

**From Special Needs
to Equal Rights:
Japanese Disability Law**

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FROM SPECIAL NEEDS TO EQUAL RIGHTS: JAPANESE DISABILITY LAWKatharina Heyer¹

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This paper is an overview of postwar Japanese disability legislation and activism. It analyzes the impact of the 1981 U.N. International Year of Disabled Peoples on Japanese disability law and on the growing disability movement. While the U.N. mandate for “full participation and equality” was meant to introduce a Western social model of disability, which focuses on civil rights, social discrimination and stigma, this paper argues that Japanese disability legislation continues to reflect what disability theorists term the medical model. This model understands disability as physical imperfection best addressed through medical cures and rehabilitation. Japanese disability law recognizes special needs through sophisticated welfare and rehabilitation programs and a disability employment quota, but fails to recognize equal rights and integration. The U.N. equality mandate, rather than reforming existing disability law and policy, has deeply impacted the Japanese disability movement. It generated a new kind of activism that looks to disability movements in the United States as examples of defiant disability pride and rights consciousness. This new generation wants to embrace equal rights and opportunities and move away from the traditional emphasis on special needs. This paper

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concludes with observations about the implications of such movement strategies for Japanese social movements.

I. INTRODUCTION: INTERNATIONAL DISABILITY LAW

In 1981, the United Nations declared the International Year of Disabled Persons (IYDP) to mark the beginning of the International Decade of Disabled Persons (1983–1992), both under the motto of “full participation and equality.”² At the end of the decade, the U.N. Economic and Social Commission on Asia and the Pacific declared 1993 to 2003 the U.N. Decade of Disabled Persons in Asia, to emphasize that more work needed to be done in that part of the world. The IYDP came at a time when people with disabilities all over the world were starting to form political and social movements to draw attention to the ways societies stigmatize embodied difference and discriminate against people with mental and physical disabilities. It pointed to the shift in international thinking about disability policy away from welfare and medicine and towards independent living and equal rights. Disability theory has captured this shift in contrasting a medical model of disability, which understands disability as physical imperfections best addressed through medical cures and rehabilitation, with a social model that focuses on social discrimination and stigma as the true sources of disability.³ The U.N. motto thus symbolizes this shift by emphasizing the importance of equal rights, social integration, independent living, and government responsibility to combat discrimination against people with disabilities.⁴

A look at disability legislation worldwide reveals two basic approaches. One approach is closely associated with the 1990 Americans with Disabilities Act (“ADA”) that guarantees equality of opportunity by outlawing discrimination.⁵ Similar anti-discrimination legislation

² Theresia Degener, *Disabled Persons and Human Rights: the Legal Framework*, in HUMAN RIGHTS AND DISABLED PERSONS 9, 39 (Theresia Degener & Yolán Koster Dreese eds., 1996).

³ See SIMI LINTON, CLAIMING DISABILITY 10-11 (1998).

⁴ See Degener, *supra* note 2, at 10.

⁵ For a discussion of the 1990 Americans with Disabilities Act (“ADA”), see Robert Burgdorf, *The American with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991) and Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999).

exists in Canada, Great Britain, Australia and New Zealand. The second approach aims for equality of results by emphasizing special needs over equal rights and mandating quotas. This is the European and Japanese approach. In general terms, the ADA equal-treatment approach views disability from a civil rights perspective and mandates neutrality, or blind justice, in decisions regarding protected groups.⁶ The European and Japanese approach, in contrast, emphasizes the need to protect difference and analyzes disability as a category that must be given special considerations and state assistance. Its most outstanding feature is the employment quota, whereas the ADA approach outlaws employment discrimination *per se*.⁷

This paper will assess the impact of the U.N. equality and integration mandate on Japanese disability legislation and activism. The first part of this paper will examine the impact of international norms on Japanese law. It will then outline the development of Japanese disability law and its incorporation of the U.N. equality doctrine. Specifically, it will analyze the ways international norms forced the Japanese government to adopt principles aimed at “normalizing” the lives of its disabled population and revise the majority of its disability legislation. The second part of this paper will examine the ways the U.N. equality mandate invigorated part of the disability movement to shift its demands from special needs and welfare to rights and integration. It will show how the new generation of activists draws on the American disability movement as an inspiration for political activism and disability pride, and on European disability policies as a model for progressive social legislation. Finally, this paper will consider the implications of this new development in disability law and activism for our understanding of the role of rights and the law in Japanese society.

II. INTERNATIONAL INFLUENCES ON JAPANESE LAW

Japan responded to the U.N. mandate by adopting the “normalization principle” (*nomarizeeshon* in Japanese) as the guideline to reform its disability law and policy. Why should the U.N. decade prove so influential? The Japanese Constitution (Art. 98(2)) establishes that treaties and customary international law have domestic legal force of law in Japan and thus

⁶ See STEPHEN PERCY, *DISABILITY, CIVIL RIGHTS AND PUBLIC POLICY* 245 (1989).

⁷ See Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: from Quotas to Antidiscrimination Laws*, 18 COMP. LAB. L.J. 62 (1996).

prevail over Diet statutes.⁸ International instruments that are not binding under international law, such as declarations on human rights, are non-self executing and Japan has shown great reluctance to sign them.⁹ Nevertheless, they have become an important symbol for Japan's participation in the international human rights community and its role in the international political arena. Japan has ratified some of the most important human rights conventions in the last twenty years, including those on economic, social, cultural and political rights (1979), refugees (1982), women (1985), children (1994), and racial discrimination (1995).¹⁰ Ratification of these treaties in most cases forced Japan to revise its laws to bring them into conformity with the requirements of the treaties.¹¹

Japan's 1985 ratification of the 1979 U.N. Convention on the Elimination of All Forms of Discrimination against Women ("Women's Convention") provides a good example of the reluctance with which the country has embraced international human rights law. Japan initially opposed the Women's Convention for conflicting with many aspects of Japanese law regarding women and work. For example, Japan rejected clauses regarding equal rights for women in respect to their children's nationality, paid maternity leave, and penalization of dismissal due to marriage and child birth.¹² Had it not been for the pressure of women's groups and female Diet members, Japan might not have signed the Convention.¹³ As a result of ratification, Japan was forced to enact legislation reflecting the Convention's emphasis on equal employment opportunity. The resulting 1985 Equal Employment Opportunity Law ("EEOLE") (*Danjo Koyou Byoudouhou*) approximated the equality mandate by prohibiting discrimination in training, benefits, and retirement and only mandated *endeavor* in ending discrimination in recruitment,

⁸ See YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS, AND JAPANESE LAW 2 (1998).

⁹ See *id.* at 5-11.

¹⁰ Human rights treaties still awaiting ratification are treaties regarding genocide, torture, education discrimination, as well as a host of International Labor Organization (ILO) Conventions, including forced labor, and employment discrimination.

¹¹ See generally IWASAWA, *supra* note 8.

¹² See *id.* at 207.

¹³ See IWASAWA, *supra* note 8, at 209.

hiring, job assignment and promotion. Its weak enforcement measures have made it an ineffective instrument to combat sex discrimination.¹⁴

Despite its weaknesses, the EEOL, as well as Japan's participation in the Women's Convention, has drawn attention to Japan's highly gendered labor market and invigorated parts of the feminist movement.¹⁵ Social movements generally welcome international pressure on Japan to show commitment to human rights principles. Especially in the last twenty years, international human rights law has enjoyed unprecedented interest in Japan, generating a growing body of literature. Individuals and attorneys invoke human rights treaties before the courts more frequently than before¹⁶ and social movements of underrepresented groups are increasingly turning to the law as a tool for social change.¹⁷

Likewise, international influence has played a large role in the development and reform of Japanese disability law. In 1955, the International Labor Organization (ILO) passed its Recommendation on Vocational Rehabilitation, which became the internationally recognized guideline for vocational rehabilitation and spurred appropriate legislation in most member nations.¹⁸ Based on this example, a coalition of disability groups led by the Japanese Society of Disabled People for Rehabilitation (*Nihon Shougaisha Rehabilitation Kyoukai*), one of the first generation disability groups formed was organized by disabled war veterans, demanded that the Japanese government take concrete action. The result was the 1960 Physically Disabled Persons Employment Promotion Law (*Shintai Shougaisha Kihonhou*) that established an employment quota.¹⁹ In 1987, under the influence of the IYDP and the ILO Convention on Vocational

¹⁴ See Barbara Molony, *Japan's 1996 Equal Employment Opportunity Law and the Changing Discourse on Gender*, SIGNS 268, 287-89 (1995).

¹⁵ See Katharina Heyer, *Rights or Quotas? Disability Politics in Japan and Germany* ch. 3 (unpublished Ph.D. dissertation, University of Hawai'i (Manoa)) (on file with author).

¹⁶ See IWASAWA, *supra* note 8, at 3.

¹⁷ See generally FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987).

¹⁸ See *The ILO and Human Rights*, Report of the Director-General (Part 1) to the International Labour Conference, 52d Sess., available in Degener, *supra* note 2, at 20.

¹⁹ See PHYSICALLY DISABLED PERSONS EMPLOYMENT PROMOTION LAW (1960). The initial quota was set to 1.3% for private and 1.6% for government organizations, and has risen to 1.8% and 2.1% today (since July 1, 1998). It is still low in comparison to quotas in European countries (6% in Germany, France and Poland; 4% in Austria; 5% in Hungary).

Rehabilitation and Employment of Disabled Persons, which was geared primarily to expand employment opportunity, the Japanese government was forced to revise its employment law one more time.²⁰ To mark the inclusion of mental disability in employment legislation, the Japanese government renamed the law and mandated that the quota and the levy systems should now also be applied towards people with mental disabilities.²¹

III. JAPANESE DISABILITY LAW

Japanese law defines a person with a disability as someone “whose daily life or life in society is substantially limited over the long term due to a physical disability, mental retardation, or mental disability.”²² This definition closely follows that of the ADA,²³ which states that “a disability is a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or, being regarded as having such an impairment.”²⁴

The Japanese government currently recognizes six million Japanese as having some form of physical, intellectual, or psychiatric disability.²⁵ This is considered to be a low percentage (5%) of the general population in comparison to other countries (10% in Germany, 20% in the United States, and over 30% in Sweden), mainly because Japanese law strictly limits the types of disabilities that it recognizes.²⁶ Most significantly absent from the list are AIDS or HIV-

²⁰ See Ryosuke Matsui, *Employment Measures for People with Disabilities in Japan*, 17 INT’L J. REHAB. RES. 368, 369 (1994).

²¹ See MINISTRY OF LABOR, NIHON SHOUGAISHA SOKUSHIN KYOUKAI (SHOUGAISHA NO KOYOU NO SOKUSHIN NO TAME NI) [EMPLOYMENT PROMOTION FOR PEOPLE WITH DISABILITIES] 12 (1998).

Another powerful example of international pressure on Japanese disability law is the reform of mental health law that came only after Japanese human rights activists alarmed the U.N. about human rights abuses in mental hospitals. See *infra* IV. This paper, however, will concentrate on the effects of the U.N. International Year and Decade of Disabled People and its emphasis on equality and integration.

²² SHOUGAISHA KIHONHOU [DISABLED PEOPLES’ FUNDAMENTAL LAW] art. 1(2) (1993). For the full Japanese text of all disability laws cited in this paper, see <<http://www.dinf.ne.jp/doc/law/jsrd/z00002/z00002.htm>>.

²³ 42 U.S.C. §§ 12101 *et seq.* (1990).

²⁴ Burgdorf, *supra* note 5, at 445.

²⁵ See SHOUGAISHA HAKUSHO [DISABILITY WHITE PAPER] 251 (1998).

²⁶ Compare note 22 and accompanying text with note 23 and accompanying text.

infection, alcohol or chemical dependency, epilepsy, rheumatism, and learning disabilities.²⁷ Furthermore, official surveys only include those people carrying a *shougai* *techou*, a disability handbook, which lists the name, type, and severity of the individual's disability. Carrying this card is not a requirement, but it is the only way to receive a host of welfare and tax benefits. Many disability activists see this card as reproducing the stigma associated with disabilities, but cannot afford to forfeit the benefits associated with it. Students attending special schools are encouraged to apply for a handbook, as are job seekers at their local public employment security office, because only handbook owners can officially claim to be disabled and thus count for a company's legal employment quota.

Japan has instituted a sophisticated network of rehabilitation and welfare benefits servicing people with disabilities. In particular, its vocational rehabilitation system is internationally recognized for the way it administers its levy and grant system, as well as for the way it operates vocational training and placement services at the public employment security offices.²⁸ The National Institute for Vocational Rehabilitation (*Shougai* *Shokugyou* *Sougou* *Centaa*), a central institution for the nationwide rehabilitation centers, conducts surveys and research, trains rehabilitation counselors, collects and distributes information concerning the employment and rehabilitation process of people with disabilities, and gives advice and technical assistance to employers. Japan is seen as a leader in vocational rehabilitation in Asia, and provides much support and fundamental research for the establishment of similar systems throughout the region.²⁹

The 1960 quota system became a legal requirement in 1976.³⁰ Employers not complying with the quota would have to draw up a plan for such employment and would be "urged" to follow it or face stiff fines. Such plans might require employers to adapt existing facilities, build new facilities, or provide extra supervision and training. The costs that this might entail were to

²⁷ See *supra* note 22.

²⁸ See Terence Ison, *Employment Quotas for Disabled People: The Japanese Experience*, 26 *KOBE U.L.J.* 1, 4 (1993).

²⁹ Interview by Katharina Heyer with Nobuo Matsui, Senior Researcher at the National Institute of Vocational Rehabilitation, Tokyo, Japan (Oct. 1998). The Institute is playing a leading role in facilitating vocational rehabilitation networks throughout Asia, most prominently South Korea.

³⁰ See MATSUI, *supra* note 20, at 369.

be covered by grants, which, in turn, were to be provided by the monthly levies collected from employers who did not comply with the employment quota.³¹

Today the employment quota lies at 1.8% for private enterprises and 2.1% for public enterprises.³² Companies who fall short of the employment quota are levied ¥50,000 per employee per month, but for now only companies with 300 or more employees are actually levied. Awards, however, are given to everyone exceeding the quota. Companies with 300 employees or less are awarded ¥17,000 per person per month, and companies with 300 or more are awarded ¥25,000.³³ The actual employment rate for people with disabilities still lies below the legal requirement at 1.47%, which means that half (49.8%) of all enterprises do not reach the quota. Labor Ministry surveys show that, when it comes to quota compliance, only smaller companies show any true effort.³⁴ Very large companies have developed a way to comply with the quota by establishing special “barrier-free” subsidiary companies (*tokurei kogaisha*). These companies hire primarily people with disabilities who then count for the parent company’s employment quota. This de facto re-segregation into separate workplaces falls short of the U.N. integration mandate but is promoted by the Japanese government as the best compromise and preferred means to boost the employment of people with disabilities.³⁵

The educational system is similarly segregated. The vast majority of students with disabilities are educated in special schools (*yougo gakkou*). The mainstreaming of children into regular classes is still the exception, and does not receive any government funding for special needs.³⁶ Parents fought a long and ultimately successful struggle for basic education rights in the 1970s. Only children with visual or hearing disabilities have been subject to compulsory

³¹ See *id.*

³² See NIHON SHOUGAISHA SOKUSHIN KYOUKAI, *supra* note 21, at 8.

³³ See *id.* at 15-16.

³⁴ See *id.* at 8.

³⁵ See Katharina Heyer, *Integration von Behinderten ins Arbeitsleben [Integration of People with Disabilities into the Workplace]*, in JAPANS WIRTSCHAFT IM UMBRUCH [JAPAN’S ECONOMY IN TRANSITION] (Jochen Legewie & Hendrik Meyer-Ohle eds., 1999).

³⁶ See Maike Roeder, *Schulische Erziehung behinderter Kinder und ihre Integration in das japanische Schulsystem. [Education of Children with Disabilities and their Integration into the Japanese School System]* 73 (1997) (unpublished M.A. Thesis, Bonn University) (on file with author).

education, which runs until junior high school, since 1948; special education for children with other physical disabilities, or mental disabilities, did not become compulsory until 1979.³⁷ The very early separation between a disabled and a non-disabled world is now a source of intense criticism by parents of disabled children who might receive a pedagogically sound and disability-appropriate education in special schools but in the process remain segregated from the children of their neighborhoods. They argue that the interaction between disabled and non-disabled students is a basic requirement for future success at a workplace, which relies heavily on interpersonal relations and adherence to social norms.³⁸

IV. IMPLEMENTING THE U.N. DOCTRINE: THE NORMALIZATION PRINCIPLE

What impact did the U.N. mandate for equality and integration have on Japanese disability law and policy? Immediately after the U.N. decade, the Prime Minister's Office became the IYDP headquarters and established a Central Council on Measures for Mentally and Physically Disabled People to formulate an action program to implement the U.N. mandate in the areas of education, health, employment, recreation, housing, welfare, and public awareness.³⁹ This led to the official adoption of the normalization principle in Japanese law and policy.

The normalization principle was first developed and implemented in Sweden during the late 1960s.⁴⁰ It offered the first fundamental critique of the treatment of people with mental retardation and their segregation into hospitals, where they were denied the most fundamental right to privacy, personal possessions, communication with others, and the right to fully express their individuality.⁴¹ Normalization, thus, became an attempt to promote "patterns and

³⁷ See Toshihiko Mogi, *The Disabled in Society*, JAPAN Q. 440, 442 (1992).

³⁸ See generally Tetsuo Okutsu, *Kyouiku naiyou [The Content of Education]*, in SHOUGAISHA NO SEIKATSU TO KENRI WO MAMORU: SHOUGAISHA NO JINKEN - 20 NO KADAI [20 ISSUES IN DISABILITY HUMAN RIGHTS] 64 (Zenkoku Renraku Kyougikai ed., 1997).

³⁹ See HEADQUARTERS FOR PROMOTING THE WELFARE OF DISABLED PERSONS (PRIME MINISTER'S OFFICE), GOVERNMENT ACTION PLAN FOR PERSONS WITH DISABILITIES: A SEVEN-YEAR STRATEGY TO ACHIEVE NORMALIZATION (1995) [hereinafter GOVERNMENT ACTION PLAN].

⁴⁰ See generally Beignt Nirje, *The Normalization Principle and its Human Management Implications*, in CHANGING PATTERS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED (R. Kugel & W. Wolfensberger eds., 1969).

⁴¹ See *id.*

conditions of every day life which are as close as possible to the norms and patterns of the mainstream of society.”⁴² The normalization principle and notions of self-determination and self-advocacy that developed from it have profoundly impacted the course of the mental disability rights movement and the provision of services. Self-advocacy movements found that their strength in the simple but powerful concept that people with disabilities could, and should, have a voice in determining the course of their lives and could be expected to share what could be considered “normal” needs for privacy, intimacy, connection, and fulfillment.⁴³

When Japan chose the normalization principle to reflect its commitment of the U.N. mandate of full integration and equality, it spent considerable time and effort explaining how the term was going to apply to Japanese society. A 1982 Ministry of Health and Welfare report defined normalization as, “the creation of a society in which all people can lead ordinary lives in their communities, regardless of the presence of any disability,” and emphasized the importance of people with disabilities leading “ordinary lives in their homes and communities.”⁴⁴ The purpose of rehabilitation services, it concluded, should therefore go beyond medical technology and provide that “technology that aims for the restoration of rights as a full citizen for those alienated from human living conditions for reasons of disability, and a comprehensive system for social and political measures.”⁴⁵

This report might lead one to believe that Japanese disability policy was ready to accept the shift from medical to social model of disability. This paper argues, however, that the actual commitment to rights and equal opportunity remained on paper only, as has been the case with social policies regarding childcare and elder care.⁴⁶ Yet, the choice of normalization is significant in that it drew attention to the fact that much of Japanese disability law had ignored the very existence of people with mental disabilities, as I shall show below. Adopting the normalization principle, then, meant that Japan had to update the language of its disability law,

⁴² See *id.* at 181.

⁴³ See generally WOLF WOLFENSBERGER, *THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES* (1972).

⁴⁴ MINISTRY OF HEALTH AND WELFARE, *ANNUAL REPORT ON HEALTH AND WELFARE 2* (1992).

⁴⁵ *Id.*

⁴⁶ See generally Patricia Boling, *Family Policy in Japan*, 27 J. SOC. POL’Y, No. 2, 173 (1998).

and broaden the meaning of the term “disability,” which had, until then, been limited to “physical disability” in many laws.

The first evidence that the Japanese government selected to show its commitment to the U.N. doctrine was a 1984 revision of the 1949 Law for the Welfare of Physically Disabled Persons (*Shintai Shougaisha Fukushihou*). The opening section of the revised law explains the reasons for the revisions: to “integrate ‘full participation and equality,’ the guiding principle for the International Year of Disabled Persons, into the Law.”⁴⁷ In this spirit, the term “rehabilitation” was replaced with “independent living and provision of opportunities.”⁴⁸ “Full participation and equality” was to mean that “all physically disabled persons, as constituent members of our society, are entitled to the opportunity of participating in social, economic, cultural, and other aspects of all fields of endeavor.”⁴⁹

The expansion of the term disability became settled in the renaming of the 1970 Physically Disabled People’s Fundamental Law (*Shintai Shougaisha kihonhou*), which had used the term for “physically disabled person” (*shintai shougaisha*) to designate all people with disabilities (*shougaisha*).⁵⁰ In 1993, the law was renamed Disabled Peoples’ Fundamental Law (*Shougaisha Kihonhou*) to reflect the expanded legal definition: “a disabled person is a person whose daily life or life in society is substantially limited over the long term due to a physical disability, mental retardation, or mental disability.”⁵¹

Notions of independence and participation in society, both fundamental aspects of the normalization principal, were also incorporated: “disabled persons shall endeavor to participate actively in social and economic activities by making effective use of the abilities they possess. The family members of disabled persons shall endeavor to promote the independence of disabled persons.”⁵² This last sentence is significant because it recognizes the complicated relationship

⁴⁷ 1949 LAW FOR THE WELFARE OF PHYSICALLY DISABLED PERSONS [SHINTAI SHOUGAISHA FUKUSHIHOU] (amended 1984) art. 1.

⁴⁸ *Id.* art. 2.

⁴⁹ *Id.* art. 2(2).

⁵⁰ *See supra* note 47.

⁵¹ 1993 DISABLED PEOPLES’ FUNDAMENTAL LAW [SHOUGAISHA KIHONHOU] art. 2.

⁵² *Id.* art. 6.

between people with disabilities and their families in matters of independence. Especially women with disabilities are expected to remain living at home with their parents and often struggle with their family's protectiveness.⁵³

A. *Mental Health Law*

If these revisions amounted to mere changes in language, it was the field of mental disability law that demanded true reform. The devastation of WWII had made the need for comprehensive mental health legislation very pressing. There was a desperate need for beds in psychiatric hospitals, and fewer families could now take care of their mentally ill family members, as pre-war legislation had mandated.⁵⁴ Prewar public policy towards mental illness mandated that those whose mental illness was seen as a threat to public safety were confined and isolated from the community, with the family holding the initial responsibility for confinement.⁵⁵ The 1950 Mental Hygiene Law (*Seishin eiseihou*) had a dual objective; it outlined the treatment and protection of mental patients, while also providing for the protection of the society at large. There were many aspects of the law that violated basic human rights principles under the normalization doctrine, the most striking being compulsory hospitalization.⁵⁶ Over 90% of all hospitalizations occurred without the patient's consent under a system (misnamed "consent admission") that allowed either a physician or, in most cases, a family member to order the hospitalization without any possibility of appeal by patients and with little to no possibility of external review.⁵⁷

Stories of human rights abuses in mental hospitals abounded, but it was not until the infamous 1984 Utsunomiya Incident, which brought the situation in Japan to international

⁵³ See, e.g., Yukiko Oka Nakanishi, *Independence from Spoiling Parents: the Struggle of Women with Disabilities in Japan*, in *IMPRINTING OUR IMAGE: AN INTERNATIONAL ANTHOLOGY BY WOMEN WITH DISABILITIES* (Diane Driedger & Gary Swan eds., 1992); KEIKO HIGUCHI, *ENJOY JIRITSU SEIKATSU [ENJOY INDEPENDENT LIVING]* (1998).

⁵⁴ In 1945 the numbers of psychiatric beds had dropped to just over 4,000 from a peak of nearly 24,000 in 1941. See Stephan Salzberg, *Japan's Mental Health Law*, 14 *INT'L J.L. & PSYCHIATRY* 137, 148 (1991).

⁵⁵ See *id.* at 144.

⁵⁶ See *id.* at 148.

⁵⁷ See *id.* at 139.

attention, that policymakers started talking about reform. It was revealed that patients in a mental hospital north of Tokyo had been beaten to death by hospital staff, in full view of other patients, and that the families had been told the death had been caused by epileptic seizures.⁵⁸ Investigations revealed a list of abuses so long and horrific that Japanese human rights organizations, led by DPI Japan, called on the International Commission of Jurists (ICJ) and the United Nations to intervene.⁵⁹ The ICJ conducted on-site investigations and released a highly critical report condemning Japanese mental health system and recommending a complete overhaul of the Mental Hygiene Law.⁶⁰

In this case domestic and international pressure, rather than a commitment to the normalization principle, caused the government to make major changes in the law. The 1988 revision renamed it the Mental Health Law (*Seishin hokenhou*) and instituted stricter treatment standards for patients as well as the introduction, for the first time, of a legal form of voluntary hospital admission.⁶¹ It established psychiatric review boards as a mechanism to monitor the need for continuing hospitalization and treatment of patients involuntarily hospitalized.⁶² For example, it set limits on the use of physical restraints and established patient communication rights.⁶³ Another important aspect of the revision was its emphasis on community-based social rehabilitation, establishing facilities (such as halfway houses and sheltered workshops) to ease re-integration into society. The law, however, still ignored central issues of self-determination now being discussed in the mental disability rights movement and has not prevented further rights abuses in mental hospitals.⁶⁴

⁵⁸ See *id.* at 141.

⁵⁹ See *id.* at 142-143.

⁶⁰ See THOMAS HARDING ET AL., HUMAN RIGHTS AND MENTAL PATIENTS IN JAPAN 81 (1985) (Int'l Commission of Jurists).

⁶¹ See Salzberg, *supra* note 54, at 155.

⁶² See *id.* at 160.

⁶³ See *id.* at 159.

⁶⁴ On October 1, 1997, the Osaka Prefectural Government withdrew the license for Yamatogawa Hospital three years after mental health and human rights activists started their movement to force an official response to the human rights abuses occurring there. See Miyuki Yamamoto, *Seishin Iriyou Jinken Centaa* [Osaka Human Rights Center for the Mentally Ill], Address before the *Zenkaren* Conference (Tokyo, 1998).

B. *Employment Law*

The employment needs of people with mental disabilities also took a long time to find legal recognition. As mentioned earlier in this paper, Japan instituted one of the more sophisticated employment quota systems among developed nations. Its main weakness, however, was its negligence towards people with mental disabilities and their employment needs. The 1960 Physically Disabled Persons Employment Promotion Law (*Shintai shougaisha koyou sokushinhou*) was the first law directly targeting the employment status of people with disabilities through a voluntary quota aimed to ensure employment opportunities in regular workplaces.⁶⁵ People with mental disabilities were not included in the quota until 1988 when the law was renamed Law for the Employment Promotion, etc. of the Disabled (*Shougaisha no koyou no sokushinto ni kansuru houritsu*). This marked the official recognition of people with mental disabilities as members of the labor force.

Despite their inclusion in the quota system, which was designed to integrate people with disabilities into regular companies, the Japanese workplace remains even more segregated for people with mental disabilities than it already is for people with physical disabilities. For both groups, however, sheltered workshops remain the primary source of employment. The first workshops were started by parents' groups in the 1950s, focusing primarily on people with mental disabilities whose employment needs were ignored by the law, but by the late 1960s, they had spread as an organized, nationwide campaign.⁶⁶ The vast majority of sheltered workshops today are private community workshops, which exist as extralegal facilities outside of the sheltered workshops run by the Ministry of Health and Welfare, and the government has come to rely on this private network to provide these essential services. For example, the 1988 Mental Health Law's emphasis on social rehabilitation has resulted in the establishment of only 48 sheltered workshops for people with mental disabilities, and only two of these are residential.⁶⁷

⁶⁵ See MATSUI, *supra* note 20, at 368.

⁶⁶ See Katsunori Fujii, *Present Situation of Securing Work or Occupation for Disabled Persons in Japan*, 22 JAPANESE J. STUD. ON DISABILITY & HANDICAP 140, 146 (1994).

⁶⁷ See Fujii, *supra* note 66, at 147.

It is estimated that between 30% and 40% of all psychiatric inpatients could be released from hospitals if the appropriate transitional facilities were available in communities.⁶⁸

The U.N. Asia Pacific decade saw further attempts at promoting social rehabilitation and welfare infrastructures in local communities as mandated by the Mental Health Law. The 1995 *Government Action Plan for Persons With Disabilities: A Seven-Year Strategy to Achieve Normalization* set up concrete numerical goals regarding what should be implemented by 2002.⁶⁹ It defined the goal of normalization as “enabl[ing] people with disabilities to lead regular lives in their communities as members of society,”⁷⁰ which is in line with the U.N. mandate. Concrete goals included a plan to quadruple the current capacity of group homes, specifically group homes for people with severe mental disabilities.⁷¹ These would be accompanied by an increase in the number of home helpers and day care programs for children and adults living at home, as well as the establishment of more sheltered workshops and vocational rehabilitation facilities in the communities.⁷² Finally, the Transportation Ministry was to “provide guidance” by installing elevators in existing train stations that serve 5,000 or more passengers a day.⁷³ These were ambitious promises that responded to the obvious need for the extensive social expenditure necessary to implement the normalization principle. The actual implementation of these plans throughout years of economic recession, however, remains to be seen.

V. THE JAPANESE DISABILITY MOVEMENT: INDEPENDENT LIVING, ACCESS, AND EQUAL RIGHTS

The U.N. equality and integration mandate has also impacted the Japanese disability movement, although in different ways that it influenced Japanese disability law. It gave birth to a new generation of disability organizations that is moving away from a welfare-based model

⁶⁸ See *id.* at 146.

⁶⁹ See GOVERNMENT ACTION PLAN, *supra* note 39.

⁷⁰ *Id.*

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

and frames itself in the context of rights, equal access, and disability pride. The first generation disability organizations had successfully organized themselves around the assertion of “special needs,” which resulted in welfare policies based on well developed but still segregated facilities.⁷⁴ Organizations such as the Japan Federation of the Deaf (*Nihon Roua Renmei*), the Japan Federation of the Blind (*Nihon Moujinkai Rengou*), the National Federation of Families with Mentally Ill People (*Zenkoku Seishin Shougaiisha Kazoku Kai Rengokai; Zenkaren*), and the Japan Federation of Disabled Peoples Association (*Nihon Shintai Shougaiisha Dantai Rengokai; Nisshinren*), all founded during the immediate postwar period, focused their activities on gaining services and protective legislation by lobbying the appropriate Ministries.⁷⁵

The new generation of disability organizations now finds itself working towards a rights-based model that demands full participation, self-determination, and integration into all levels of society. The most prominent representative of this new generation is the growing network of Centers for Independent Living (CIL), first established in 1986 and modeled after the CIL in Berkeley, California, which was both the origin and center of the American disability rights movement in the late 1960s. There are now fifty CILs nationwide, which united in 1991 under the Japan Council on Independent Living Centers (JIL) (*Zenkoku Jiritsu Seikatsu Centaa Kyoukai*).⁷⁶

The notion of independent living lies at the heart of the normalization principle. It represents the shift from the medical model, which places decisions about care and welfare provisions in the hands of rehabilitation specialists, to what DeJong has termed the “independent living model,”⁷⁷ which places control back in the hands of the consumer. Rather than spending public funds on nursing homes and institutions, ILC advocates argue that social services should go directly to the consumers, who can then hire, fire, and train the attendants necessary to assist them to live self-determined lives.

⁷⁴ For a history of early disability activism, see SEI NO GIHO [LIFE TECHNIQUES] (Asaka, Junko et al. eds., 1990).

⁷⁵ The differentiation into generations of activists is the author’s finding based on the research into disability activism mainly through interviews.

⁷⁶ See HIGUCHI, *supra* note 53, at 103.

⁷⁷ Gerben DeJong, *Independent Living: from Social Movement to Analytic Paradigm*, 60 ARCHIVES OF PHYSICAL MED. & REHAB. 435 (1979).

Japanese ILCs assist people with disabilities make the transition from institutions or group homes to independent lives in their own apartments. This includes organizing peer counseling services and training sessions for independent living skills, arranging for attendant care, and counseling consumers on how to communicate better with attendants and family members.⁷⁸ This is especially important in promoting notions of self-determination for people with disabilities in Japan, because they have been taught from an early age to accept as well as cherish their dependence on the care they receive from parents and institutions. Self-determination and assertiveness are not always valued positively in Japanese culture, especially if they imply a separation from the family. It is the special task of ILCs to take what might be considered foreign concepts⁷⁹ and integrate them into a Japanese setting. Self-determination, then, does not have to mean living apart from your family or selfishly asserting your will without regard for others. It does, however, place the consumer at the center of analysis and starts a process of determining life choices based on an awareness of rights and equal opportunities.⁸⁰

Equal opportunities and equal rights as citizens require access to public buildings and public transportation systems, which is another civil rights issue addressed by the new generation of Japanese disability activists. The Japan branch of Disabled Peoples International (Japan DPI) has organized yearly protests in large train stations all over the country to point to the inaccessibility in the nation's public transportation systems.⁸¹ The Transportation Ministry has launched a "barrier-free campaign," as part of its 1995 Normalization Plan, which aims to install escalators or elevators in 1,900 train stations for both elderly and disabled users. It has also promised improved access to public buildings with the 1994 Law for Buildings Accessible to and Usable by the Elderly and Physically Disabled Persons, which is popularly referred to as the "Heart Building Law" (*Haato biruhou*). This law is the official response to the U.N. mandate for social integration and barrier-free access. The law encourages, but does not force, owners of "specialized buildings," such as hospitals and theatres, to modify entrance designs.⁸² There are

⁷⁸ See JUNKO ASAKA, INDEPENDENT LIVING SKILL TRAINING MANUAL 49-53 (1993).

⁷⁹ In particular, self-determination and self-reliance.

⁸⁰ See generally HIGUCHI, *supra* note 53.

⁸¹ See generally YOSHIHIKO KAWAUCHI, BARRIA FURU NIPPON [BARRIER-FULL JAPAN] (1996).

⁸² See *id.* at 183-185.

no penalties for those who ignore it, and compliance is only encouraged through administrative guidance (*gyousei shidou*).⁸³

The new generation disability organizations are increasingly using the language of rights in framing their demands. They look towards the United States as an example of defiant disability pride and rights consciousness. There is an overwhelming sense that Japan lags many decades behind the U.S. and Western Europe in terms of disability law and activism. The only way to catch up, activists argue, is by moving into new and foreign territory: the language of civil rights and anti-discrimination.

This new path towards rights and representation is leading to demands by a network of academics and activists that have formed a Disability Policy Research Group (*Shougaiisha Seisaku Kenkyukai*, “SSK”) to include anti-discrimination legislation in existing disability laws during the next revision of disability laws scheduled for the year 2000. There are also calls to propose an entirely new law: a “JDA,” Japanese with Disabilities Act, closely modeled after the American example, which would forbid any kind of discrimination on the basis of disability. Only such a law would truly fulfill the government’s promise to incorporate the normalization principle and move towards equal rights.⁸⁴ The construction, scope, and implications of such a law will be the subject of further analysis. Its mere existence, however, points to a new direction for the Japanese disability movement.

Another move towards legal reform is directed towards the abolishing of disqualifying clauses (*kekaku joukou*). These clauses restrict, or even prohibit, people with disabilities from obtaining licenses or certifications, from being engaged in certain professions, and from using certain facilities and receiving services.⁸⁵ For example, when a ministry issues a particular license or certification, the applicant is required to submit to a medical exam certifying that the

⁸³ See *id.*

⁸⁴ For a discussion of the need for disability rights and anti-discrimination legislation, see Houkou Sekigawa, *ADA, soshite JDA e [From the ADA to the JDA]*, 9 JB – JOYFUL BEGIN 97 (1998).

⁸⁵ The “Citizens’ Committee on Abolishing Disqualifying Clauses” counts 274 clauses contrasts the mere 79 clauses acknowledged by the government. For a full list of restrictions, see the online database *Shougaiisha wo Shokugyou nado kara jogai suru kekaku joukou wo motsu houritsu no deitashuu*. [database of restrictive clauses eliminating people with disabilities from occupations] (visited Jan. 17, 2000) <<http://www.humind.or.jp/welfare/disablep/restrict/index.html>>.

applicant's condition does not contradict *kekaku joukou* limitations.⁸⁶ If the doctor performing the routine exam writes that the applicant's disability falls under the restrictive clause, the government will not issue the license and the applicant has no recourse.⁸⁷ Applicants who prove their intellectual or physical capabilities by passing the licensing exam will still be denied certification if their medical exam gives evidence of certain disabilities.⁸⁸ People with certain disabilities are prohibited from, serving on juries, riding public transportation unaccompanied, boarding commercial ships, living in public housing, owning a horse, or becoming a politician, among others.⁸⁹ Similarly, people who are deaf cannot obtain driver's licenses, and those with psychiatric disabilities do not fall under the minimum wage law and are barred from receiving licensing in all medical fields (*Shougaisha deitashuu*).⁹⁰

Foreign pressure, again, is seen as the tool for reform. Activists are collecting examples from other countries regarding the presence or absence of such restrictive clauses, which they see as human rights violations and barriers to employment. They argue that qualification for licenses or certifications should be based on a person's ability to perform the tasks rather than on assumptions regarding limitations imposed by their physical or mental disability. The foreign examples are meant to lobby (and shame) the government into completely abolishing *kekaku joukou*, rather than just revising them, by exposing their official justification as backward and discriminatory.

VI. CONCLUSION: RIGHTS CONSCIOUSNESS AND SOCIAL MOVEMENTS

This paper has attempted to show that despite international mandates for equality and inclusion, Japanese disability policy and legislation remain deeply rooted in the medical model in their recognition of special needs through sophisticated welfare and rehabilitation institutions that separate people with disabilities from the rest of society. The new generation disability

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

movement, in contrast, seeks to politicize the Japanese disability movement by increasing the role of rights and rights consciousness, making rights the main tool towards leading self-determined lives.

Rights and equality have been the focal point of the international disability movement for the last two decades. Japan has been slow to reflect this spirit in legislation and in policy. The rights orientation of the Japanese disability movement, however, provides an interesting example of the workings of international norms on Japanese law. How can an American example become a model for Japanese disability politics? The American disability rights movement very clearly and self-consciously builds on a rights tradition developed by its own civil rights movement and, to a lesser degree, the women's rights movement, and has in that process created notions of equality that might not apply to the Japanese situation. The ADA's interpretation of equality is one that emphasizes sameness and non-discrimination: i.e. mandating that people with disabilities must be treated like other citizens with "reasonable accommodation" of their differences. The emphasis is on the removal of barriers that prevent equality of opportunities.

Lacking a similar civil rights tradition, Japanese legislation has emphasized different needs over equal rights, and in the area of employment opportunity, it has moved towards an 'equality of results' approach through the use of the disability quota. The actual impact of the quota system has been limited by businesses establishing separate companies to accommodate disabled workers. In general, however, the right to be different is well protected and supported in Japan. Especially in the areas of education and employment policy, the emphasis on difference and special needs has resulted in well equipped but nonetheless separate facilities. Disability groups have traditionally adopted their demands accordingly and have focused their energies on improving the quality and quantity of services rather than demanding full integration.

The challenge facing the Japanese disability movement is this: how can rights become instruments for personal empowerment and community building? How can rights-based principles be translated into difference-based social policy and legislation so that they are both culturally appropriate and politically useful? If the Japanese disability movement can successfully integrate rights language, what implications will this have for the role of the law in Japanese identity-based social movements?

Questions surrounding the role of law and rights in Japanese society have received a great deal of attention in the literature, sparked by the assertion that Japanese civic culture eschews

notions of equality and rights consciousness as Western constructs alien to Japanese values of harmony and social hierarchy.⁹¹ The evidence of such cultural disinclination to using law as a tool for social change has been challenged by studies of tort law,⁹² as well as by a growing number of studies of social movements.⁹³ Particularly the examples of the hemophiliac community's protest against the AIDS Prevention Law and the tainted blood scandal,⁹⁴ as well as the anti-pollution movement, show a shift towards rights consciousness and an increasing use of the law as an instrument for social change. Groups are framing claims using rights language and directly criticizing the bureaucratic elite in order to become part of the policymaking process. Rights might not hold the organizing force they do in American political life and social movements, but they are becoming increasingly significant in Japan. For the Japanese disability movement, rights hold the promise of a society that remains inclusive of disability difference while guaranteeing equal rights and opportunities.

⁹¹ See, e.g., Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41 (Arthur von Mehren ed., 1963).

⁹² See, e.g., DANIEL FOOTE, *Resolution of Traffic Accidents Disputes and Judicial Activism*, 25 *L. IN JAPAN* 19 (1995); John Haley, *The Myth of the Reluctant Litigant*, 4 *J. JAPANESE STUD.* 359 (1978).

⁹³ See generally UPHAM, *supra* note 17.

⁹⁴ See generally Eric Feldman, *HIV and Blood in Japan: Private Conflict into Public Scandal*, in *BLOOD FEUDS: AIDS, BLOOD AND THE POLITICS OF MEDICAL DISASTER* 60 (Eric Feldman and Ronald Bayer eds., 1999).