘good’ private junior high school or an academic stream senior high school it became necessary for most children to attend *juku* several evenings a week. Many have commented on how education has become a process of the accumulation of more or less useless facts and how schooling has taken over family life.

Meanwhile, the number of children has declined both absolutely and proportionally. This has changed the nature of childhood in a number of ways and had an effect on policy towards children. The long-term birth-rate

Table 11.1 Changes in average family size in Japan, 1950–95

	<i>1 child</i>	<i>2 children</i>	<i>3 children</i>	<i>4+ children</i>
1950	27.2	28.0	16.5	28.4
1975	45.4	40.4	11.8	2.5
1995	47.8	36.1	13.2	2.9

Source: Chôchiku Kôhō Chuô Iinkai 1997: 102

was gradually falling from 1920 and was largely unaffected by the pro-natalist policies of the late 1930s and early 1940s. As men returned from war there was a 'baby boom' in 1947–49 and around 70 per cent of people born in 1952 had three or more siblings. This pattern levelled off in the early 1950s to mid 1970s when the average number of births to each woman was 2.13, slightly more than necessary for the population to reproduce itself which is 2.08 births per woman. However by 1994 it had declined to around 1.50, reaching a low of 1.34 in 1999.

Until the 1980s big business was happy with the functioning of the education system as, in R.P. Dore's words, 'an enormously elaborated, very expensive intelligence testing system with some educational spin-off, rather than the other way round' (Dore 1982: 48–9). But since then there has been increased attention given to its dysfunctional aspects notably bullying and 'school refusal syndrome'. These are believed to be related to the increased pressure being applied to children to do well in tests and entrance examinations. The system which placed constraints on individuality, which produced 'managed individualism', turned out effective and loyal workers for the large- and medium-sized companies. Since the mid 1980s, however, there is a concern that loyalty is not enough and senior executives have criticised the education system for producing standardised workers lacking the imagination and creativity required by Japanese industry in the twenty-first century. There are now demands for the reform of the education system to promote the development of creative individuals, although it should be noted that this is not a concern for individualism for its own sake or for the sake of the development of the moral status of the child but for the sake of the company within corporate society. The question that confronts policy makers in the Ministry of Education is: how far can control be relaxed to allow sufficient development of personality – to suit the current needs of industry – without the pupils rejecting all social norms and lapsing into delinquency?

Post-war definition of the child

Finally a brief discussion on the legal definition of the child. There are in Japan, as in most states, a myriad of laws and regulations that influence the

lives of children and which use different definitions. Broadly speaking only individuals over twenty are considered as full citizens with the rights to vote or enter into contracts. Conversely 'children' refers to those under the age of twenty but there are a number of other legal definitions of children and indeed words used to refer to those less than twenty, Namimoto lists seven used in legal documents, the most common being *kodomo* and *jidô*, with the latter being used most frequently to refer to younger children. Children have a right to compulsory education up to the age of fifteen and parents or carers have the obligation to send them to school up to that age. At the age of fifteen individuals may take up full-time work although there remain some restrictions on the nature of work and hours until the age of eighteen. The age of sixteen marks the start of treatment as an adult: females may marry and in the married status enter into contracts, boys and girls may obtain motor-bike licences. Boys may not marry until they are eighteen, at which time both sexes cease to be regarded as minors for some legal purposes, and they may obtain full driving licences. Though no citizens may vote until the age of twenty, members of the Imperial family would appear to be regarded as adult after their eighteenth birthday (Namimoto 1979: 254-7). In practice well over 90 per cent of children remain in full-time education until they are eighteen, and over 50 per cent carry on with some form of education thereafter for at least two years.

The rights of children – the recent debate

Of the eighty-five books on children's rights in print in 1995 most had been first published in the 1990s. Two were pre-war, three first appeared in the 1960s (one a translation from French), six in the 1970s and another six in the 1980s. Of course some books may have been published, gone out of print and therefore cease to be listed but it seems safe to say that the absence in the 1950s and 1960s of books linking children with rights is indicative of the way in which dissatisfaction with the way children were being treated in Japan was not conceived of in terms of rights until after 1970. While discussion was taking place at the international level about how to draft what came to be the CRC, within Japan two types of groups started to take an interest in children issues and think of them in terms of rights: lawyers and teachers.

Lawyers

In 1975 some lawyers became alarmed at a proposal to revise the Juvenile Crime Law and a committee was formed within the Tokyo Bar Association to organise opposition to it and similar groups were formed elsewhere in the country. Some aspects of the legal treatment of young offenders were changed but the activities of the bar associations at national and local levels appear to have prevented more radical reform. By 1980 the scope of these

committees had widened to consider children's rights in general and several adopted the name of *Kodomo no Kenri Inkai* (Children's Rights Committee). The JFBA holds a conference on human rights each year and in 1985 the theme of the conference held in Akita was children's rights in schools, in particular the issue of school rules, the use of corporal punishment and the use made of confidential report cards (*naishinshō*).

Since 1994 the JFBA has produced a bi-monthly newsletter to report on activities relating to children's rights both at the national level and within local associations. At the prefectural level the groups usually meet once a month to discuss on-going campaigns and to consider an appropriate response to particular incidents. During the 1990s one on-going campaign has been to demand that all juveniles arrested or accused of a crime be accompanied by an 'attendant' (*tsukisoinin*) when being interviewed by the police or appearing in the family court. This hardly ever occurred before the 1990s and even in the mid 1990s happened in less than 1 per cent of cases. The bi-monthly newsletter contains accounts of cases where a lawyer has accompanied a child during the police investigation or trial. Other items that are commonly reported in the newsletter are local incidents that involve children's rights issues, for example the use of corporal punishment in schools. Although strictly speaking illegal, it remains common although only incidents that result in serious injury get reported. In 1995 a teacher slapped a junior high school pupil across the face causing her to fall, hit her head and suffer a fatal injury. Such an incident will attract such publicity that further action by the committee may not be needed. However lawyers will investigate allegations of the recurrent use of corporal punishment in schools or children's homes and produce reports of their investigations that they hope will reduce its use.

Individual associations go further and become involved in local campaigns. The Fukuoka Bar Association has operated a telephone helpline giving free legal advice on child-related issues, sometimes seeking to highlight particular themes. For example, it became customary in some junior high schools to insist that on entering from primary school all boys had to have their hair cut short into a 'crew cut'. This was common in rural Kyushu schools from the 1960s and 1970s. The 'crew cut rule' was challenged in the Kumamoto court in 1985 but the eventual judgement did not find in favour of the complaining boy and anyway by that time he had already graduated from the school. However the court did suggest that there was no rational basis for that particular rule. In 1991 the Tokyo District Court expressed its opinion that the right to decide on one's own hairstyle was protected by article 13 of the Constitution. This is the background to the campaign conducted from 1993 against the forced crew cut rule.

In February 1993 the Fukuoka Bar Association (FBA) received a request for help from the parents of a boy who shortly would be having to have his hair cropped. Then in early March the *Asahi* newspaper ran an opinion column which suggested that head teachers should re-consider this rule.

Soon after the FBA received five more requests for help in challenging the 'crew cut rule' and three lawyers formed a committee to devise a strategy that would eliminate the rule from all schools in Fukuoka. A special phone help-line was created which in two hours took thirty-nine complaints. Next the committee telephoned all 346 public and private junior high schools in Fukuoka asking if they had the rule. There were 130 of them, mostly newly established schools near cities or in the countryside. The next step was to publish a twenty-three page document explaining why the 'crew cut rule' was illegal and unconstitutional and to distribute it to each of the 130 schools and related boards of education. The day following publication of this, the FBA president visited the prefectural Education Affairs office, a visit which was shown on local television.

Next, two lawyers visited each school which persisted with the practice to discuss it with the head teacher. Some forty-two schools abandoned the rule without a visit, eighty of the eighty-eight schools visited have given up the rule. School authority has not been weakened, discipline problems have not got worse. Those schools that doggedly persisted with the rule were now telephoned each term and the indications are that all schools dropped it by the end of 1998 (Yahiro 1997: 72–80).

Needless to say the lawyers groups are not always well liked by teachers, especially head teachers. In Fukuoka the lawyers groups cannot advertise their telephone help-line in schools and must resort to putting posters on telephone pylons around school entrances to publicise their activities. The various bar associations campaigned for the ratification of the CRC, refer to it frequently in their publications and find imaginative ways to try to ensure its implementation. At the national level the JFBA produced an alternative report in summer 1997 for submission to the committee in Geneva. We will come back to that report in a moment.

Teachers

However it would be incorrect to conclude therefore that all teachers are opposed to the notion of children having rights. Indeed the Japan Teachers Union (JTU), which has led the struggle against the Ministry of Education reforms since the 1950s, has given its full backing to an organisation whose central interest is children's rights, the Federation for the Protection of Children's Human Rights, Japan – *Kodomo no Jinkenren*.

This has its origins in a committee formed during 1979, the UN Year of Children. In 1985 it was proposed to form a federation to promote the idea of the rights of the child and the three main supporters were *Sōhyō* (the left-of-centre labour union federation), *Jichirō* (the local government workers union) and the JTU. Also involved were the (JCP oriented) *Nihon Kodomo o Mamorukai*, the *Nihon Fujinkai* (Women's Group – JSP), and the *Ikuei Shōgakkin* Group (Educational Scholarship – JCP). The Buraku Liberation League and the Korean Schools League (DPRK oriented) wanted to join

but for them to have done so would have upset the JCP groups in the federation. When *Sôhyô* dissolved itself to create the umbrella union federation *Rengô* in 1989, the JCP supporters of the JTU left to form a rival union and the *Ikuei Shôgakkin* group left the *Jinkenren*. The *Nihon Kodomo o Mamorukai* remained but now the way was clear for the BLL and the Korean schools group to join a restructured organisation in 1990.

Having said all that, the *Jinkenren* is located within the JTU offices in central Tokyo and the JTU is the main source of its support certainly in terms of personnel, probably in terms of income. Since 1991 it has produced a bi-monthly newsletter (*Infômeeshun*) circulated to the corporate members and to the 300 individual members which shows how the CRC is being implemented in Japanese homes and schools. During the first few years the *Jinkenren* sought simply to publicise the idea of children having rights through seminars, lectures and the publication of books and pamphlets. It produced its own translation of the CRC in 1987 and the following year it launched a campaign demanding that Japan be among the first to ratify it. In January 1990 it published a booklet showing how the CRC was incompatible with various parts of Japan's legal framework. Ratification, it argued, would require substantial changes to domestic law. On 21 September 1990 the Japanese government signed the CRC and that December Nakayama Taro, the Foreign Minister, said it would be ratified by the Diet at the next session. In the event it was not and despite pressure from the opposition parties the government did not finally get round to submitting the CRC for ratification until 1994. The explanation for the almost four-year delay between signing and ratification is the political confusion following the Gulf War and then the election of 1993 which saw the LDP out of power for the first time since 1955.

Throughout this time the *Jinkenren* was lobbying the government and opposition parties, even organising a national petition demanding early ratification. Since ratification it has been active on three main fronts: to survey how the CRC is treated in school textbooks (a report on this survey was published in April 1996), to produce an 'alternative' report for consideration by the UN CRC committee in May 1998 and to investigate how the CRC is being implemented by local government (report on this survey published July 1997) (interviews at *Jinkenren* offices, 26 September 1997; *Kodomo no Jinkenren*, 1996).

The CRC network

There are many other organisations in Japan that have taken a serious interest in children's rights and the CRC. These range from branches of international organisations such as the YMCA or Amnesty International, groups only active within Japan such as the Osaka-based International Children's Rights Centre or the Korean Residents Human Rights Association (*Minkenkyo*) to the purely local groups such as the Nagano

CRC committee or tiny groups of housewives and teachers who meet in community halls to study the CRC and advise on cases of actual or imminent school refusal. Some of the larger of these groups formed a CRC Network at a founding conference in November 1991. Since then it has produced a bi-monthly newsletter – *Kodomo no Kenri Joyaku* – and several books about the covenant. More importantly it has held an annual Spring ‘event’, in 1997 it was a one-day conference on the theme ‘Children’s Experience of and Views about Participation’, and in November a ‘Forum’, which lasts two days including panel discussions on such themes as: the environment, children from minority groups in schools, child prostitution. The ‘Forum’ brings together representatives of groups throughout the country to discuss how the CRC is being implemented in schools and local government. The organisation of these events is done by a committee of twenty of whom, in principle at least, ten are between ten and twenty years old.

Responses to the CRC

In January 1991 the then Prime Minister, Kaifu Toshiki, said there was a need for speed in the ratification of the CRC. As we have seen, it was not until May 1994 that formal ratification took place and in part this delay can be blamed on the international and domestic political crises that overtook Japan in the early 1990s. However, the delay also reflects a certain reluctance to take the idea of children’s rights seriously in Japan. This can, I think, be identified at a number of levels. To begin with, though the CRC had much support from those on the left, there were many who were sceptical or critical about it. I will begin with a review of those criticisms. Then there were the responses of government. CRC advocates claimed that many changes in law would be required to meet the standards set in the covenant, what did government do? Finally the covenant stipulates a report be presented to the UN within two years of ratification. So what was in the government report and what were the responses of the child rights advocacy groups?

The November 1992 edition of *Gendai no Esupuri (L’esprit d’aujourd’hui)* is a special edition on Children’s Rights. Not all the articles are published here for the first time, not all of them are critical of rights but reading through them gives one a feel for conservative attitudes. For example in the roundtable discussion which begins the journal, Yamamoto Noboru talks of how the USA with 200 years of history has imposed its ideas of basic human rights and democracy onto the educational concepts of Japan, which has a 2,000 year history. He suggests that, as in the occupation, the CRC is something being imposed on Japan from outside and used by the JTU to bolster their failing fortunes. They fear that the JTU will ‘use’ the CRC in its struggle with the Ministry of Education and at several points there is discussion about whether the use of the *Hinomaru* flag and the *Kimigayo* anthem in school ceremonies are consistent with the provisions of the CRC. This was a controversial issue at the time. Most of the panel think they are both

constitutional and consistent with the CRC but they fear that the JIU will use the CRC to oppose their use and disrupt the management of schools. How far, asks one participant, will this idea go? Will children be asked to select teachers? (Takahashi *et al.* 1992: 5–25; on the *Hinomaru/Kimigayo* issue see Cripps 1996).

In a different article Morita Akira relates the growth of interest in children's rights in the USA to the breakdown of the nuclear family. He concludes his piece on children and the law by saying that just as the notion of a child's 'right to care' emerged from the process of industrialisation in the nineteenth century so the current vogue for the child's 'rights for autonomy' comes from a society of the 'destruction of the family' (Morita 1992: 68–9). Both weaken the concept of parenthood and the inference seems to be that the CRC based on the notion of child self-determination is not appropriate for Japan.

Several authors express concern about the effect the introduction of the CRC will have on education in schools. Takahashi Shiro, in an article which originally appeared in *Bungei Shunju*, claims the CRC could do for Japanese education what Commodore Perry's Black ships did for Tokugawa Japan (Takahashi *et al.* 1992: 148). Another argues that 'where rights prosper, personality withers' – school rules stimulate self-discipline so a certain degree of restriction of the freedom of the rights of the child is fully justified (Mori 1992: 129). Another opines that the ratification of the CRC will hasten the trend towards a litigation society and encourage distrust of the school system (Aoyama 1992: 145–7).

Clearly the introduction of the CRC provoked much concern but two themes become apparent: the effect the CRC will have on the family system and, second, its impact on the school system. While not all agreed, this group of conservatives fear the impact will not be good.

The official government view was that its impact would be neutral. *Toki no Ugoki* (Trends of the Times) is an official journal used to announce and comment upon new policies. The edition of June 1994 was devoted to the recently ratified CRC. There is an initial discussion led by Morita Akira followed by a series of formal responses to the CRC from the main ministries concerned. Morita's introduction includes remarks on the high incidence of child abuse in the USA compared to its rarity in Japan. He suggests that schools and families are not working in the USA due to the stress on rights. The implication seems to be that the CRC has less relevance to Japan than the USA and European countries where the family has allegedly collapsed (Morita and Takano 1994: 12–14). The MFA comments that Japan will give more support for projects involving children through its ODA budget, its contributions to WHO and UNICEF and support for refugee children through UNHCR. The MoE official position was that the recognition of children's rights was already part of the Japanese education system and therefore no change would be needed (*Toki no Ugoki* 943, June 1994). The MHW suggested there was a need to change the main aim of

child rights from 'welfare' to 'well being'. It also announced a system of *Jidō Fukukushi Adovokeeta* (Child Welfare Advocates) to be set up in major cities to act as counsellors in instances of child abuse (*Toki no Ugoki* 1994: 40–5). However the most significant announcement was that from 1994 Children's Rights Specialists (*Kodomo no Kenri Senmon In*) would be nominated from among the Civil Liberties Commissioners to create a national network of individuals with a remit to promote and protect the rights of children. They would deal with incidents involving children, would organise public lectures and other forms of publicity and would conduct research in collaboration with other local groups (*Toki no Ugoki* 1994: 29). Government reported to the CRC that by January 1996 515 such children's rights specialists had been appointed (MFA 1996: 7).

This system was completed in 1997 and these 'children's ombudspersons', as some call them, are now active in every prefecture. They seem to be most effective where they work with local groups. The fifty specialists in Tokyo not only work with local rights groups but make a positive effort to have children speak at their meetings. Eighteen children's rights ombudspersons in Fukuoka have formed the core of a 'network' composed of representatives of the groups and committees interested in children from the lawyers to doctors, social workers, police and teachers – twenty-eight groups in all. They have concentrated on the issue of violence against children and created a working group on child abuse.

Reports to the United Nations

Article 44 of the CRC stipulates that countries which ratify the CRC shall submit to the Committee on the Rights of the Child,

reports on the measures they have adopted which give effect to the rights recognised herein and on the progress on the enjoyment of those rights: a) within two years of the entry into force of those Convention ... b) thereafter every five years.

The Japanese government submitted its initial report in May 1997 and it was considered by the committee in May 1998 which gave its final considerations on 5 June 1998.

The production of the government report provided the occasion for child rights advocacy groups to produce and submit an alternative report for the Committee's consideration. In the Japanese case there were no less than three lengthy reports produced; one by the JFBA, one (mainly) by the *Jinkenren* and one by a coalition of groups with an interest in children's rights (*Kodomo no Kenri Jōyaku: Shimin/NGO Hōkokushō o Tsukurukai*). Let me try to summarise some of the key points from this mass of material beginning with the government's report.

The Government Report, as is usual in these cases, begins with an intro-

duction and outline of 'General Measures of Implementation'. Then it moves through the sections of the covenant commenting on how these aspects of children's rights are protected or promoted in Japan and/or by the Japanese government. Its basic approach to the CRC is expressed most clearly in Par. 12 where it states:

Ratification of the Convention ... did not require any amendments to Japanese legislation nor any new enactments of law since most of these matters have been stipulated by the ICESCR and ICCPR ... and are guaranteed under the existing legal framework of Japan, including the Constitution.

(MFA 1996: 5)

The report follows each reference to articles of the CRC with an indication of how this point is dealt with in Japan either in the Constitution or in law. Compared, for example, to the UK Initial Report (1994), it is a very formal document, more concerned to show the existence of legal provision than to explain any, 'factors and difficulties ... affecting the degree of fulfilment of the obligations ...' (CRC, Par. 44.2).

The JFBA's counter-report, 'A Report on the Implementation in Japan of the Convention on the Rights of the Child' was released in June and published in Japanese as a book in August 1997. It is very critical of the government's report:

the report is no more than a specification of the appropriate laws and regulations, lacking an approach of concrete examination on whether the rights of children are sufficiently guaranteed.

... the government has not made any specific efforts to consolidate policies in a comprehensive manner.

... the CRC aims to realise children's participation and expression of views. ... Nevertheless the child as the subject of these efforts is completely left out and ignored in the government's report.

... no consideration is made at all to the point that since children are not experienced nor informed about exercising their rights, it is necessary to establish an appropriate environment in order for them to actually enjoy and exercise these freedoms and rights.

The Government Report does not reflect correctly the present situation, difficulties and tasks of Japan.

(JFBA 1997b: 1-2)

The report is over 160 pages in English translation so only a few points will be picked out. It highlights the fact that there has been no attempt to devise a co-ordinated policy. When CEDAW was ratified a section on women was created in the PM's Office, a Domestic Action Plan was formulated in 1977, reformulated in 1987 and re-presented in 1996 as the 2000 Plan for the Joint

Participation of Men and Women. No such overall plan has been devised for children (JFBA 1997b: 9–10). There has been little consultation with the NGOs in general and no opportunity for them to take part in the preparation of the government's report.

Government is accused of trying to minimise the impact of the CRC. The MoE, in its infamous 'notice' issued soon after ratification which suggested no changes were needed as the Basic Law on Education conforms to the spirit of the CRC, also stated, 'It is extremely important for children to understand their rights and duties correctly.' As the JFBA report points out the CRC makes no reference to 'duties'. Similarly the MFA material produced to publicise the CRC includes the comment on the child's right to express its views, 'To realise this however children should also think of others and comply with moral principles' (JFBA 1997b: 12).

Despite being the key concept within the CRC the principle of 'the best interests of the child' is not explicitly stated anywhere in Japanese law. Particularly in the creation and implementation of school rules the report comments, 'human rights of the child do not enter through the school gates'. There are unnecessary restrictions on the rights of the child and, 'excessive importance [is] given to parental authority' (JFBA 1997b: 23). Children are not permitted to speak for themselves in civil litigation and even in criminal proceedings juveniles 'often cannot present his/her view freely' (JFBA 1997b: 31). Only rarely are children assisted in court. They have a right to be accompanied when they appear in the Family Court but in 1995 only 1.2 per cent were (up from 0.34 per cent in 1977). Even in serious cases where the juvenile was held on remand in a Juvenile Classification Home, less than 20 per cent were represented in court (JFBA 1997b: 130). This and other aspects of the treatment of young offenders is not only contrary to the spirit of the CRC but also the UN Rules for the Administration of Juvenile Justice (Beijing Rules). As one might expect in a report issued by the JFBA there are many and detailed criticisms of the Japanese government's record and practice in the treatment of young offenders but there is considerable amount of space also given to criticism of the education system. The government's report is said to underestimate the amount of violent action by teachers against children; the response to incidents of bullying should be to restore the dignity of both the bully and the bullied; school rules should be revised following consultation with both parents and children; parents and children should be able to control personal data gathered about them. Most of these are aspects not mentioned in the government's report or only given cursory treatment. This report was produced by the JFBA in the hope that it would be the start of a constructive dialogue with the government after they had been excluded from the drafting process.

Other NGOs also felt annoyed at having been ignored and it was initially planned for them to co-operate with the JFBA to produce a combined 'counter-report'. However organisational differences and ideological prob-

lems emerged and there were two more reports produced. The 'Citizens and NGO Report on the CRC' (aka Tsukurukai) starts by commenting that the government's report 'was prepared from the government's perspective as an enforcer of policies on children's issues ... [and] ... completely ignores other perspectives, specifically those of children who the policy is intended for, citizens and NGOs' (Tsukurukai 1997: 2). The committee which produced this report was formed in April 1996 and heard from 100 NGOs and 220 individuals – their reports and opinions were published in six volumes. From that a report was compiled which amount to 371 pages in English translation (for a description of the process of the creation of this report see Fukuda 1997).

The implementation of the CRC, the report begins, is hampered by the fact that the government completely ignores the CRC 'and even regards it with hostility' (Tsukurukai 1997: 5). In the two years since ratification there has been no government programme which has incorporated its values. The 'Angel Plan', introduced in 1994 to improve child-care policies in an attempt to encourage women to have more children, does not mention the CRC nor does the Child Welfare Law which was partially revised in 1997. The government interprets the CRC in terms of 'one way protection and control of the child by adults and society without considering the independent desires of the child' (Tsukurukai 1997: 7). They regret the fact that the government did not use the reporting process as an opportunity to review policy and stimulate discussion of the implementation of the CRC in Japan (Tsukurukai 1997: 16).

The report makes some concrete suggestions. They want to lower the voting age from twenty to eighteen and revise the laws and regulations of the sexual activity of young people to being based on them being able to decide for themselves (Tsukurukai 1997: 32). Laws that relate specifically to children should be amended to include explicit reference to the notion of the 'best interests of the child' (Tsukurukai 1997: 38), and they suggest the legal system should incorporate the 'best interest' principle into its procedures (Tsukurukai 1997: 39). Respect for the views of the child is not a part of Japanese legal procedure, even the government's report only talks of the 'opportunity to express views' not the duty to listen to them (Tsukurukai 1997: 43). Only when a child is fifteen or over is it mandatory for courts to hear his/her statement; they suggest twelve might be more appropriate. The government's report states that the Administrative Procedure Law 'guarantees in principle opportunities for having statements of opinion or for explanation and rebuttal of advice dispositions' but it omits to mention that this law does not apply to schools, prisons or training institutions – three areas crucial for children (Tsukurukai 1997: 44). Freedom to seek information is impaired by the textbook screening system. School rules which ban 'sleepovers', attendance at rock concerts, which force children to sing the national 'anthem' *Kimigayo* and which prohibit children (even high-school students) from attending political meetings inhibit freedoms of expression,

belief, assembly and association (Tsukurukai 1997: 55). In child welfare 'there is a social consensus to treat children as subordinates to their parents or the society' (Tsukurukai 1997: 83), which the government made no effort to challenge following ratification of the treaty. The use of corporal punishment in 'protective institutions' is said to be widespread. Minimum living standards in these institutions were fixed by law in 1948, when the economy was in ruins and poverty widespread: these should be revised and a system created to review standards periodically. Corporal punishment in schools is described as being common – at least 20 per cent of children receive corporal punishment at some time in their school career and well over one third of children in compulsory education are bullied (Tsukurukai 1997: 178). If the MoE is serious about enforcing the legal ban on institutional violence in schools it should establish a reporting system which will take children's complaints seriously (Tsukurukai 1997: 247–8). The CLC system of child specialists ('ombudspersons') will not do this. At one point it declares 'the problem of school corporal punishment is a touchstone of whether we treat a student as a person with dignity and whether we wipe out the suppressive nature of school' (Tsukurukai 1997: 246–7). There is a long section on Juvenile Justice which repeats many of the points made in the JFBA report. The government's report makes only cursory reference to the rights of non-Japanese children in Japan, which consciously or not reflects the government view of their responsibility, or lack of it. This report goes into considerable depth about the children of minorities urging that Koreans and Ainu living in Japan be regarded as a 'minority in terms of Article 30 of the convention'. The Government is also urged to eliminate discrimination against foreign children (Tsukurukai 1997: 355).

At first the *Jinkenren* and IMADR/BLL were among the groups which sent reports to and supported the work of the network that produced the above report. However, for reasons that are not entirely clear, in early 1997 they decided to prepare and submit a report of their own: 'The Convention on the Rights of the Child: 95 issues to be solved in Japan' (Kodomo no Jinkenren/IMADR 1997). This is another massive document which focuses more on school-related issues and takes up some points not mentioned in either of the other reports. For example, there is a long section on the definition of 'child', showing that as many as six different words are used to refer to children and that even some of these are defined differently under different laws, for example, *Jidô* may refer to people over six but under thirteen, under fifteen, under eighteen or under twenty. Japan must make the law consistent and lower the age of majority to eighteen.

Following consideration of the reports and discussion with the government representatives, the UN Committee noted twenty-two 'principal subjects of concern' and twenty-one suggestions and recommendations in its Concluding Observations. Many of these echo the points made in the 'alternative' reports. They point to the lack of co-ordination of government planning, the inadequate data gathering apparatus, the lack of independence

of the CLC Children's ombudspersons, the lack of co-operation between the authorities and the NGOs, 'developmental disorder due to exposure to the stress of a highly competitive educational system' (Par. 22), the lack of human rights education in the school curricula, the 'levels of violence in schools, especially the widespread use of corporal punishment and the existence of numerous cases of bullying among students', the incompatibility of the administration of juvenile justice with the various UN standards and the insufficiency of independent monitoring or complaints procedures.

In May 1998 it also produced a set of comments on the written responses produced by the government to the questions put to it by the Committee on the Rights of the Child. The main thrust of these comments was once again to point out the 'minimalism' of the nature of the government approach when what is required is a comprehensive review of the education system to fully guarantee children's rights as spelled out in the covenant.

It remains to be seen how the Japanese government will respond to these comments but the various NGOs must feel that their complaints over the years have been justified.

Future prospects

The occasion of the report to the UN Children's Rights Committee gave many children's rights groups the opportunity to focus on what were for them the most important issues. And it may be that although the government resisted being brought into direct consultation with the children focused NGOs, the publicity given to the CRC has encouraged the development of policy towards children. Having said that other events of the late 1990s did not all work to promote the interests of children. In this final section let me make some brief comments on the development of policy towards children and their rights in four areas: in welfare, in schools, in the courts and within local government.

Changes were taking place in policies towards children which coincided with the process of ratification of the CRC. It would however be mistaken to conclude that this policy process is driven by a desire to take children's rights seriously. Current predictions suggest that Japan's population will reach a peak of 126 million in 2005 and thereafter decline. Government has been concerned that unless it takes some action the unwillingness to have babies will continue and the population will shrink even more rapidly. In 1989 fourteen ministries and agencies created a working party to produce a co-ordinated report. The 'Children's Future 21 Research Committee' produced a report on child care in 1993 whose main points were: that child caring should be seen as a partnership between family and society, that a variety of facilities be developed as a basis for both family and local society and policies be devised which regard the child as a rights subject. Overall the aim was to create a healthy environment in which to bring up children. Concrete expression of this was the 'Angel Plan' – a ten-year programme

starting in 1995 to develop facilities for young children to improve the quality and availability of child-care facilities for pre-school children and to increase the provision of after-school care to assist working mothers (Yoshida 1997:171–5).

Its immediate impact seems small: in the metropolitan areas the birth rate per woman has dropped still further to 1.11 in Tokyo and 1.33 in Osaka (Kanda 1997: 30). The population problem is being taken increasingly seriously, some people have called it the most serious problem facing Japan. Several solutions have been proposed but the most radical are based on changing society's view of children from being the private property of parents to regarding them as a public good. This is not a reversion to the pre-war view of children, it goes even further back to the pre-modern period where parents were busy (presumably in the fields), had several children and had little time to 'bring up' children. The parental family provided the basic needs – food and shelter – and left the children alone to get on with their lives. Combined with a notion of children as autonomous members of society and a view of children, even disabled children, as valuable resources from which we can learn, it proposes a rights friendly model of childhood for the twenty-first century (Funabashi 1999). It is hard to see at the moment how this can be more than a thought experiment given the tenacity with which the corporations continue to dominate government and society but it perhaps represents a continuation of that 'liberal' approach to children that has been present in Japan throughout the twentieth century.

Concurrent with this there was discussion of reform of the Child Welfare Law. This was originally framed in 1947 when society and economy was only just starting to function again after the war. The main problem then was children with no parents. By the 1990s the main problem had become children whose parents were temporarily or permanently unable to look after them. At least in theory the role of welfare facilities was less to act in place of parents and rather to prepare children for their return to their parents and provide support when they did. An advisory committee on reform was set up in March 1996, which received submissions from various groups interested in children: lawyers, the kindergarten federation and those concerned with child abuse and foster parents. The Partial Revision of the Child Welfare Law which was introduced in 1998 did not amount to a reconsideration of basic principles, it only addressed the three areas of nursery provision, children in care and single parent families (see Goodman 2000: 59–61). The law lacks the premise of children as bearers of rights in themselves and still views them as objects for protection. The complicated relationship between child, parent and state is not considered and in particular it is not considered from the point of view of the best interests of the child. There seems to be a growing demand for the creation of an independent third party which can take an interest in rights issues and consider cases referred to it by children (Yoshida 1997: 195). Whether the CLC

Children's Rights specialists can develop this way remains to be seen, but one would predict not.

Schools remain the most important institution for the majority of Japanese children and within this context school rules and corporal punishment are the two critical issues. The Ministry of Education has issued guidance to schools recommending the relaxation of rules where appropriate. However, it has been the formal policy of the MoE for many years that corporal punishment is illegal, undesirable and to be discouraged and yet there is plenty of evidence that it continues to be common practice in most schools. This contrasts with European countries where the discussion about corporal punishment was often heated but, once it became illegal, its use disappeared from schools very quickly. The question then arises about the sincerity of the MoE in enforcing its policy and the surrounding social attitudes which would appear to condone the use of physical punishment to control children's behaviour.

Corporal punishment is just one extreme example of the way schools exert control over children. School rules were tightened during the early 1970s when there were concerns about violence within schools and fears that the radicalism that was disrupting universities might spread to younger students. It was in this context that the MoE issued its notice that high-school students be forbidden to take part in political activity. Regulation of school children's lives goes well beyond what happens on school premises although that is strict enough, controlling not only the fine detail of clothing but also what may or may not be carried in the regulation make of satchel (no comb or brushes) and children are subject to spot checks. School rule-books go beyond the school environs. Children may be forbidden to sleep at each other's homes (even at weekends), to attend rock concerts. They may not go to shops on the way home and some even rule that children should wear school uniform when travelling outside the school district at weekends or in holidays. Not all these rules are scrupulously obeyed but it does mean that otherwise perfectly well behaved girls and boys may go shopping or to the cinema on non-school days not in school uniform hoping they will not bump into off-duty teachers.

More seriously, high schools often have rules that forbid pupils from learning to ride motorbikes or drive cars even when it is legal for them to do so. There is some doubt about the constitutionality of these rules and lawyers groups sometimes have become involved in cases where pupils have been expelled from schools on the pretext of the breach of these rules.

Legal aspects of children's rights continue to be central to the discussion of how Japanese society treats its children. The legal profession first became involved in the children's rights area in the 1980s precisely in order to resist the MoJ proposals to reform the Juvenile Crime Law. New proposals were presented by the MoJ in May 1998 and the Bar Association has given them qualified approval. Though complex the crucial issue is the role of the public prosecutor. The MoJ appointed advisory committee, which included some

lawyers, has proposed that where the facts of a criminal case involving a minor are contested by the accused the public prosecutor will become involved in the Family Court proceedings in a way similar to cases involving adults (*Japan Times*, 12 May 1998). The JFBA as a whole supports strengthening the role of the prosecutor under certain circumstances without fully backing the MoJ position but some local bar associations, for example, Fukuoka and Tokyo, oppose strengthening the role of the prosecutor in juvenile cases under any circumstances. Meanwhile the LDP is putting pressure on the MoJ to lower the age of criminal responsibility to fourteen (interview with Uchida Hirofumi, September 1998). The campaign emphasising the need for children accused of criminal behaviour to be represented in court will presumably continue.

Great variation exists between the way different local authorities have tried to put children's rights into practice. Osaka prefecture published a 'Comprehensive Vision for Osaka's Children' in September 1995, the product of two years work by a project team created from all the child-related bureaux in the prefectural office. The 'Vision' was based on two principles: to provide social support for child rearing and to respect children's rights. The birth-rate in Osaka is almost as low as that in Tokyo and so the main motivation of the plan is the same as in the 'Angel Plan'. The big difference is the inclusion of the principle of respect for rights. So, as well as improvements in the child-care facilities, advice and support given to families bringing up children, a booklet, 'Notes on Children's Rights', was produced for distribution to all children in institutions and reformatories explaining their rights in simple terms and describing what they should do when they felt their rights were not being respected. Measures are being developed to address problems of child abuse. A 'Child Advocate Committee' is being set up composed of specialists such as lawyers and doctors to act as independent monitors of the protection of the rights of children (Kanda 1997: 30–7).

Kawasaki city, two years before the CRC was ratified, started to arrange study sessions on rights for teachers. In 1994 the local journal for teachers produced a special edition on the CRC and a committee to promote human rights education was formed. This published pamphlets to explain children's rights to infants (6–9 years old), juniors (9–12 years old) and junior high school pupils (13–15 years old). All children were given one of these booklets as appropriate to their age. A network of Children's Councils was created during 1994. Four city-financed youth institutions have started 'children's committees' which participate in the decision making. Elsewhere councils and committees have been formed to promote the idea of children's rights through such means as a poster competition (Komiayama 1997: 22–9).

In Fukuoka the chair of the Children's Rights CLC specialists has taken the lead in the creation of a network of twenty-eight groups interested in children. It has concentrated its efforts on the issue of child abuse (*Yomiuri*

Shimbun, 4 September 1995; interview with Uchida Hirofumi, 3 September 1997). In a quite separate development between 1995 and 1997 the education sections of Fukuoka city and Fukuoka prefecture commissioned the production of sets of textbooks on human rights issues for use throughout the years of compulsory education. Meanwhile in 1996–97 the prefectural branch of the JTU has sponsored the formation of a Fukuoka Prefecture Children's Council which meets regularly to discuss children's issues.

Conclusions

There are several paradoxes in the development of attitudes to children's rights in Japan. At the 'official' level the government has been reluctant to acknowledge the principles of the CRC. The government report to the UN in 1996 was markedly defensive and certainly not compiled in a way that would promote discussion about rights and children. During the 1990s the government has produced child-related initiatives but they amount to no more than a continuation of earlier policies and mainly relate to manpower issues. Many doubt the sincerity of the Japanese government's commitment to the elimination of discrimination against women but there have at least been a series of plans to reduce discrimination and two pieces of legislation. No such measures have been launched for children, not even a standing committee to liaise the activities of the various government departments. As one official who was responsible for parts of the 'Angel Plan' at the MHW said to me, 'welfare concerns guide policy, children's rights exist out there (pointing out of the window)' (interview at MHW, 6 October 1995). The MFA and the MoE tried to reinterpret the meaning of the idea of children's rights at the time the CRC was ratified by linking the notion of rights to duties in a way not envisaged in the original document. A generous interpretation might be that this was a process of indigenisation of the ideas in the covenant making it appropriate to local culture were it not for the protest that came from child rights groups in Japan both the legal and educational sectors. More persuasive is the view that this amounted to an attempt by the 'competent readers' to determine how this particular text will be understood.

One cannot ignore measures such as the creation of the 'children's ombudspersons' by the CLB. However no special training has been provided and the record of the CLCs over the last fifty years does not enable one to confidently predict that they will take the lead in promoting the liberties of children or their empowerment. In many areas a large proportion of the CLCs are former teachers or even head teachers and it is feared that rather than promote and protect children's rights they are more likely to dissuade children from asserting their rights. Some have played a role in creating networks where they have allied themselves with NGOs and lawyers but one suspects that as long as the CLC system remains under MoJ supervision there will be limits to their effectiveness. They will not be able to develop

their roles as independent 'ombudspersons' promoting children's rights and investigating allegations of their violation. They will function to enable the state to keep control over the demands for rights made by and on behalf of children in Japan.

On the other hand, as we have seen, there is a large number of groups which take an interest in the rights of children from national organisations down to tiny community-based groups. Whether or not these belong to the national network they have been encouraged by international developments to try to work out what in practical terms the idea that children have rights might mean to their families, schools and communities. Indeed, although many Japanese activists bemoan the fact that Japan is an economic super-power but only a 'developing country' in the human rights field, there can be few countries in the world where there are so many people and groups which take such a passionate interest in children's rights issues.

12 Children's rights in Korea

The development of ideas about childhood and the rights of children was, in Europe, the background to the UN-centred process of international standard setting for children. Meanwhile there were also developments in the discussion about the theory and nature of rights. As we have seen in the previous section, in Japan too there was a significant amount of discussion of what it might mean to say that children have rights even if this had little influence on the development of mainstream policies towards children until the 1980s. It did however mean that at the same time that discussion was taking place at the international level on the formulation of the international covenant there was also interest in the issue emerging among the domestic 'human rights community'. There was pressure from them within Japan to have the state ratify the treaty and groups were vocal in demanding its more effective implementation.

The RoK was far less influenced by the process of international standard setting in this area. It is not too much to say that South Korea ratified the CRC in 1991 less out of serious concern for protecting the rights of the children of Korea than out of the perceived need to improve its international image. It had ratified the two main international treaties in the previous year; ratification of the CRC was an obvious next step. Moreover formal recognition of the CRC did not immediately lead to any new initiatives by the government neither did it provoke a great deal of interest in children's rights issues. Few academics seem interested and social movement groups have not focused much on children's rights issues with the result that at the time of writing there are only meagre resources which can be used to inform this section. No history of Korean children has so far been written, there is no analysis of the role played by children in the twentieth-century development of Korea, no extended discussion exists of the gap between the Korean government's formal commitment to protecting and promoting the rights of children and the daily reality faced by them in Korea. To the extent that there has been any degree of serious interest in children's rights in the last decade it can be ascribed mainly to the impact of the UN process rather than spontaneous interest.

Background

Not enough has been written in English or in Korean on pre-modern attitudes to childhood in Korea for it to be possible to begin this section with a sketch of 'traditional' attitudes to children. It is clear that the ideal patterns of the traditional family in Korea with its emphasis on genetic lineage and strong Confucian ideology produced a family structure quite different from that in Japan. Nevertheless the restructuring of Korean society that took place in the first half of the twentieth century under the influence of Japanese-controlled modernisation and urbanisation undermined many of these social structures which were replaced by social forms that were influenced by Japanese models.

It is hard to tell how far indigenous ideas of children and childhood have informed policies towards children in the late twentieth century but there is some evidence of a plurality of views about children in the late eighteenth and nineteenth centuries. Baek and Lee in an article based on an examination of pre-modern textbooks used in the education of children identify three distinct attitudes to children in *Sunglihak*, *Shilhak* and *Tonghak* thought. *Sunglihak*, the mainstream, orthodox neo-Confucian system of ideas located children within a hierarchy in which they were ascribed relatively low status that did not encourage people to respect children. Children were regarded as basically good but in order to mature they needed to be educated so that they might better serve the hierarchical order. Children should obey their parents in the same way as all members of society have an obligation to serve their superiors in society. As childhood, defined as the period up to the age of fifteen for women and twenty for men, is regarded as a period of preparation for becoming human it is not possible to speak of treating children as equals.

Shilhak (practical learning) thought was influenced by western scientific thought and the positivism of the Ch'ing dynasty China (Kim 1982: 195). It shared the orthodox view of children as basically good but it encouraged a more objective observation of children as the basis for ideas of education. They too viewed the child before the age of fifteen as immature in both body and mind and agreed that it is important to educate them to play their allotted role with the social hierarchy.

Tonghak thought was a radical challenge to orthodoxy concerning children as in most other areas. They argued that children, particularly babies, had a purity and goodness because they carry with them the spirit of reason and nature of heaven in their bodies. Because of this, not only should children be treated as equal to adults but they have qualities from which adults could learn: children can teach adults. This was not to deny the need for education, without which children were no better than animals. Nevertheless the education process should treat children with respect and therefore they should not be subject to corporal punishment nor should teachers shout at them. Whereas the Confucian sets of ideas only regarded children as valu-

able and worthy of respect as future adults, *Tonghak* thought argued that children's lives are important both in the present and in the future (Baek and Lee 1997: 47–63).

Sunglihak and *Shilhak* were philosophies that no doubt reflected the attitudes of those who sought to influence the ideas of the ruling elites, the only ones whose children received formal education. It is tempting to think that the *Tonghak* ideas drew from attitudes to children which were rooted in the peasant class which questioned the Confucian view of children as dependent on or belonging to adults. Whether or not this is true, the small amount of evidence we have clearly indicates that before the arrival of Christianity, liberalism, socialism or even the Japanese, there was more than one way of thinking about children in Korea.

During the 1920s, in the liberal phase of Japanese colonial control, workers and peasants formed groups and fought for their rights and against Japanese imperialism while youth groups also took part in various anti-Japanese activities. This was also a period of relaxation of control over intellectual life which permitted the re-emergence of heterodoxy. Pang Chong-hwan (1899–1931) was the son-in-law of the second-generation leader of the *Tonghak* movement, by now called the *Ch'ondogyo*, and he became an active proponent of child rights ideas in the 1920s. In 1921 he proposed that in place of the somewhat derogatory expression *ai*, children should be referred to as *orini*, a more respectful alternative. That same year he held a parade on 1 May to demand greater respect for children and later suggested that this become an annual event. Pang, commonly known as Sopap, the 'little ripple', continued to develop and propagate his ideas about children until his death in the 1930s (interview with Yi Bae Keun, 9 September 1998). Meanwhile educators in Korea were also strongly influenced by the liberal ideas of John Dewey, which were brought into Korea by Christian missionaries.

In the Spring of 1919 there were youth groups formed in several parts of the country echoing the demands for independence that were being voiced by adults, several of them were arrested and imprisoned. In 1923, youth groups were formed by *Ch'ondogyo* supporters and socialists respectively and in the following year an association of youth groups was formed in Seoul which decided to designate 1 May as Children's Day and commit itself to 'social progress'. At a meeting held on 1 May 1923 a declaration of the rights of Korean Children was proclaimed with three main points:

- that children be regarded as human beings with full dignity and free from traditional oppression,
- that children under 14 should not have to work,
- that facilities for play should be provided by the family and by society.

(Yi Bae-gun *et al.* 1997: 32)

Inevitably the youth groups became involved in the debates both between the nationalists and socialists and within the socialist movement but they also campaigned on 'child' issues. For example, at a meeting in 1926 the Korean Youth League committed itself to advocate and represent the rights and interests of Korean youth and more specifically they declared their opposition to the trade in (presumably female) young people, to young marriage (under eighteen), to the employment of young people in dangerous occupations and to any employment of children (Mun and Koh 1981: 376–8). The celebration of a Children's Day on the first Sunday in May had become an event of national significance by the end of the 1920s and it was widely reported in newspapers.

Tolerance for the increasingly radical social movement groups evaporated and they were closed down by the police during the 1930s as Japan prepared its colonies for mobilisation behind the war effort. Unorthodox ideas whether indigenous or foreign in inspiration were also treated harshly by the colonial regime and no real free intellectual enquiry or social activity was possible in Korea until the 1990s.

Children's rights in the RoK

Despite the pioneering work of liberal and socialist child rights activists in the 1920s, just as human rights in general have not been taken seriously by the government until the 1990s, so the topic of the rights of the child barely surfaced within the minds of most Koreans, even those active in human rights groups.

There was some interest in children though. The transitional government committed itself in the late 1940s to child protection policies forbidding the employment of any child under twelve and the employment of those under eighteen in dangerous occupations. Ma Hae-song (1905–1966) and a caucus of writers developed the idea of a charter for children in the early 1950s and submitted a proposal to the welfare ministry. A charter was adopted in 1957, endorsed by the President, and children would read it out at ceremonies held in school on 5 May. The Charter's preamble affirms 'the equal rights without distinction of all children to receive respect as the emerging future generation and to enjoy the opportunity of developing with rectitude and self-assurance'. The eleven-point document suggests that children should, 'be born under healthy circumstances and nurtured in a warm and loving home' (article 1); 'receive an education in good facilities' (article 3); 'value their great national cultural tradition' (Article 4); 'be protected from all harmful social conditions and dangers' (article 8) (Cheong 1994: 97–8). However the charter does not use the language of rights. It is at best a set of aspirations with no indication of how they might be implemented, which government agency might be responsible for their implementation, or what redress was possible when they were not implemented. Nevertheless they are said to have provided the basis for child welfare policies and they are

broadly similar to the UN Declaration of 1959 with its emphasis on child protection and child welfare. Possibly in response to the UN declaration, a Child Welfare Law was passed in 1961. In 1975, 5 May was designed as 'Children's Day', a national holiday.

Article 6 in the 1957 charter referred to the need to provide food for starving children. Economic improvements in Korea meant that by the 1980s this was no longer a problem and children would giggle when they read this section out so it was decided to revise the document and a new version of the charter was issued by Roh Tae-woo on 5 May 1988. The following year the minister for Youth and Athletics announced the need for a new charter to cover children from 0–24 years of age. As a compromise it was agreed that a document be devised for those 'youths' from 9–24, though there is no plausible explanation why the age of 24 was selected. This has paragraphs on the importance of youths themselves, their relation to home, school, society and nation. At each level youths are encouraged to develop wholesome attitudes (Cheong 1994: 99). There were proposals in 1998 for the creation of another version of this charter (interview with Yi Bae Keun, 9 September 1998).

The Japanese colonial authorities and the Rhee regime had encouraged large families to provide cheap labour and manpower for their armies to protect the empire or, in Rhee's case, to fight the DPRK. However the Park regime gave its full backing to family planning, endorsing the Planned Parenthood Federation of Korea and its slogan 'small families for a prosperous Korea'. This campaign along with a rise in the age of marriage and an increase in wedlock abortion led to dramatic decreases in the birth rate. The number of births per woman was 6 in 1960, this stood at 4.5 in 1970 and 2.7 in 1980 and in 1992 it had fallen below replacement level to 1.6. This pattern is very similar to the one we have described in Japan and one might predict that it will fall still further in the crowded conurbations. According to government statistics the number of children under eighteen in 1980 was just over 40 per cent of the total population. This dropped to 25 per cent by 2000. This compares to children making up 20.4 per cent of the population of Japan in 1994. Demographic change provides the background in which child rights ideas have been introduced into Korea. Several informants commented that recent changes in attitudes towards children are related to the fact that most couples have only one or two children compared to the large families of the past.

The Korean government defines a child as a person under the age of eighteen, although people under the age of twenty are legally minors with no right to vote or enter into civil contracts unless they are married. As in Japan, girls may marry at sixteen or above, boys eighteen or above with the permission of their parents or the courts. Criminal acts by those less than twenty are dealt with under the juvenile crime legislation. Criminal acts by those under the age of fourteen are not covered by the Penal Code but treated as 'protection cases' in family courts. One must be sixteen to get a

licence to ride a motor bike, eighteen to drive a car, twenty to legally purchase alcohol or tobacco. There is no minimum age for giving evidence in court but only children over fifteen have the right to express an opinion in civil cases such as those involving divorce or adoption.

The pattern of the school system is like that in Japan, based on the US system: six years of primary school followed by three years junior high school, three years senior high school, after which graduates may go to universities or colleges. Education became compulsory for the first six years in 1948 and was extended to nine years in 1984. In 1996, 99.9 per cent of children leaving elementary schools went on to junior high school, 98.9 per cent junior high school graduates entered senior high school and 54.9 per cent of those leaving senior high schools continued their education in universities or colleges of some kind (Ministry of Education n.d.: 18). However, as recently as 1970 the rates of progression to education beyond primary school were relatively low as can be seen in Table 12.1. The significance of this is that by the 1990s childhood in Korea had become practically synonymous with a school-centred life, a major change over a period of twenty-five years.

UNICEF has been the main NGO interested in Korean children during the post-war period but its role has changed during the late 1980s and early 1990s from being a channel through which charity and aid from the outside world flowed into Korea to being an institution which, while mindful of the situation of children in Korea, was increasingly an organisation which raised funds in Korea to be distributed to children in less-developed countries. Reflecting this, in 1993/4, UNICEF changed from being a field office into a national committee.

UNICEF acted as an advocate of the CRC in Korea from the time the convention was adopted by the UNGA. It sponsored a series of one-minute cartoons on commercial television in 1989 as well as a series of seminars, conferences and meetings later in the year. Early in 1990 it organised a

Table 12.1 Educational progression in Korea, 1970–95

	<i>Primary to junior high school</i>	<i>Junior high school to senior high school</i>	<i>Senior high school to college</i>
<i>1970</i>	66.1	70.1	26.9
<i>1975</i>	77.2	74.7	25.8
<i>1980</i>	95.8	84.5	27.2
<i>1985</i>	99.2	90.7	36.4
<i>1990</i>	99.8	95.7	33.2
<i>1995</i>	99.9	98.4	51.4

Source: Ministry of Education n.d.: 18

group of about forty lawyers to review Korean domestic law in the light of the standards of the CRC. They suggested ratification would require the revision of the Nationality Act, the law on adoption and the introduction of the notion of a child's right to maintain personal relations with separated parents (as compared to the parent's rights of access to children which is all that was assured by law at that time) (UNICEF 1990). It is not clear what effect the UNICEF lobbying had on the government's decision to ratify in 1991, probably not very much. A lawyers' group to support children's rights was created and it held a few seminars with UNICEF but it did not develop into an ongoing organisation.

The RoK government ratified the CRC in November 1991 making minor reservations with respect to three articles: article 9, which deals with adoption, article 21, on the rights to see parents, and article 40, on the treatment of children in courts during times of martial law. UNICEF has urged the government to make domestic reforms to eliminate these reservations but the official position is that they 'are not considered as having a great influence on children's rights' (Cheong 1994: 102).

An obvious impact of the ratification was the introduction of the obligation of the RoK government to submit an initial report and then periodic reports to the UN Children's Rights Committee.

The initial report to the UN Children's Rights Committee

The RoK initial report under the terms of the CRC was due in 1993 but was not in the end submitted until November 1994 – *prima facie* evidence for some critics that the government was not taking its international obligations seriously. Government did not consult with the NGOs working on children's issues in the formation of the report. However UNICEF did host two seminars which were attended by representatives of some of the NGOs and UNICEF had some influence on the final report, so government could claim there had been a degree of indirect consultation. The final version of the report was put together by one man, Dr Cheong Key-won, director of the Welfare Policy Division of the Korean Institute of Health and Social Affairs (KIHSA) which is attached to the MHW. Dr Cheong collected the basic data for the report from the various ministries – education, justice, labour – and he claims to have shown early versions of the report to the NGOs and incorporated their comments. His report was submitted unamended by the MHW to the MFA, which then forwarded the document for consideration by the UN CRC.

The report was published by the KIHSA in September 1994 in English and Korean with the title 'The Legal, Institutional and Administrative Measures for Improving the Rights of the Child'. As the title suggests, the report is a fairly dry document providing basic statistics about children and an outline of how children's welfare and protection is provided within the Korean legal and administrative system. It briefly describes an 'Action Plan'

devised to implement the Declaration of General Protection and Development of Children adopted at the World Summit for Children in June 1991. This focused on the improvement of health care and living conditions for disadvantaged children. There are places where the report accepts that RoK performance has not entirely lived up to its obligation, 'The RoK did not take concrete steps to publicise the provisions and principles of the Convention'. Later the report admits, 'it is hard to say that children's rights presented in the Convention are fully exercised in the RoK' (Cheong 1994: 105).

Twenty-one NGOs with an interest in children's rights formed a 'Korean NGOs Coalition for the Rights of the Child' in February 1995 in order to produce an 'alternative' report for the UN committee. Various parts of the report were allocated to experts from the different groups and the final seventeen-page document was put together in July ready for submission. The report makes four general criticisms of government policy:

- that it has not made sufficient effort to disseminate the CRC,
- that it has no intention to re-examine the patriarchal ideology that defines a child as the property of his/her parents, which seriously hinders Korean society from implementing the CRC,
- that it does not recognise that a central body is necessary to co-ordinate the various government agencies working for the implementation of the CRC,
- that it does not acknowledge the NGO's independent role in implementing the CRC nor create channels to collaborate with the NGOs.

(Korean NGOs Coalition 1995: 1–2)

To summarise the more detailed comments: There is little room for respect of children's opinions either in court or in schools. Pupils have virtually no freedom of association or assembly as their activities are subject to the approval of the school authorities. They are strictly forbidden to take part in out-of-school activities especially those involving social movement groups, while schools direct students to participate in government-sponsored activities. In various places the report expresses concern about child abuse and the inability of the welfare system to intervene on behalf of abused children (issues 15, 20, 23, 49, 50, 51). Child welfare facilities in general are described as 'inadequate' and policy for disabled children is said to be based on inaccurate statistics and not properly funded. The education system too is poorly funded – the government education budget only amounts to 3.6 per cent of GNP, while an average household spends 30 per cent of its budget on education. The education system is said to 'kill creativity'. Students need to be informed of their rights in school so they can 'exercise such rights autonomously' (18.6). The report alleges that juvenile crime is not dealt with on the basis of 'separate justice for juveniles' or 'education rather than punishment' despite government claims. One particular recommendation is that juveniles must be granted access to counsel not only after

prosecution begins, but much earlier during interrogations.

I can find no reference to the 'alternative' report in the UN CRC's consideration of the RoK Initial report (CRC/C/SR.276, 26 March 1996). The Korean delegation did mention at the session in Geneva the creation of a 'National Committee on the Rights of the Child', which had been formed in August 1995,

to disseminate the Convention, to train persons who are in contact with children about the principles and provisions of the Convention, to urge the Government to promote all the rights of the child recognised in the Convention, to monitor the activities for implementing the convention and to co-ordinate government and non-government activities relating to the convention.

(CRC/C/SR.276, 26 March 1996 :4)

This looks like the government response to one of the NGOs' main criticisms. The UN committee discussed in some detail the reasons for the reservations on articles 9.3, 21 and 40.2 (b)(v). There was particular concern among members (as with the NGOs) that there were insufficient guarantees for the protection of the 'best interests' of the child in adoption proceedings.

In its concluding observations the committee expressed its concern about the lack of effort to publicise the CRC and suggests the need to prevent the abandonment of children and to eliminate corporal punishment. It suggests that RoK ratify the 1993 Hague Convention of Protection of Children and Co-operation in respect of Inter Country Adoption. It recommends the introduction of further measures to prevent child abuse and domestic violence, the creation of an ombudsman or independent complaint monitoring mechanism and a comprehensive reform of the system of juvenile justice in the spirit of the CRC and other UN standards such as the 'Beijing Rules' and 'Riyadh Guidelines' (CRC/C/15/Add51 CRC 11th session, Concluding Observations of the CRC, RoK).

The impact of CRC ratification is not easy to assess. Interviews with MHW officials in 1995 just produced the assertion that it was not necessary to change regulations or practice in Korea as government policy was already working in compliance with the spirit of the CRC. In 1997, bureaucrats in the same ministry while still accepting that no fundamental changes had taken place in child-care policy, suggested to me that the protection of children and the promotion of the rights now had a higher priority than before ratification of the CRC (interviews MHW, 5 July 1995, 8 September 1997). Lawyers who take on cases involving children suggest that criminal cases involving juveniles are now being resolved more quickly than in the past (interviews with You Jung Lee and Lee Chan-jin, 10 September 1997). More generally the ratification of the UN convention has encouraged some research on children's rights issues.

Current issues

The CRC still has not received much publicity. In 1997 UNICEF, in co-operation with PSPD, published an introduction to the main points of the CRC in Korean. This contains advice on handling cases of the infringement of children's rights and suggestions for games that can be used in activities in schools or elsewhere to make children aware of rights issues. Copies of it were said to have been distributed to every school in the country (Yi Baegun *et al.* 1997). It will, however, be some time before the CRC is widely known in Korea.

Practically all children in Korea now remain in full-time education until they are eighteen, a significant change in the past twenty-five years. Those who are not in the academic stream are, it is alleged, 'dumped' in vocational schools. School and class sizes are often large, in areas around Seoul there are schools with twenty classes per year and fifty students in each class. School violence is perceived to be a major and increasing problem. While some critics blame government policy and urge respect for children's rights within education, conservatives blame liberal influences and see the solution to the problem as increased regulation of children's activity.

We can see one manifestation of this in the Law on the Protection of Youth, which came into effect on 1 July 1997. To some extent this law simply tidied up the legal inconsistencies on the definition of youth which had been either eighteen or twenty: now eighteen is the main age threshold. The law has three sections. The first is about access to alcohol, drugs and tobacco. The second is about access to 'harmful' places, chiefly bars or similar places. Here the laws revised up from fourteen to eighteen the ages that people can work in such places. Finally, there are new restrictions placed on access to harmful media. The original intention of this, apparently, was simply to introduce a law which focused on this third area but that would have aroused too much opposition. By making the law more comprehensive in addressing youth protection it won approval in the National Assembly.

The law established a Council for Youth Protection which can examine any piece of published media. Staff will randomly sample films, books and other publications and if they are found to be 'harmful' a report will be made to the Council which may instruct the publisher to label it 'Adults Only' on penalty of a fine. There is no obligation to submit items to the council in advance but if an item is designated 'adult' after it has been circulated the publisher/distributor will be liable for the costs of recalling the product and labelling it. To avoid any such costs most companies will therefore submit items for approval prior to distribution. This, it is feared, will put a great deal of power in the hands of the Council particularly since it is given a very vague definition of 'harmful', which includes having an anti-social or immoral influence on the formation of the character of young people or their civic consciousness (Par. 10.4). In September 1997, a booklet circulated by a small left-wing group to be given away free in book shops

and which was unrelated to sex or violence had come to the attention of the committee's investigators and was designated as harmful to youth.

While not doubting the value of protecting young people from genuine pornography, lawyers argue that the law may well be used to restrict the freedom of expression of those under eighteen. It is even suggested that one explicit aim of the law is to enable government better to control student activism which is spreading to high schools (interviews at Minbyun, 22 August 1997; MHW, 8 September; Lee Hyun-gun, 11 September 1997).

The late 1980s/early 1990s were a time when government control over civil society was relaxing and various bodies emerged as pressure groups and interest organisations. This is reflected in the area of education and child protection issues.

Since the late 1980s teachers have been demanding the right to organise their own union as part of a set of demands to democratise education. A Korean Federation of Teachers was formed in the 1950s but served the government rather than working for the welfare of teachers. An early attempt to organise an independent teachers union was closed down by Park Chung-hee in May 1961. There were teachers involved at the grass roots of the democratisation movement in 1987 and the various local groups came together to form the Korean Teachers and Educational Workers Union (KTU) in 1989. Obviously fearing that this might interfere with the governmental control of education the Roh Tae-woo declared the union illegal, arrested 107 teachers and had 1,500 dismissed. This did not prevent its growth and by 1995 it had 15,000 members and claimed the support of a further 35,000 (KTU 1995: 1–2; interview with Lee Dong-jin, 12 September 1997). Kim Dae-jung promised in his election campaign to make it a legal organisation and a bill passed the National Assembly in 1998 which made the KTU fully legal as of 1 July 1999. It did however contain some restrictions in that teachers were prohibited from taking collective action, such as strikes and they continue to be prohibited from engaging in political activities.

The KTU promised to continue its campaign for the democratisation of the education system. It needs to be recognised that its conception of democratising educational reform is one that is defined as reflecting the opinions of teachers and parents, no mention is made of the role that children themselves might play in administration of schools or the contribution they might make to changing the school environment. On the other hand we should perhaps not be too critical. The creation of a teachers union which is independent of the state – the limited recognition of teachers rights – is a necessary precondition for the creation of a school system in which the protection and promotion of children's rights is possible. Having won this battle it will be interesting to see how far the KTU is prepared to go in its fight for democratisation.

In 1989 the Korean Association for the Prevention of Child Abuse and Neglect (KAPCAN) was created following discussions between officials in

UNICEF and MHW. By the mid 1990s this had developed to create sixteen 'reporting' centres and eleven branch offices. It holds workshops twice a year at which such topics as school violence, sexual abuse and child prostitution have been discussed. It has also had an influence on the drafting of legislation on child neglect and abuse (interviews at UNICEF, 3 July 1995, 12 September 1997).

In 1997 a proposal originally developed by KAPCAN was introduced to the National Assembly as the Family Violence Bill. This proposed a notion of child rights such that, if abuse by parents is proved, the state will be able to intervene to separate the child from his/her parents – possibly the first time the Korean state has been able to intervene within the family. The bill was passed and became effective in July 1998. Severe punishments are set and a reporting procedure introduced. Article 76 of the Education Law permitted the use of corporal punishment in schools. This was revised in December 1997 although without actually making its use illegal and such punishment is still believed to be widely used. Since then proposals have been put forward to protect children outside the family in institutions and school which at the time of writing are being considered by the government (interview with Yi Bae Keun, 9 September 1998).

Korean lawyers have taken an interest in child rights issues, though as yet they have not taken on as active a role as their Japanese equivalents. The annual publication of the Korean Bar Association on human rights issues includes a chapter on Children's Rights. The report of 1996 discusses the plans of the MHW to promote an extension of the nursery school system in response to the increase in the number of married women at work, it considers trends in the living environment which may be reducing the quality of children's lives, such as the increase in traffic around schools which seems to have caused an increase in the number of children involved in car accidents. While recognising bullying in schools as a real problem they are critical of the way prosecutors are maintaining lists of potential bullies/criminals as an abuse of their power. Finally, the report notes how there were a number of reports of sexual abuse of children in 1996 and urges that this problem be taken more seriously (KFBA 1997: 228–35).

Conclusion

Social change has inevitably influenced the way Korean society defines children and childhood. The 1997 law amounted to the recognition that it was inappropriate for schoolchildren (= almost all Koreans under eighteen) to be involved in certain occupations such as bars and the 'entertainment' industry that they had 'traditionally' worked in. At the same time the state devised new ways in which it could exert patriarchal powers to 'protect' children from new threats to their innocence. This followed the state's commitment to promote the rights of children in its ratification of the CRC.

The CRC has had only limited influence on this process. It is not widely

known in Korea, even the government concedes that it has done little to publicise it. However the process that resulted in the production of the Initial Report to the UN led to the creation of an NGO coalition to create the 'alternative' report which in turn seems to have stimulated an interest in children's rights where previously there was little or none. In 1996 the first academic conference on children's rights was held and its proceedings published the following year. This academic organisation may stimulate the development of 'children's studies' in Korea, which will provide the basis for informed discussion of the past, present and future role of children in Korea.

Although the Youth Protection Law, on balance, probably did more to restrict than promote children's rights, the law on child abuse has introduced the notion that children have rights even against their parents in certain circumstances. This law and the creation of the 'Council' may even be evidence of the government responding to criticisms from the child-oriented NGOs and that a child policy is in the process of being created.

On the other hand we should be wary of ascribing too much influence to the CRC. The period since 1989 is one in which Korean society had been increasingly liberalising and, even if this rate of liberalisation is frustratingly slow for many, it is not surprising that it should even have some influence on children. The question that emerges is what might have happened had it not been for the CRC and part of the answer to that can be found by considering the situation in Taiwan.

13 Children's rights in Taiwan

While still a member of the UN the RoC signed (though did not ratify) some of the main UN covenants but it took no further action about them after its expulsion. After the PRC took the place of the RoC in the UN it still might have been possible for the RoC to ratify the various international human rights treaties and report to the appropriate committees, however the PRC blocked this as tantamount to the acceptance by the UN of a 'two China' policy. Nevertheless there was nothing to prevent the RoC from incorporating the international standards into its domestic legal practice. At least until the 1990s this was not done and until 1998 there were few demands, even from within the small human rights movement in Taiwan, that the RoC should pay much attention to international human rights law. Nevertheless, as was the case in the development of health-care provision in Taiwan, the RoC has not completely ignored the process of international human rights standard setting for children and the rate of change has increased since 2000.

If the amount of information about children's rights in the RoC was meagre, that on children and children's rights in the RoC is practically non-existent. This can be put down to a number of factors. To start with the whole language of rights is new to Taiwan. After having been suppressed for almost forty years, and scarcely encouraged before that, it was only after 1985 that it became possible to develop 'rights thought'. For example, it was not until the 1980s that women's groups were widely formed and feminist thought began to develop in Taiwan and 'child rights' ideas were slow to emerge within the Taiwanese human rights discourse. Second, there is little or no work on the history of children in Taiwan because until recently any research on the history of Taiwan was virtually forbidden. Schools, until the 1990s, taught the history of China; Taiwan's particular history was ignored. It was only in the mid 1990s that it became possible to do serious research about Taiwan's history. In general children are ignored in the histories of China and there is nothing written on the history of children in Taiwan. In the last couple of years there has finally been published some work on women in Taiwan which may herald the start of research on Taiwanese social history and which in turn may some day include children, but nothing

has been published yet. Third, not being a member of the UN, the RoC on Taiwan has not been forced to consider how to respond to the UN CRC and so the reports and counter-reports which are a source of information about children in many countries do not exist.

Using the basic information that we can obtain we will portray children in the context of the background factors, their legal situation and their educational environment.

Background

The idea that the notion of 'childhood' was problematic is scarcely recognised in Taiwan. With few exceptions the view seems to be very close to that reached by a study on children in mainland China done in the mid 1970s, which concluded that most Chinese think that 'Children behave the way they do because that is the way children behave' (Kessen 1975: 219).

We are informed by an anthropologist that 'Japanese influence over such institutions as the family was superficial at most and in many rural areas non-existent' (Wolf 1970: 38). We know that a rather tenuous control over the island by the government in Peking began in the 1860s but it is not clear what formal or informal influence mainland Chinese social customs exerted over, say, child-rearing practices on Taiwan before 1895. It just is not possible to say how children were treated in Taiwan before the mid nineteenth century. And, the above anthropologist's observation notwithstanding, it seems likely that within the urban areas that developed in the first half of the twentieth century, the model for family life was provided by the Japanese colonial regime. The legal codes that were implemented on the island were borrowed from or imposed by the Japanese, depending of your view of the period of colonial rule. As the Japanese Civil Code in the late 1890s had been a self-conscious attempt to impose Confucian standards on the people of Japan, the legal system based on these norms was probably just as appropriate, maybe even more so for Taiwan.

Although a legal substructure remained, from the time of the imposition of the 1948 'Temporary Provisions', the Constitution was effectively suspended. Until the 1970s any person who was thought to be endangering the national interest could be arbitrarily arrested, tortured, executed or sentenced to ten years or more in prison. Those who discussed independence or tried to organise unions sometimes died in mysterious circumstances. The refugees from the mainland who took over the administrative apparatus from the Japanese brought with them traditional attitudes that merged with nationalism and produced a system of ideas that emphasised submissiveness, conformity and deference to superiors and authority. These ideas were incorporated into the education system and also informed attitudes towards authority within the family. Children were regarded as being the possessions of their parents; outsiders or outside agencies had no right to intervene in family business.

Children and the law

The Civil Code adopted by the RoC in 1931 before it moved to Taiwan provided the framework for family relationships. Parents or guardians may exercise rights over children with near ascendants or members of the 'family council' authorised to intervene should the parents be thought not to be carrying this out effectively. Only if this fails will the court intervene. Revision of the code in 1985 retained the idea of the extended family having responsibility for children, however, as the welfare system has been elaborated in the 1990s the traditional powers of the extended family are being taken over by the courts and the welfare authorities in the name of child welfare and protection (Shee 1998: 109).

The RoC was one of the original signatories to the UN Declaration on the Rights of the Child in 1959 and a draft Child Welfare Bill was proposed to the Legislative Yuan in 1960. However, as the pioneering welfare law of the KMT this proposal generated considerable controversy and debate and was not finally enacted until 1973. Its enactment did not amount to recognition of the rights of the child in domestic law, nor even that law was required to protect children from abuse and neglect, merely that government in Taiwan was willing to support some child and juvenile development programmes. A Juvenile Welfare Law was passed in 1989 although, despite its name, the law was mainly concerned to deal with juvenile delinquency particularly juvenile prostitution rather than broader welfare matters. Attention did shift to these broader issues as the deficiencies of the 1973 Act were realised. Following the adoption by the UNGA of the CRC in 1989 the KMT sought to create a law in tune with 'world trends'. Meanwhile in 1990 a group of social workers, lawyers and academics began to campaign for a more radical revision of the welfare legislation and they sent their proposal for a draft bill to the Legislative Yuan in Spring 1991. Later that year they formed the Child Welfare League Foundation as 'a permanent organisation dedicated to the ongoing promotion of child welfare work in the RoC' (CWLF n.d.: 9). The Taipei Bar Association co-operating with the Taipei Women Rescue Foundation also sent proposals for consideration by the Legislative Yuan in 1992. Out of this complex lobbying process there came the 1993 Child Welfare Law which contained the innovative principle in article 4 that, '(w)hen child related matters are dealt with by governments at all levels and governmental as well as non-governmental institutions or organisations, the first consideration should be the best interest of the child' (quoted in Shee 1998: 114).

However, although the language of international law has been used here, this still does not amount to recognition of the rights of children by government. As Shee comments, 'the state's recognition of parental rights and child care is still legally expressed in terms of child-saving language rather than children's rights statements' (Shee 1998: 113).

The Child Welfare League Foundation began with four full-time workers in a tiny office. In 1996 it moved into a new suite of offices and by 1997 it

had twenty-seven full-time workers plus part-time and volunteer helpers. It operates a number of research projects: on abandoned children, on child protection services (for the Taipei Municipal Bureau of Social Welfare), tracing missing children and setting standards for child safety (CWLF n.d.: 11–12).

The CWLF takes part in regional conferences on child welfare issues, in 1997 it started to campaign for the reform of the Child and Youth Welfare law, one aspect of the campaign is to ensure that ideas of children's rights are included in the legal framework in which parents and children operate. One imagines that if the RoC were party to the CRC it would be the CWLF that would take the lead in producing the alternative report.

Definitions of childhood

The formal definitions of children are similar to those in Japan and South Korea. In general the law treats people as minors until the age of twenty when they acquire full legal adulthood. Girls may marry at sixteen, boys at eighteen with the permission of their parents or courts and married people may enter contracts. There is only limited criminal responsibility between the ages of eight and fourteen, the law deals differently with children fourteen to eighteen. For welfare purposes the law has distinguished between children under twelve and juveniles between twelve and eighteen. The age of consent for sexual intercourse is sixteen. Education law draws a line at the age of fifteen for compulsory education and this is also the minimum age recognised by labour law for most purposes. In divorce cases the opinions of children over the age of seven should be considered when custody is being decided but lawyers suggest that judges pay little attention (interviews at CWLF, 8 October 1997; Shee 1998: 65 n. 46).

As we have seen elsewhere in East Asia there has been a substantial reduction in the number of children in families. The number of children born to each woman had fallen to 1.8 by 1998 and government statistics project that it will remain at this level for the next ten years. However the pattern elsewhere has been for it to fall still further and there is reason to think that this will apply to Taiwan too.

Education system

Taiwan also reconstructed its education system on the American model: six years in elementary school followed by three years each in junior and senior high school. In 1968 compulsory education was extended to nine years to the end of junior high school. In 1993 practically all children leaving elementary school entered junior high school and went on to complete nine years of full-time education. In 1998, 92 per cent of junior high school graduates went on to one of the three kinds of senior high schools. In total 85 per cent of those aged between six and twenty-one are enrolled in full-time

education. As in Korea and Japan parents and pupils are very conscious of a hierarchy of universities and there is much pressure to enter the most prestigious institutions which are thought to ensure the best careers.

Schools in Taiwan are massive enterprises. A primary school of ten classes to each school year with thirty-five pupils in each class, or a junior high school with twenty-three classes of over forty pupils in each of the three years are not considered particularly large in Taipei.

Article 164 of the Constitution stipulates, 'Expenditure for educational programmes, scientific studies and cultural services shall be in respect of the Central Government, not less than 15 per cent of the total national budget.' At times it has been even higher. However, there has been strong ideological and military control of schools that has gone beyond that in Japan or South Korea. Reflecting on their loss of control of the Chinese mainland, the KMT concluded that one reason for their defeat was that their 'thought control' was not as effective as that of the Chinese Communist Party. Therefore throughout the martial law period the quasi-Leninist KMT attempted to exert ideological control over the whole of society. Party members were placed in key positions in all institutions. Specially trained officers were assigned to schools and universities to conduct 'political warfare'. There was a particular fear that high school pupils and students could be 'used' by 'communists'. Until the late 1980s these officers wore army uniform at the schools and were responsible for school discipline and drill, which sometimes would even include instruction in the use of firearms. Their influence was especially strong in universities where all students had to live on campus (interviews at Department of Health, 7 October 1997). During the 1990s their functions changed to become mainly security guards but they still amount to a kind of military presence.

Rule making in schools has been a top-down process, there are no pupil councils or other means through which pupil opinion can be expressed. However, some change has taken place. A Teachers Human Rights Association has existed since the late 1980s, which has primarily been concerned with getting acceptance by the government of teachers' rights to organise their own union organisation and to write and speak freely. Teachers associations, hitherto suppressed were permitted by the Teachers Law of 1995. There are increasing demands for the consolidation of teachers' rights which many activists see as a necessary precondition for children's rights.

This same Teachers Law addressed the issue of corporal punishment. Already it had been made illegal in children's homes by the Child Welfare Law of 1993, although there was some doubt about the extent to which it had affected practice. In 1995 teachers were at first urged only to use punishments that caused 'temporary pain' but later this was changed and though the act is vague it seems to prevent the use of physical punishment (interview with Wu Li-feng, 24 September 1998). Minister of education Ovid Tzeng, in June 2000 explicitly urged teachers to end corporal punishment.

The Humanistic Education Foundation (HEF) was set up in Taipei in 1987 with the aim of promoting 'alternative educational ideas' in order to cause a 'revolution' in education in Taiwan. In 1990 they established a 'free school' in Taipei, the Forest School, and by 1998 there were four other 'free schools' operating under the same ethos in Taiwan. At first these schools were outside the official system and pupils could not receive from them the formal graduation certificate they needed to progress within the school system. An act of 1998 has resolved this problem.

The HEF has attracted considerable support. In addition to the Forest School, it holds courses and conferences, it runs training courses for teachers, it lobbies government and operates a complaints hot-line to handle complaints from students, parents or teachers about their treatment within the education system. The fact that it is able to operate freely in Taipei in the 1990s attests to the degree of tolerance and plurality and suggests that further change is possible.

Government control over the school curriculum is being relaxed, since 1996 schools have been able to select their own textbooks. Although there are some teachers who are wary of rights ideas which they think will make children more difficult to control, two projects are underway to investigate ways of teaching children's rights in school, one of them funded by the Department of Education. The UDHR is studied as part of the social studies curriculum introduced in 2001 (interview with Tang Mei-ying, 22 September 1998).

Current issues

Child prostitution was a new social problem discovered in the late 1980s and 1990s. Moreover, as it often involved the sale into prostitution of girls from Taiwan's aboriginal groups there was an added 'rights' dimension to the issue. The urgency of this issue seems to have declined following the enactment of the 1995 Law to Suppress Sexual Transactions Involving Children and Juveniles (Shee 1998). The main issue now is, rather similar to Japan, that society is becoming concerned about schoolgirls becoming involved in sex with older men.

Child abuse is an issue taken seriously both by welfare groups and local government, at least in Taipei. In 1989 a Child Protection Hotline was established following co-operation between the government and the Chinese Fund for Children and Families, Taiwan. However it has been hard to persuade people to report child abuse even in cases where, as doctors or teachers, they have a legal obligation to do so. Judges too are reluctant to act on behalf of the child. Although a social worker does have the power in the last resort to take children away from the family and place them in homes or with foster parents there are very few social workers. Government agencies have less than 100 specialist children's social workers with only 500 in the non-government sector. The Child Welfare section of Taipei Municipal

Government bases its policy on the 'basic principle of acting primarily in the protection of the best interests of the child', a principle which it recognises as being borrowed from the CRC (Taipei Municipal Government n.d.).

Amendments were made to the Juvenile Crime Settlement Act in October 1997 to change the emphasis of law from punishing young offenders towards their education and training. Any juvenile delinquent aged between twelve and eighteen who is sentenced to less than ten years in prison may be exempt from serving time in prison and instead receive up to three years of 'protective measures'. These may be enforced either by the child's parents or in special 'juvenile guardianship institutions'. The law also provides for the parents of the juvenile delinquent to attend between eight and fifty hours of parental counselling or instruction backed up by heavy fines if they fail to attend. In the past, lawyers were permitted only limited access to an accused juvenile after the court had completed its investigation but now it is possible for a lawyer to advise and accompany the child at any stage of a police investigation (*China News*, 4 October 1997; interview with Wellington Koo, 10 October 1997).

Throughout the 1990s the Child Welfare Law has been amended to bring it into line with international standards as expressed in the CRC, starting with a major revision in 1993. It now recognises the child's right to protection from violence, it includes the notion of 'best interests', the notion of a child's right to health services and the right to an education and cultural identity. Starting in the academic year 2001, it became compulsory for elementary school pupils to study a minority language either Hokkien, Hakka or one of the Aboriginal languages for two hours a week, suggesting an acceptance of the plural nature of Taiwan's cultural heritage.

In November 1999, a Children's Bureau was created within the Ministry of the Interior responsible not only for children's welfare but also for the advocacy and co-ordination of children's rights. It will liaise between central government agencies and also oversee the promotion of children's rights and welfare at the local government level. Moreover, through a revision of the Child and Youth Welfare Laws it plans to create a comprehensive legal framework for child welfare and in the process bring the legal definition of children into line with the UN convention.

In 1998, the TAHR started a campaign to persuade the RoC authorities to take the CRC seriously by enacting legislation in the Legislative Yuan. Meanwhile the CAHR included Children's Rights as one of the areas on which it made a report at the end of 1997 and the author commissioned to produce the report was the executive director of the CWLF. Its reports in successive years have graded the protection of children's rights in Taiwan as inadequate. In June 1998 and 2000, the CAHR produced a small booklet, 'Key Key the Monkey', for distribution in primary schools which uses a cartoon figure to introduce the main features of the CRC in a way children can understand.

One of the reasons for the poor coverage of children's rights issues is the fact that the RoC on Taiwan is not party to the CRC. The government has

no obligation to report about its children's rights record and this has meant that the human rights groups have not had the opportunity to present an alternative view. In South Korea the very process of putting together the alternative report on children's rights created the 'NGO Coalition in Children's Rights'. Not only did this produce a report which will act as a benchmark of the state of children's rights in Korea as of 1995 it also established the framework for future co-operation on children's issues and prompted the start of an academic interest in the subject. Being outside the CRC system has meant it is hard to get access to even basic data about children and thus less easy to assess their position in Taiwan in the 1990s. However, in April 2000, an NGO alliance launched a campaign to ensure that Taiwan would ratify the CRC by 2003. Those involved in the campaign urged the Cabinet to produce a report on children's rights, to sponsor a conference on the issue and set a schedule for the incorporation of children's rights into primary school curricula (*Taipei Times*, 2 April 2000, <http://www.taipeitimes.com/news/2000/04/02/story>).

Conclusions

Children's rights until the late 1990s had so low a profile in Taiwan as to be scarcely visible at all. Although Chinese translations of the CRC existed they were not widely available. However, from the early 1990s the international standards began to affect the lives of children in Taiwan as the welfare law was revised, suggesting that there may be some basis to the idea that standards expressed in the CRC are becoming international customary law. The change in the juvenile crime law in 1997 moved the legal emphasis away from retributive punishment and towards education and protection in line with the UN guidelines as set out in the Beijing and Riyadh rules. Both central and local government have incorporated the notion of the 'best interests of the child' into their child protection policy.

Unlike their counterparts in Korea the Taiwanese welfare organisations seem to have been freer to operate and more likely to influence national level policy making. Moreover the DPP influence on Taipei city government has enabled opposition party ideas to be implemented by local government which placed further pressure on central government to take further action. The emergence of the HEF and the 'free school' movement provides a radical critique of the policies towards children adopted within the school system and in Taiwan's child welfare policies. Indeed this goes beyond anything so far attempted in the RoK such that one can say that despite the fact that there has been no direct influence of the CRC a more radical challenge to established policies has developed in Taiwan. Groups such as this will ensure that the government is not able to dominate the children's rights agenda.

It would be naive to take at face value the government supported attempts to be accepted as part of the CRC system. Taiwan has membership

of the UN as one of its long-term foreign-policy goals and acceptance into the CRC system is probably regarded as one step towards that goal. However, the creation of a children's bureau at the centre of government is an important first step towards creating a comprehensive framework for the promotion of child welfare and children's rights. The director-general of this bureau in 2001 noted that, 'To improve the human rights situation for children in Taiwan we first need to break down the traditional notion of children being the "property" of parents' (quoted in *Sinorama*, 20 February 2001). This is an important start but it also indicates that the process of accepting children's rights has only just begun.

14 Children's rights in Japan, South Korea and Taiwan – comparative aspects

What can we generalise about children's rights in East Asia from the material reviewed in the preceding pages? First, it is important to be clear that the paucity of material on South Korea and Taiwan makes it prudent not to claim too much. We know too little about the present let alone the past to enable us to 'conclude' much. However, with that caveat in mind, there is enough to enable us to make some tentative remarks about three topics: the developing ideas about 'childhood' in East Asia, the relation between the child and the state, and the impact of the CRC.

Is there a new notion of childhood developing in these three states that can be said to have East Asian characteristics? One clear commonality is that the combination of the priorities of the developmental state plus the Confucian value placed on education has generated high levels of state and private investment in schooling. Families are prepared to invest time and money in ensuring the access of their members to the best possible education and the school system has developed to serve the interests of the state. Indeed in all three states competition to enter the 'best' universities has created pathological aspects within the education system, to the extent that practice in schools has often been contrary to the best interests of at least a minority and sometimes the majority of the pupils.

This had become particularly significant by the 1990s when practically all children (over 90 per cent) remained in full-time education until eighteen. Not only is the official school year longer than that in most western countries, but a larger proportion of children also spend much of their 'spare' time in evenings and during holidays in *juku* or their equivalent preparing for exams. Doubts about the educational value of this aside, more schooling is taking place now compared to fifty years ago and the role of the child is largely conceived by family and society as a passive participant in this school system.

But what of the basic image of children? In the absence of a Puritanical notion of original sin, the Dionysian notion of children is largely absent. On the other hand, although most Asians might subscribe in principle to what some have called the Mencian notion of original virtue, and one often comes across attitudes to children's purity of the kind Jenks labelled

'Apollonian', this does not rule out the use of corporal punishment. One Taiwanese informant explained to me how he had regularly used a cane to chastise his children when they were young to deter unacceptable behaviour, explaining that because reason was insufficiently developed in children under twelve, they could not understand why they should not misbehave. By associating misbehaviour with pain they were able to make the 'correct' choice before they were able to understand why. This was a particularly lucid rationalisation of the use of punishment as the punishment of love (*ai no tsuchi* in Japanese), which was referred to by many in the context of punishing children. Not everyone accepts this and there is in each state both liberal demands that violence against children be prohibited in schools and elsewhere and a widespread social acceptance of corporal punishment which explains why it continues to be used. There is a split between the conservatives who, whether or not they favour physical punishment, argue the case for strict (and even stricter) discipline and liberals who urge greater freedom to enable children to develop their powers of decision making. Although they may be drawing on different intellectual traditions, this conservative/liberal split on basic attitudes to children is not much different to that we can find in Europe or North America.

One cannot speak with confidence about the notions of childhood held by Koreans or Chinese before the nineteenth century but it seems clear that whatever these were the conditions of childhood are radically different now: from growing up in a large extended family in a village community where infant mortality was high, to being brought up in a nuclear family with rarely more than one sibling and living in a cramped apartment within a high-rise bloc located in a crowded urban development. We earlier characterised the changes that took place between 1850 and 1950 in relation to the productive process in Japan as a move from the 'child of the village' to the 'child of the company' but in terms of housing it was a move from the 'child of the village' to the 'child of the apartment bloc'. This probably applies to most children in each of the three states.

Despite this, one is surprised at the invisibility of children within the major cities. Planning rarely has taken account of children's needs. There are few parks, playgrounds or open spaces where children can play relatively unsupervised, very little provision of free or cheap leisure facilities where children can go without their parents. This may be due to a lack of demand as children are often too busy with school or *juku* to have time to play. More likely it reflects a lack of attention to children's needs during the period of industrialisation and urbanisation when growth was the over-riding priority. Moreover martial law in Korea and Taiwan discouraged public congregation of any sort.

This has been changing in the 1990s as the child has been recognised as a major consumer of commodities. Growing affluence and the small number of children per household has meant children are the focus of increasingly high spending, creating a commodity culture for kids. Mostly this has been

controlled by the major corporations and supervised by the guardians of the state, although there is some evidence that a spontaneous 'kids culture' may be emerging. Moreover some aspects of this children's culture is transferable across Asia. Despite all the efforts of the South Korean government to keep them out, videos of Japanese TV cartoons have become available there as have cartoon books. In Taiwan too aspects of Japanese mass culture are available in Chinese translation or dubbed in Chinese. Japanese humour is regarded as bawdy or base by some Asian conservatives who fear what effect these cartoons will have on the attitudes of the young but, in an age of satellite TV and the internet, governments will be unable to prevent the spread of this culture. The cult of the 'cute' has spread across Asia from Japan without being controlled by Japanese companies.

It is only recently that Japanese popular singers have been able to perform in Korea but Japan has always been open to pop singers from across Asia. Japanese popular songs can be found in the *karaoke* clubs all over Asia. It is not too much to project forward current trends and see a pan-Asian 'youth' culture that children in Japan, Korea and Taiwan can identify with and whose influence could well go further to include Hong Kong, Singapore, Malaysia and even the more prosperous parts of mainland China. The Japanese element is the most important single part of this transnational youth culture but it obviously includes other elements both from elsewhere in Asia and the wider world.

Meanwhile, just as there is increasing commodity production for children there is a trend for children themselves to be treated as commodities – an item to be acquired at a certain point in the life cycle once other commodities (apartment, automobile) have been secured. All of which undermines whatever was left of traditional attitudes towards children.

In summary, irrespective of what the nation-states may have in mind for their younger citizens, there is a change in the living circumstances of children and these changes are tending to converge within Asia. Housing conditions are becoming similar, childhood is increasingly defined within the school process, the child becomes increasingly visible as a consumer of commodities while at the same time taking on some of the characteristics of a commodity, a lifestyle accessory. This is creating a context for the development of children and a need for the articulation of ideas of their rights quite different from that which previously existed in these societies and also one significantly different from that which exists in either the 'developed' west or the developing 'south'.

The states of East Asia have taken a close interest in children. There has been a clear idea among policy makers in the late nineteenth century in Japan and post 1945 in Korea and Taiwan that education was good and more education was better. However in each case the state took control of the educational system to make sure that it served the interests of the state both in the sense of strengthening the state structure and contributing to the process of economic and social development. The constructors of the Meiji

state were quite clear about this, they regarded the 'supreme objective of education as the making of people who could be useful for the welfare of the state' (Halliday 1975: 38, quoting Okubo 1967). This remained true in post-war Japan although the definition as to what qualities were most useful has changed slightly as the demands of major corporations have played a more significant role than the requirements of the armed forces. One can see a similar evolution of policy in Taiwan and South Korea although the loosening of the grip of the armed forces has occurred more recently.

Meiji statesmen were also quite clear what role teachers should play, in the view of the Minister of Education Kôno Togama in 1880, 'Teachers were not independent scholar-educators ... but rather public officers, official guardians of morality, responsible to the state' (quoted in Halliday 1975: 36). From the mid 1920s all post-primary schools had a serving army officer attached to them to reinforce the military ethos. This was ended by the occupation but Europeans are still impressed by the military-like discipline considered normal in most Japanese schools, not only the uniforms but also the standing to 'attention' when lined up and the 'salute' given to teachers when they enter a classroom. As we have seen, in Taiwan there was a serving army officer present in most schools and, although his presence has become relatively benign, there is no doubt that the intention was to ensure an element of military discipline in schools and to maintain ideological control.

Teachers have been thus identified with and controlled by the state although they have also sometimes been the ones responsible for encouraging the introduction of liberal ideas. At times when the power of the state has been reduced, in Japan during the 1920s and late 1940s, Taiwan and South Korea since 1988, some teachers have sought to develop ideas of child-centred learning and have resisted the control of the state both over their activities and the curriculum they have been delivering. The RoC and RoK tried to prevent the development of an independent teachers' union, successfully until the late 1990s. The Japanese government was bequeathed a radical teachers' union by the occupation and then spent forty years trying to bring it under control. So on the one hand the teaching profession has been a means through which state control has been exerted over children but at the same time some teachers have played a role as advocates of liberal and social democratic ideas which have included the rights of children.

As social space opened up within which it was acceptable and safe to criticise government policy, teachers were among the first to point out some of the dysfunctional aspects of the development-oriented education systems. But teachers have not always been comfortable with the ideas of children having rights, fearful that their recognition might undermine teacher authority in the classroom. Furthermore there seems to be an assumption that there is a causal link between the maintenance of a respect for authority within the school and law and order in the wider society. Proposals that might weaken some aspect of the former were resisted on the grounds of long-term consequences for society at large.

What then has been the influence of the CRC? Lewis was critical of the UN discourse of human rights, including the rights of children, as amounting to an attack on democratic freedoms, which he talks of as rights to equality and freedom from state interference. Moreover he feared that it threatened to impose on the 'south' views of a 'universal childhood' which was derived from 'western' experience. None of the three states we are interested in can be regarded as belonging to the 'south', although it is not long since per capita income levels in Taiwan and South Korea were close to or below those found in the contemporary 'south'. They are however indisputably not part of the west and entered the twentieth century with patterns of family structure and notions of childhood quite different from those which could be observed in western Europe.

Some conservatives in Japan regarded the CRC as based on standards alien to Japanese tradition and thought of it as an imposition, often with the implication that it was something being done to Japan by America, apparently unaware of the hostility to the CRC in the USA. These conservative critics and representatives of government often suggested that the CRC was not relevant to Japan and that it was more important either to the developing world, where children's economic and social rights were undermined because of poverty, or to countries such as the USA, whose children needed economic or civil protection because of the collapse of the family system.

Some developed this further to argue that the collapse in family values in the USA and elsewhere was a direct consequence of the over-emphasis of rights of which the advocacy of children's rights was just one more example. Perhaps in recognition of this worry the Japanese government response to the ratification of the CRC was to try to maintain control of the discourse on child rights in Japan by trying to couple the concept of rights with duties and obligations to the family and state and to give the CLCs a role in child rights protection, a group that had proved so reliable in the past at containing the development of rights ideas.

However, as we have seen, there had developed a liberal and social democratic critique of society which had no difficulty in using the rights ideas developed in the west during and after the creation of the CRC to urge their policy makers to include rights concerns into policy formulation and school curricula. This was first observable in Japan in the 1980s but as the room for democratic activity expanded in Korea and Taiwan similar demands emerged. In all three states the legal and teaching professions played a key role in the articulation of these demands.

It is true that, as yet, there is little or no indigenous theory or practice of children's rights. This is perhaps not surprising in Korea and Taiwan given the relatively short time since an interest in rights issues has been allowed to develop freely. Only recently have activists and academics turned their attention to these issues. In Japan the lack of the development of child rights ideas is less easy to explain. Given the relative abundance of work on children in Japanese history, it is surprising how much reference there is in the

writing on children and their rights to the history of rights ideas and childhood in western Europe and North America. This may reflect an ignorance of their own history or it may just be an indication of a fundamental rejection of the Asian values argument; that they see nothing special about Japan or its history that makes it different from the west so that the notion of the imposition of a 'western' model makes no sense.

We have come across no examples in the three cases we have examined of an international agency or state interfering to impose a 'universal childhood' on these Asian social structures. Notions of childhood have changed radically over the past century and the experience of childhood has changed too but this is less to do with the imposition of any non-Asian model of childhood than the introduction of capitalist, commodity production both in rural and urban areas and changing housing patterns. If the state and related social structures have been eager to encourage that, they have offered no encouragement to ideas of children's rights, not at least until forced to pay attention to these ideas by indigenous social organisations. It is only where groups active within civil society have taken up rights ideas and asked how these might be applied to children that there have been responses from the state.

Having said that it is also clear from the cases that we have studied that engagement with the United Nations system does make a difference. To repeat a point made earlier, ideas of children having rights are somewhat more familiar in South Korea than in Taiwan simply because of the fact that government has had to make a report to the Geneva-based committee, which made hitherto hard to obtain material available and prompted human rights NGOs to ask further questions. Responses from the committee to the reports presented by the Korean and Japanese governments have been critical of their attempts to publicise the convention or to meet its high standards but there is no evidence in these two reports compared to the reports from (say) the UK that the process 'infantilises the East' in the way that Lewis argues the implementation of the CRC threatens to 'infantilise the South'.

Before and after ratification of the CRC there has been broad support in Japan for children's rights both from the legal and teaching professions and within other social movement organisations. These activists have no feeling that they are the advocates of alien ideas foisted on them by the USA, the UN, or any other foreign body. Most may not be aware that they are part of a tradition of campaigning for children's rights that can be traced back over a hundred years and they probably think of themselves as simply trying to get rights taken as seriously in Japan as they believe them to be taken seriously in the 'west'. In fact they are engaged in precisely the same task as their western counterparts; that of re-conceptualising rights ideas so that they better protect the dignity of the children for whom they care.

Evidence from Taiwan and Korea is less clear. There are fewer people with a direct interest in children's rights and it is less easy to characterise

their views. One would predict though that as the space, both discursive and social, opens up the stances taken by the different parties will be similar to that in Japan. For example, one imagines that in Taiwan activists in the Humanistic Education Foundation will take a lead in promoting rights ideas in schools and that this will be met with resistance from conservatives within the KMT and the Ministry of Education, meanwhile in South Korea teachers in the Korean Teachers Union will have to argue with their more conservative colleagues and the bureaucrats in the central and local governments.

As the demands for children's rights were better articulated it became clear that they were not only demands that the state recognise the immunities and liberties of those under eighteen in the sense of clarifying the boundaries of state power that had been blurred during the process of creating a strong state to resist imperialism and promoting industrialisation but that they also required a redefinition of the role of the family whose structure had been changed in that process of industrialisation and urbanisation. Traditional patriarchal structures always contained,

The decisive characteristic ... the belief that domination, even though it is an inherent traditional right of the master, must be exercised as a joint right in the interests of all members and thus is not freely appropriated by the incumbent.

(Weber 1972 quoted in Woodiwiss 1998: 2)

Where the master, the patriarch, does not act in the interests of all he is in dereliction of his duty and kinship structures and notions of joint right may be mobilised to ensure the enforcement of benevolence where it is not freely given. However, as these structures were disrupted, new mechanisms were required to protect the entitlements of individuals within them. The discourse of rights gave helpful support for that process. Woodiwiss has described how the development of labour law in East Asia has resulted in the Confucian notion of benevolence being made legally enforceable within a neo-patriarchal system in which the practices of liberal democracy and rule of law prevent the rulers from appropriating all the benefits to themselves (Woodiwiss 1998).

In a similar way the discourse of children's rights has clarified what children are entitled to expect from the state both in respect to what it should refrain from doing, respecting immunities and liberties, and what it should positively engage in, which may at times result in the state intervening to protect the child from the family. In East Asia the implementation of children's rights requires a re-negotiation of relationships not only on the state/society boundary but also the boundary of family authority. It is this latter aspect of the implications of the rights of children that most concerns conservatives (though of course this is not confined to Asia, one of the main reasons the CRC has not been ratified by the USA is that it is perceived to

pose a threat to 'family values'). There is, however, little evidence yet that the children's rights discourse is developing in a way that is significantly different to that in the west, let alone one that is seeking to 'enforce benevolence' within the existing hierarchies. So far the chief inspiration has been the ideas of rights as encapsulated in the CRC with their mixture of liberal and social democratic characteristics. This does not mean that a distinctive 'East Asian' approach to rights will not emerge reflecting the distinctive circumstances of the region, simply that it has not done so yet.

Implementation of children's rights requires a redefinition of the role of the family but that is something that has been occurring anyway, the importance of the children's rights discourse is that it has tried to clarify the nature of the immunities, powers and claims that children may expect of both family and state in novel circumstances where the traditional structures can no longer be relied on to protect human dignity. This is rather different to the 'denigration of the state as a legal structure' that Lewis talks about (Lewis 1998: 99).

However, as Minow suggests, rights implementation need not only create or preserve distances when the 'individual' is engaged with the state as the only other player. Rights can also be part of legal arrangements that permit or even promote relationships while protecting autonomy (Minow 1986: 17–18). She talks of two inter-linked 'rights for children that constrain abuses of power by their parents and by the state, and rights for children that promote their abilities to form relationships of trust, meaning and affection with people in their daily lives and their broader communities' (Minow 1986: 24). One can see this point of view meshing with East Asian patriarchal values to support claims by children or their representatives to request, if not enforce, benevolence by either state or family.

As state power in Japan, Taiwan and Korea retreats from its position of dominance over society it has become possible to talk about re-negotiating the rights of children in state-controlled institutions such as schools and the wider society. As the ideals of the family catch up with the reality of family life in the twenty-first century we can expect a gradual redefinition of childhood, children and their relation to families both nuclear and extended. Just as happened in the past, changing social conditions will generate new notions of childhood and it seems reasonable to expect that the emergent definition of 'what a child is' will include the notion of what a child has a right to. While influenced by transnational trends such as the implementation of the CRC, there will be particular regional characteristics that will mean that the conception of children's rights in East Asia will retain distinctive characteristics.

15 Conclusion

One cannot envisage what developments will have occurred by the end of the first decade of the twenty-first century, but one can be fairly certain that, unless interrupted by external invasion, human rights cultures in each of these states will develop to have some common features and also distinctive characteristics. Moreover these 'hybrid' human rights cultures will be significantly different from those either in the 'west' or in the 'south'. Contemporary Asian medical culture which has been strongly influenced by western medical practice but which retains many traces of pre-modern attitudes might provide an analogy of what we can expect. The theory and practice of human rights in general and the implementation of the rights of children or patients will have local characteristics while sharing universal aims of ensuring care and enabling autonomy. This seems to imply that in acquiring local characteristics the practice of human rights will be influenced by 'Asian values'. Is there any indication at this stage about what these might consist of?

First, I think that whatever does emerge as 'Asian human rights' will not be a coherent set of ideas but rather that it will be composed of at least four elements which may rub up against each other. First the human rights culture in Asia, or at least this part of it, will be strongly influenced by liberal democracy, albeit with Asian characteristics. Second, their practice will be conditioned by the struggle between the state and social movement organisations over who controls the human rights agenda. So far the priorities of the developmental state have been all but overwhelming but this is in the process of change. The Confucian, or at least patriarchal, elements of Asian political culture may prove to be less inimical to human rights than has previously been suspected. Finally, there may prove to be other elements of indigenous Asian political cultures that both support the development of human rights and provide it with local colour.

In this concluding section I want to consider how these themes are working out in Japan, Korea and Taiwan, first at the national level of rights awareness and then in the more specific contexts of patients and children.

From the country studies

Can we discern a common pattern in the development of human rights in our three countries? One that might have a wider applicability perhaps? It is often suggested that there is a close connection between human rights protection and promotion and the existence of civil society. There are not a few problems associated with the notion of civil society which have been over-used and, arguably, over-inflated in scholarly use (see for example Ehrenberg 1999). Nevertheless if we opt for a pared down definition which regards it as that area 'beyond the family and yet before the state' we maybe able to use it to organise our ideas. However to state the conclusion before the discussion, the chief difference between Europe and East Asia is that whereas the creation of civil society is seen as being the pre-requisite to economic development in the former, its formation is only made possible by economic development in the latter.

This is not the place to say too much about the development of the modern state in the west. However, we can briefly characterise it as a process led by demands from urban classes, largely unconnected to the land or farming, to create an area free from the control of the state in which they could develop social and economic structures – markets – which would generate wealth for their class and for the state. Crucial to this process was the creation of, or the freeing of, civil society, which was a precondition to the development of capitalism and the modern state structure.

If we turn next to consider economic and social development in East Asia, however else we might try to explain it, and there are several competing explanations, it is quite clear that the process did not begin with the determination of the state authority freeing civil society from political interference (Held 1995: 13). However much we may need to deflate the claims made by the developmental state theorists about the role played by the state in the economic development of Japan, South Korea and Taiwan, it is quite clear that industrialisation was not principally driven by forces freed within civil society or the energy of market forces. On the contrary in the first phases of economic development – in Japan 1880–1945, Taiwan 1945–85, South Korea 1961–85 – the pattern has been for the state to close down or control all manifestations of autonomous social activity. Even today there are remnants of this pattern in political cultures that are premised on a moral authority that is top down and state ordained rather than bottom up and democratically decided.

During the first stages of economic growth, the state led the drive to industrialise based on the assumption that market forces would not necessarily produce the preferred outcomes and that it was necessary too to manage the production and circulation of social and political ideas. Dissenting ideas, liberal and socialist, and their accompanying notions of civil and social rights did seep into these states and at times were tolerated by them but the frontiers of thought control were for the most part closely policed. Civil society to the extent that it survived at all led a precarious existence.

By 1930 the authoritarian state in Japan permitted very little dissent and society was reorganised to support the project of the imperial state. Curiously, as Dower has shown, after 1945 the US occupiers of Japan colluded with the Japanese elite (or vice versa?) to present the Japanese people with an image of their own country that was more traditional, more hierarchical, less individual and spontaneous and more homogeneous both culturally and geographically than had been the case before the creation of the authoritarian state (Dower 1999). This means that even after the liberalisation and democratisation of political and social structures there was little celebration of the diversity in Japan's heritage because it was not perceived as such.

Similarly official accounts of Korean culture have deliberately minimised regional distinctiveness and rivalries despite, or perhaps because of, their pervasive influence in political affairs, and under-emphasised class divisions and plural traditions. Korea's economic success is commonly ascribed to the high degree of homogeneity among Koreans. Likewise, the KMT on Taiwan stressed its commitment to a mainland version of Chinese culture to the exclusion of any local traditions or languages. Common to all three states in the first period of the influence of human rights ideas is the reluctance to recognise, still less to celebrate, diversity. Human rights ideas though present were barely tolerated.

The next phase is one in which there is some formal recognition of civil society and I think that in each of our states it is marked by the introduction of laws that free the legal profession from direct state control. This occurred in 1949 in Japan, 1982 and 1993 in South Korea and 1992 in Taiwan. This was significant because although we can talk about the creation of civil society as determining the state's authority, on a practical level this is not going to be possible while those who are the advocates of those resisting state control are themselves directly controlled by the state. Legislation which created independent bar associations were both a recognition of the importance of civil society and a precondition to its further development. In Japan the results were not immediate. It was not until the 1960s with the use of the court system by victims of industrial pollution that the potential of citizens using the law to protect their interests was first realised. Since then the legal profession has played a leading role in many dimensions of the human rights movement acting as advocates for a view of law as a device to regulate state power as opposed to being an instrument at the state's disposal. In Korea and Taiwan too the legal profession, or at least part of it, has played a key role in the local implementation of rights ideas and became more able to do so after its independence was assured.

A third phase of the development of human rights ideas can be detected in the 1990s with the internationalisation of commitments to human rights. The most obvious manifestation of this has been the states' ratification of instruments produced by the United Nations and participation in such events as the conferences on Human Rights held in Bangkok and Vienna in

1993. This is not just about state actors though. NGOs from states in Asia gathered in parallel meetings held in Vienna and Bangkok and produced rival declarations which went much further than the states in their commitment to universal values. Links between NGOs have been maintained, for example, as they have tried to ensure human rights have not been ignored by the APEC nations at its annual meetings. Also there have been bilateral links set up between, for example, sections of the Japanese and Korean bar associations to exchange views on human rights. Groups of lawyers assisting other NGOs have produced documents as 'counter-reports' to submit to UN bodies. Taiwan has been excluded from this process, but even there the existence of widely accepted standards for human rights protection and promotion have provided points of reference for the legal profession and others demanding local acceptance of rights ideas.

Finally, I think we might be able to detect or predict a fourth phase of human rights development as human rights protection becomes formally incorporated into state structures. The South Korean government supported but then abandoned a proposal to introduce a national human rights commission. Such proposals have existed in Taiwan since the mid 1990s and might come closer to implementation now a DPP politician has been elected President. Even Japan, where a weak Civil Liberties Commissioner system has existed since 1948, is considering creating a new structure independent of the state, or radical reform of the existing framework. As Stammers points out there are dangers here that human rights may become just part of a set of ethical standards for a managed society when they are absorbed into the state. For this very reason it is crucial that this is accompanied by, and not regarded as a substitute for, the regeneration of the NGO human rights groups able to challenge the activities and interpretations of state actors. Thus precisely at the time of the internationalisation of human rights standards it is important that local human rights cultures develop enriched by local traditions and using strategies that are appropriate to local conditions. It will be for them to decide whether this can best be done by working within existing hierarchies to 'enforce benevolence' as suggested by Woodiwiss or to fight against hierarchical values as proposed by Mushakoji. Thus although civil society may have developed under very different circumstances in Japan, Korea and Taiwan, the role of human rights NGOs active within its boundaries will continue to play a role both similar and different to that of groups in the 'west'.

It is tempting to conjecture whether this four-stage model has any broader relevance to understanding the development of human rights theory and practice elsewhere in Asia. Has economic development in Malaysia, Thailand or even the PRC created the possibility for the development of civil society within which the advocacy of human rights and their implementation has become possible? Will the states and other political structures be able to prevent these developments if indeed these pressures emerge as they did in the three countries that were the focus of this study? If they do, will

the human rights ideas that guide these changes turnout to have ‘Asian characteristics’? Indeed, as human rights theory and practice develop in what I have called the ‘fourth phase’, will these ideas evolve with local characteristics or become indistinguishable from international practice as theorists and activists from all parts of the world interact both in real time at conferences and virtually via the internet?

From the patients’ rights study

Earlier I suggested that we might consider the impact of western medicine in East Asia as a metaphor for the discussion of the consequences of Asians taking human rights seriously. Medical ideas of western origin such as ‘germ theory’ of the origins of some diseases have proved to be not incompatible with some parts of oriental medical practice, which can be regarded as maintaining what western medical practice would call the immune system. Moreover it is even possible that Chinese medicine might be able to stimulate the bodies’ own systems to resist or remove a specific disorder. Could a similar accommodation be reached between the demands for patients’ rights and East Asian medical culture?

Unlike other areas of human rights implementation this is one where the UN-generated standards have played only a peripheral role. On the other hand, doctors in all developed societies probably more than most professionals are involved in a trans-national scientific culture that ensures medicines and techniques devised in one part of the world are eagerly adopted wherever patients suffer from the same disease and can afford to pay for the treatment. Advances in the power of medicine and changes in the way medical care is delivered in the west – its industrialisation – led to demands that patients be treated at least as well as consumers of other goods and at best in ways that protect and enhance their dignity and autonomy. These demands had costs but they were broadly accepted in North America where the commodification of medicine was most advanced and rights demands most vociferous, but a version of patients’ rights has been accepted in most western countries and by the world medical profession, even though there remain many contested areas.

In Japan the medical profession largely supported by the state resisted the implementation of informed consent as subverting the traditional hierarchy of health care in which the authority of the doctor has gone unquestioned. However the spread of an awareness of human and consumer rights in the 1980s and 1990s, a process in which the legal profession played an important role, propelled the patients’ rights movement. While there is no doubt that there is extensive conservatism in the medical establishment and individual hospitals that patients’ rights advocates will have to overcome, compared to the situation in the early 1990s rights ideas had become much more firmly embedded in medical practice by 2000. From concessions on the use of the contraceptive pill through to the acceptance that access to medical records

will soon be put into law, the overall trend is for reforms to be introduced that give increased respect for patients' decisions. Pressure from 'Patients' Rights Ombudsmen' will no doubt maintain this impetus.

The legal profession supported by the ICJ ensured that an element of 'due process' was introduced into the admissions and discharge procedures in psychiatric hospitals. Human rights ideas are now present among the principles that guide the provision of psychiatric care in Japan and the medical profession no longer monopolises control over these processes. On the other hand it cannot be said that the patient's position is strong. This is in part because, unlike the patient with a somatic disorder, who can rely on her/his family in any struggle to get fairness from the system, such family support is much less reliable when a mental disorder is involved. Where the patient desires release from hospital the family may be reluctant to have her/him back home or in the community where she/he may cause embarrassment. Even where a family is content to have an individual at home they may not want to draw attention to her/his condition, and their responsibility for it, by participation in such a public forum as a court. Traditional attitudes remain deep-rooted and impair the development of patient-centred policies, although the legal profession has devised methods that may counter-balance the power of the psychiatrists. If the advisory system, pioneered in Fukuoka, is spread across the country, rights ideas should become embedded. This has the potential to change perceptions of the mentally disordered in Japan, which in the long term is the only way that significant change will take place in how they are treated by society.

In neither South Korea nor Taiwan has there been such third-party intervention on the side of the psychiatric patient. As we have seen there are in both systems mechanisms which in theory could be used by patients or their families to require the release or improvement of conditions of those in hospitals. That they have not, yet, taken on these functions is largely because the issue has not been taken up by a third-party organisation. The patient-support groups that exist are primarily interested in ensuring quality of care within the institutions not enabling early release. The legal profession has not taken up the issue partly because it remains small, even compared to that in Japan, and partly because there have been much more egregious examples of human rights violations on which to focus its energies. There are some indications that this might be changing and, as there is increased interaction between the bar associations in the region, there may be some emulation of the tactics used in Japan.

More generally the impact of patients' rights ideas on the health systems of Korea and Taiwan has been minimal. When a version of patients' rights has been adopted within the hospital system, as happened in Korea, it has defined rights in a way that provides only slender basis for criticising the medical profession. The story so far in Korea and Taiwan supports our contention that rights ideas do not spread very far without some kind of third-party support. There, and in Japan too, the balance of interests may be

about to change as cost containment within the state-managed health-care insurance systems becomes a key issue and market competition starts to influence patient decisions. The state might want to reduce the length of time patients spend in hospitals and increase their treatment in cheaper community-based clinics. As the number of medical practitioners increases and states promote the development of primary-care systems one might predict that patients will seek out those doctors who are prepared to provide more information and allow greater patient autonomy in decisions about their health care. This will not immediately result in a change in rights awareness among patients but it may result in changes to the way they are treated that will incrementally ensure that their rights are taken seriously. It is a fairly safe prediction that this will proceed more rapidly in Japan where the legal profession backs these trends on the basis of principle and that the process would be more secure in Korea and Taiwan if citizens' movement groups were to develop there.

Some aspects of the relevant international rights standards have been included in national administrative practice but rarely in ways that permit an individual to resist the authority of the medical profession. There is a big gap between a generalised commitment to rights notions and the ability to implement them during an encounter with a medical professional. Groups such as those supporting the Patients' Rights Ombudsmen in Japan will be able to play an intermediary role counselling and assisting individual patients to get redress. But one pattern will not suit all and there is no guarantee that the Fukuoka-based scheme will succeed in its aims even in Japan. Nevertheless one suspects that however well-intentioned some of the medical profession might be, whatever changes are made to medical affairs laws, patients in East Asia will have difficulty in insisting that doctors respect their rights to self-determination without some back-up from intermediary groups.

From the children studies

The case of children is more complex as we cannot encapsulate the problem in terms of an encounter between two individuals although the central issue is also one of status. While on the one hand the definition of a child is in theory (though rarely in practice) simple as all that matters is age, the nature of childhood is not at all straightforward. We suggested in the introduction that the process of developing an international rights regime for children had been criticised (by Lewis) as authorising states to act in order to protect children's rights and that this amounted to the imposition of a 'universal', i.e. 'western', conception of childhood on non-western cultures. What can be concluded from our review of Japan, Korea and Taiwan?

Research in this area is not as well developed in Korea and Taiwan as it is in Japan. Histories of children and childhood in Japan show how the position of children has changed over the centuries and how, at any one time,

there were important class differences. Whatever the differences in the past though, there was convergence towards the end of the twentieth century in all three areas. The insistence on the importance of full-time schooling to the age of eighteen, the rapid urbanisation which has resulted in most nuclear families residing in relatively cramped apartment blocks, accompanied by unprecedented affluence, all these have transformed the nature of childhood in these Asian societies. If there was a conception of the child's role in the modernisation of the country in which they were seen primarily in terms of their future contribution to the country's economy they need now to be thought of in their post-modernisation (post-modern?) context. Children are still future citizens and future workers but the focus of the rights debate is not simply, or only, on the future role of children, which might justify restrictions on their freedom, but on them as human beings existing in the present, the protection of whose dignity may require the reduction of restrictions or their complete removal.

There is also a great contrast between Japan and Korea/Taiwan in terms of the amount of active support for children's rights in the respective civil societies. In Japan one can find national level groups of teachers and lawyers with offices in Tokyo as well as community-based groups that may or may not be linked into a national network. This interest in children's rights in some cases pre-dates the formulation and ratification of the CRC but there is no doubt that international interest in children's rights in the 1990s further stimulated an interest in the topic and provided a language and set of standards that were used to frame demands.

The desire to formulate a response to the Korean government report about children's rights brought together the 'NGO Coalition for the Rights of the Child'. *Inkwon Sarangbang* concern with children's rights and some academic interest continues to exist but it cannot be said that there is widespread, grass-roots concern with the topic. These developments in Korea however small were still more than have taken place in Taiwan where, in the absence of the need to report to an external body, neither government nor the NGOs have paid much attention to children's rights issues. One fears that unless and until such groups emerge, how children are treated will depend on parents, teachers and social workers, who cannot always be relied upon to act in children's best interests.

From the evidence reviewed in the previous pages I would conclude that, contrary to Lewis, the introduction of the CRC in these parts of Asia at least has provided children with greater rights protection but that this will not be secured unless formal and informal institutions are created within civil society which can vigilantly intervene in their support. Again one waits with interest to see what forms these groups take and how they will seek to articulate the universal values that are now quite well developed to appeal to their particular constituencies.

At the end of the 1990s the authority of the state in each of the three countries was being challenged by domestic social movements and international processes. Significant groups within each country are demonstrating that they are no longer prepared to defer demands for better or equal treatment. In strictly developmental terms too the role of the state in facilitating economic growth is changing. Policies appropriate up to the end of the 1980s for encouraging growth are of less help when the main problems are related to challenges of leading edge technological change or financial restructuring. Now committed to both liberalisation and democratisation there is less justification for the control of political ideas such as human rights even if tolerance of diversity and dissent may have economic and social costs. In sum I see no reason to conclude that there is any incompatibility with the theory and practice of human rights and the values of contemporary Asia.

Aspects of the introduction and implementation of human rights ideas in East Asia have been discussed at length in the main text, suggestions of how Asian human rights might develop have been discussed much more briefly here. The power of liberal thought is firmly entrenched though it might acquire Asian features. The state is devising a different role for itself within the economy while it is re-negotiating its boundaries with a variety of social forces and social movements at home and abroad. That this is a global phenomenon does not mean that the re-negotiated boundary will fall in the same place north and south, east and west, or even within East Asia. Patriarchal power structures have proved remarkably resistant to urbanisation and industrialisation and may yet be compatible with human rights claims. And there are other hitherto largely ignored aspects of local cultures that may emerge as supportive of the protection of the dignity of the weak against those with power. It is not easy, yet, to discern the shape of Asian human rights but the nature of their component parts is emerging.

Appendix

Interviews

This work is partly based on meetings and interviews conducted over the period 1995–98, over fifteen months of which I was living in East Asia, based in Japan. During that time I held a large number of meetings and conversations with academics, lawyers, doctors and bureaucrats. I kept notes of the formal interviews and looking through these notes I can find over forty interviews recorded in South Korea and Taiwan with many more in Japan. There would be little point in listing all of these meetings. The following lists comprise simply those that are referred to in the text.

Japan

Drs Iwashita, Yoshikawa, Okada, Yasunaga at the Chiyobashi Hospital, Fukuoka, December 1995.

Ikenaga Mitsuru, lawyer, Fukuoka, Japan, 12 June 1995.

Japan Federation of Bar Associations, 15 September 1998.

Kasai Hironari and Kamimoto Mieko, Jinkenren offices, JTU headquarters, Tokyo, 26 September 1997.

Oizumi Hiroko *et al.*, Ministry of Health and Welfare, 6 October 1995.

N. Tatsumi, H. Koizumi, H. Kawashima, Ministry of Justice, Tokyo, 14 July 1997.

Tomonaga Kenzo, Buraku Liberation Human Rights Research Institute, 17 September 1998.

Uchida Hirofumi, Professor, Faculty of Law, Kyushu University, 3 September 1997, 18 September 1998.

Korea

All interviews conducted in Seoul unless otherwise stated.

Ahn Chang-ho, Human Rights Division, Ministry of Justice, 5 July 1995.

Cheong Key won, Director, Social Welfare Division, Korean Institute of Health and Social Affairs, 6 July 1995.

Chun Kwan, Buddhist Committee for Human Rights, 28 November 1995.

Jung Byung-jo, Director for International Cooperation Ministry of Health

and Welfare, 5 July 1995.

Kang Je-yoon, Catholic Human Rights Committee, 27 November 1995.

Kim Byung-hu, psychiatrist, 11 September 1998.

Kim Chul-young, lawyer, 30 June 1995.

Kim Eun Young, secretary, Lawyers for a Democratic Society (Minbyun), 22 August 1997.

Kim Il-soon, Professor, Department of Preventive Medicine, Yonsei University, 11 September 1997.

Kim Min-jeong, Amnesty International, Seoul group, 30 November 1995.

Kim Suk-san, Executive Director, Korean Welfare Foundation, 9 September 1998.

Kim Yong-ik, Medical Association for Humanism, 10 September 1998.

Lee Chan-jin, lawyer, Vice-Secretary General, Minbyun, 10 September 1997, 10 September 1998.

Lee Dae-hoon, Chief coordinator, Solidarity for Participation and Human Rights (later People's Solidarity for Participation and Democracy – PSPD), 1 July, 1 December 1995, 11 September 1997.

Lee Dong-jin, Vice President, Korea Teachers Union, 12 September 1997.

Lee Hyun-gun, lawyer, 11 September 1997.

Lee Jae-yun, Professor, Department of Child Welfare, Sookmyong Women's University, 11 September 1998.

Lee You-jung, lawyer, 10 September 1997.

Lew Seon-ho, lawyer, 30 June 1995.

Lim Jae Hong, Director Human Rights and Social Affairs Division, Ministry of Foreign Affairs, 5 July 1995.

Mun Jae-in, lawyer, Pusan, 26 June 1995.

Nam Kyu Sun, Secretary General Minkhyup Human Rights Group, 30 November 1995, 10 September 1997.

Oh Chang-ik, Secretary General, Catholic Human Rights Committee, 10 September 1997.

Paik Choong-hyun, Dean and Professor of Law, Seoul National University, 3 July 1995.

Park Byung-ha, Director Child Welfare Division, Ministry of Health and Welfare, 5 July 1995.

Park Dong-eun, Executive Director, Korean Committee for UNICEF, 3 July 1995.

Park Ha-jeong, Director International Co-operation, Ministry of Health and Welfare, 8 September 1997.

Park Jing-ki, President, National Council Bereaved Families for Democracy, 8 September 1997.

Park Won-soon, lawyer, 2 July 1995.

Suh Joon-sik, President, 'Sarangbang' Centre for Human Rights, 5 September 1997, 7 September 1998.

Won Yong-bok, Senior Public Prosecutor, Director Human Rights Division, Ministry of Justice, 5 July 1995.

Yi Bae Keun, Executive Director, Child Protection Fund, 12 September 1997, 9 September 1998.

Yi Chan-jin, Citizen's Medical Victims Counselling Centre, 9 September 1997, 10 September 1998.

Yi Un-son, Citizens Medical Victims Counselling Centre, 10 September 1998.

Yoon Ki-won, lawyer, 30 June 1995.

You Jung Lee, attorney of law, 10 September 1997.

Yu Eun-suk, Education Department, Inkwon 'Sarangbang' Centre for Human Rights, 6 July 1995.

Taiwan

All interviews conducted in Taipei.

Chang Fu Mei, Commissioner for Petitions and Appeals, Taipei City Hall, 30 May 1995.

Chang Hong Jen, Director Bureau of Communicable Disease Control, Department of Health, 7 October 1997.

Chang Ly-yun, Research Fellow, Institute of Sociology, Academia Sinica, 9 October 1997.

Chen Chia Hua, Executive Secretary, Chinese Association for Human Rights, 7 October 1998.

Chen Chiao-chicy, Taipei City Psychiatric Centre (TCPC), 8 October 1997.

Chen Kuei Hsien, Chairman, Formosa Hakka Radio, 24 September 1998.

Cheng Nan Peng, Secretary, Alliance for the Mentally Ill of RoC Taiwan, 23 September 1998.

Cheng Sophia, Secretary General, Taiwan Association for Human Rights, 24 May 1995.

Chien Ching-Piao, President, Society of Psychiatry, RoC (Taiwan), 7 November 1995.

Chin Cynthia K.Y., Executive Secretary, Consumers' Foundation, 7 November 1995.

Fan K.C., President, Taipei Bar Association, November 1995.

Feng Joyce Yen, Executive Director, Child Welfare League Foundation, 25 September 1998.

Hsu Pei Tzu, Secretary General, Chinese Association for Human Rights, 27 May 1995.

Hsueh Ching Feng, Deputy Secretary General, Taipei Bar Association, 22 September 1998.

Hu Wei Herng, Director, Taipei City Psychiatric Center, 8 October 1997.

Huang Mab, Professor, Department of Politics, Soochow University, 8 November 1995, 7 October 1997, 21 September 1998.

Huang Wei Ying, Researcher Child Welfare League Foundation, 8 October 1998.

Koo Wellington L., Attorney, Formosa Transnational, 10 October 1997.

Lee Sheng Long, Managing Director, Taipei Bar Association, 31 May 1995, 4 October 1997.

Lin Mei Jung, Taiwan Grassroots Women's Workers Centre, 24 September 1998.

Liu S.L., Attorney, Direction International Law Office, 9 October 1997.

Ng B.H. Peter, President TAHR, 2 October 1997, 22 September 1998.

Ni Chia Chen, Awakening Foundation, 9 October 1997.

Sun Sen-Yen, Grand Justice, Judicial Yuan, 6 November 1995.

Tang Mei-ying, Professor, Taipei Municipal Teachers College, 22 September 1998.

Wu Li-feng, Executive Director, Humanistic Education Foundation, 24 September 1998.

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- Chiiki Kaizen Taisaku Kyôgikai (Regional Improvement Policy Council) (1996) *Dôwa Mondai no Sôki Kaiketsu ni Mukete Kongo no Hôsaku no Kihonteki no Arikata ni tsuite* (Basic Future Strategy for an Early Resolution of the Dôwa Problem), Tokyo: Sômuchô.
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- Chôchiku Kôhō Chuō Inkaï (Central Savings Information Committee) (1997) *Seikatsu to Chôchiku Kanren Tôkei* (Statistics on Life and Saving), Chôchiku Kôhō Chuō Inkaï: Tokyo.
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