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RESEARCH ARTICLE

Prisoners' rights implementation in Japan: breaking the shackles with suspects

Silvia Croydon

Graduate School of Human Sciences, Osaka University: Osaka Daigaku, Suita, Osaka 565-0871, Japan
Corresponding author. E-mail: croydon@hus-osaka-u.ac.jp

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Abstract

Several decades have passed since the first call was made toward political scientists, among other social scientists, to devote attention to human rights and enrich, through empirical investigations, our understanding of how human rights implementation works. Today, the political science discipline is finally beginning to respond to this appeal, with an increasing number of scholars making it their goal to isolate variables that obstruct or facilitate human rights implementation. The current paper joins this burgeoning body of literature by offering a within-case analysis of Japanese prison policy-making. In particular, I compare the 2005 bill updating the Prison Law (*Kangoku hō*) that had been in force in Japan since the Meiji era with an earlier draft version of that bill which appeared in parliament on three occasions since the early 1980s. On the basis of the convergence of these bills in terms of seeking to align Japan with the evolved new global standards for convicted prisoners' treatment, I argue that a three-decade delay occurred in the implementation of prisoners' rights in Japan. To account then for this delay, I point to a provision pertaining to the criminal procedure (i.e., pre-conviction) which was incorporated in the law in question in 1908 merely for pragmatic reasons, and with regard to which the modern-time stakeholders of the bar and the police could not find agreement. Ultimately, the message that this case deals to the political science of human rights is that institutional–infrastructural factors, such as ties of legal nature, matter to human rights implementation.

Key words: Convicted prisoners; human rights implementation; institutions; Japan; political science

1. Introduction

At the turn of the century, the political philosopher Michael Freeman issued a plea toward political scientists, among other social scientists, to stop shunning human rights and use their skills and knowledge to unravel the factors impacting the latter's implementation (Freeman, 2001, 2002, 2006). 'The human sciences', Freeman wrote, 'should have more to contribute to our understanding of the condition of those human beings whose rights pervade the world's political discourse' (Freeman, 2006: 53). Social scientists, he contended, needed to break free from the misconception, which they had held under the influence of scientific positivism, that the normative connotations of this concept render it an unsuitable subject to study. The fear that these connotations would tarnish their findings, making them 'subjective' and 'unscientific', was, for him, unfounded.

Freeman's such identification of a gap in the scholarship on human rights was not the first of its kind. Indeed, in 1976 an edited volume had already been published (based on a symposium composed of eight political scientists, six legal scholars, a psychologist, and a sociologist) whose thesis was that the majority of work on human rights had theretofore been by legal scholars and that there is a need for more input on this topic from social scientists (Claude, 1976). Furthermore, in 1995, the social theorist David Beetham discussed the marginal position occupied by human rights in political science,

addressing also the sources of skepticism about human rights on the part of political scientists (Beetham, 1995). What Freeman's publications in the 2000s then did was to note that not much social science research had taken place in the intervening years and that the study of human rights is still predominately legalistic. Although the spell of scientific positivism kept social scientists at arms-length from the concept of human rights, lawyers, the philosopher wrote, proactively engaged with it. In a climate of human rights discourse growing more influential (which was itself a result of the attention brought on the abuses of World War II (WWII)), law specialists embarked on a project to craft an intricate network of legal instruments, rules, and procedures pertaining to human rights, engaging also in the production, interpretation, and bureaucratization of such legal norms. As Freeman laments, however, this is no substitute for analysis of the political and social conditions and processes that obstruct or facilitate the implementation of human rights norms. To cite that author, '[l]awyers make *judgements* as to whether human rights have been respected or violated', whereas '[s]ocial scientists seek to *explain* why human rights have been respected or violated' (Freeman, 2002: 91). 'Judgmental disciplines', he continues, 'sometimes make assumptions about the measures that will improve respect for human rights. Social scientists test causal hypotheses empirically, and can thereby contribute to effective policy-making' (*Ibid.*).

Today, nearly two decades since Freeman's appeal, the impulse within political science to study human rights has strengthened, with the body of work trying to isolate variables obstructing or facilitating human rights implementation finally beginning to burgeon. As one scholar from this discipline, Todd Landman, recently observed, 'political science has overcome its historical ambivalence about human rights and has been actively developing a significant sub-discipline of research on human rights that has produced studies at all levels of analysis and across all types of theoretical approaches' (Landman 2008: 7; see also Landman, 2005, 2016).

Within this expansion of literature, one of the more often-met endeavors is the study of single-country cases. With regard to the promise and utility of these types of studies, Landman again writes that:

> … [b]y definition, they focus on countries with particularly problematic human rights records and include official reports from international governmental and non-governmental organizations, domestic commissions and NGOs, journalistic and descriptive accounts, and research monographs. Beyond their pure descriptive function, however, single-country studies can make significant and valuable contributions to the study of human rights, including the establishment of new classifications, the generation of hypotheses, and their use as 'crucial cases' for testing hypotheses. Thus they can serve larger comparative purposes if they lead to new classifications of social phenomena, generate new hypotheses about important empirical relationships, and provide critical tests of extant theories. Human rights abuses take place across a huge range of different social, economic, and political contexts, and single-country studies provide the richness of contextual description and the analysis of new institutional, cultural, and behaviour phenomena. Like the few-country comparisons, single-country studies have used different combinations of qualitative and quantitative data on human rights to provide the base of evidence for advancing larger political science arguments. (Landman, 2008: 7)

But although there is indeed a great potential for single-country works to advance the political science of human rights, in reality many of them fall short of clarifying what specific hypotheses they generate or refute with regard to human rights implementation. More often than not, these studies remain descriptive in character, with the messages they carry for human rights implementation more generally remaining implicit.

With a view to enriching the empirical political science scholarship on human rights, the current paper puts the spotlight on the case of prisoners' rights implementation delay in Japan. Specifically, I use within-case analysis of Japanese prison policy-making and, employing process-tracing as research methodology, I seek to demonstrate the spill-over effect that one human rights issue could have on another, through the domestic institutional (read legal) infrastructure. To foreshadow my findings,

despite a broad-based consensus being in place in Japan regarding the need to revise the so-called Prison Law so as to align the treatment of convicted prisoners with the evolving international standards, attempts to this effect could not transpire for over three decades due to the containment in the same law of a controversial clause on criminal suspects' treatment. That it is precisely the issue of suspects' treatment that had held prisoners' rights update hostage is demonstrated in this paper through the illustration of how, as soon as a scandal compelled the stakeholders in the suspect case to stand aside, the long-awaited revision of the articles on convicted prisoners easily enfolded.

In what follows, I first elaborate on the political nature of human rights. This section touches again on the comments mentioned above by Freeman and presents a context for the following review of the major political science works in this area. Having provided a discussion of the limitations of this existing literature, I move on to relate the details of my specific case study. To draw an inference as to the cause of the delay of prisoners' rights implementation, I use process-tracing and within-case analysis. Relying on primary resources, such as parliamentary minutes, interviews, governmental, and UN official documents, and non-governmental organizations' (NGOs) newsletters, I reconstruct the developments, or rather the lack thereof, in prisoners' rights implementation in the three decades preceding the turn of the millennium. In the course of this endeavor, the following questions will be kept in mind:

- Is there enough evidence in the Japanese prisoners' rights implementation case to suggest, in conformity with the theoretical model that could be considered, as detailed below, the strongest contender for explaining a country's human rights divergence from the international standard, that although landmark changes were not made for a long time, a drip–drip effect would have eventually brought greater harmonization with the United Nations (UN) regime? Or could we have expected that the state of the rights of prisoners in Japan in the 1970s, 1980s, and 1990s would remain not markedly different from those of the 2000s?
- If the latter is the case, how can we understand Japan's divergence from the UN human rights regime? What is it about the format of the decision-making process itself that determines the outcome? Which entities are in practice responsible for prisoners' rights implementation in Japan, and what impinging factors are their choices constrained by? Would it not be reasonable to expect similarly divergent policies in any other state whose political institutions suitably resemble those of Japan?

Answering these questions will allow us, I argue, to better understand how to devise more effective means for human rights' enforcement.

2. Human rights and politics

Human rights are inextricably linked with politics. Although we are accustomed to hearing human rights being discussed in terms of demands involving appeals for effective legal protection or redress, as Freeman explains, 'law is not the origin of rights, but, rather, politics is the origin of law, and consequently of rights' (Freeman, 2006: 53). It was, for example, as the by-product of a political tussle that the legalistic Universal Declaration of Human Rights (UDHR) was born, only being adopted after a process of 'contestation, compromise and voting, and many votes – including that on the final text – were not unanimous' (*Ibid.*).

In the implementation of human rights as well, although the value of legal strategies is not in doubt, their deficiencies cannot be fully understood if the political aspects are neglected. Even the most ardent advocates of legal approaches concede that law is only suited to dealing with symptoms, rather than identifying causes, of human rights violations (Donnelly, 2006). Legal mechanisms, for example, might give *ex post facto* recourse to prisoners that have been abused, but do not solve underlying problems in a prison system that might lead to such incidents occurring in the first place. Moreover, since it is states that are responsible for the human rights of their citizens, sometimes vast gaps between the

human rights laws and practices can stem from their economic and political failures (Forsythe, 1989, 2000; Donnelly, 1999; Woodiwiss, 2005, 2006). Freeman aptly illustrates this point by juxtaposing the Haitian Constitution of 1987, which cites the UDHR, with its grim human rights record (Freeman, 2006). Understanding these kinds of discrepancies between human rights ideals and the reality of human rights violations, and the variation in respect for human rights in different times and places, can only be achieved by examining such factors as 'development, stability, participation, bureaucracy, interest groups, power relationships, judicial behavior, popular movements, militarism, public opinion and ideology' (*Ibid.*: 52).

As highlighted above, this area of inquiry – that is aimed at accounting for the variation in human rights practices of states in terms of their domestic political situations – has largely been neglected, with only very few scholars venturing to do so. An example of an early such work is Claude's historical-comparative analysis of the industrial revolutions in Great Britain, France, and USA, which found a supportive economy and state competence to facilitate rights institutionalization and implementation (Claude, 1976). (Claude's such work on the particular relationship between economic development, human rights, and democracy has since been somewhat developed further by a few other scholars (see Donnelly, 2003: Chapter 11).) In another, more recent, bid to single out causal variables that impact human rights implementation, Foweraker and Landmann concluded, using quantitative techniques to compare four modernizing authoritarian regimes, that although social movements face sometimes dangerous opposition, they can obtain improvements in legal rights and have a positive impact on these being put into practice (Foweraker and Landmann, 1997). Finally, a third branch of work in this area that formed since around the turn of the century and that could be clearly identified is that focusing on how governments use rights as a diplomatic tool. There are multiple contributions in this respect (Keck and Sikkink, 1998; Risse *et al.*, 1999; Mertus, 2004; Brysk, 2009). However, perhaps the broadest study of domestic human rights implementation from this international relations' point of view is that of Keck and Risse and their colleagues (Keck and Sikkink, 1998; Risse *et al.*, 1999). Embedding their study into an international framework, this group of scholars discuss the contribution NGOs' networking activities could have for the promotion and protection of human rights. In what Risse *et al.*, in particular, describe as the 'spiral model', whose wide applicability they demonstrate by checking it against a large collection of diverse case studies (including Kenya, Uganda, Morocco, Chile, Guatemala, Indonesia, the Philippines, South Africa, and several Eastern European states), an initially oppressive government passes through the phases of:

(1) 'repression', whereby weakness of domestic opposition means that very limited information about human rights abuses of the regime leaks to international actors, leaving abuses to continue unabated;
(2) 'denial', whereby, in reaction to burgeoning pressure from above after these abuses are made part of the international agenda by international and indigenous human rights activists, the target state refuses to accept the idea of human rights as a question of concern to the international community, arguing that non-intervention is the supreme principle guiding interstate relations;
(3) 'tactical concessions', whereby the government, now pilloried by an emboldened domestic civil society as well as intergovernmental organizations and foreign powers, makes some minor policy changes purely for strategic reasons, and for the first time enters into conversation with its critics about whether the alleged human rights violations have really taken place, thereby becoming itself party to the discourse of 'human rights standards' and thus limiting its future policy choices to it;
(4) 'prescriptive status', whereby via regular reference to the principled human rights ideas by both the activists and the target government itself, a transformation of the government's normative understandings takes place, with it beginning to believe in what it says, and, although human rights violations continue, steps such as treaty ratification, constitutional and legal reform, and even improvements in practices are taken;

(5) 'rule-consistent behavior', whereby the sustained internal and external pressure finally pushes the state to engage in habitual compliance with the norms.

To summarize the contribution of Risse's group, even when the channels for obtaining concessions from the state are closed to domestic rights advocates, the enhancement of human rights in that particular country might not be a lost cause, as these actors can indirectly influence the behavior of their state by aligning themselves with international forces.

With regard to this last branch of work, the success of the spiral model notwithstanding, it is not without its deficiencies. Risse *et al.* themselves acknowledge the variation across their case studies and hint that in some instances a final plateau might be reached, from which it is difficult to make further advances in the institutionalization and implementation of human rights. Two points that are identified as critical are phase 3, when a possible reversal to oppression might occur, and the final transition of the spiral model – from phase 4 to 5 – when a state that has accepted international norms fails to implement them and instead 'endemic and low-level human rights abuses [continue]' (Risse *et al.*, 1999: 35). Although Risse *et al.* have attempted to account for this with their suggestions of 'blocking factors' (in particular, 'forces threatening the territorial integrity or internal cohesion of the state') and '[lack of] societal 'openness' to external processes of argumentation and persuasion' as obstacles to the further permeation of human rights as the spiral model would predict (Risse *et al.*, 1999: 258–267), these terms are vaguely defined and yield more questions than answers.

More broadly-speaking, the efforts of political scientists outlined above in identifying economic development, competent state, civil movement, and NGOs' activities as relevant factors in determining human rights practices are not insignificant. Much, however, remains to be done to further understand the political reality that shapes states' human rights policies. To be truly predictive, models seeking to explain how human rights are implemented need to account for sometimes complex domestic decision-making processes. It is toward the goal of enriching the understanding of these processes that this paper draws attention next to the case of prisoners' rights in Japan. The following sections provide an illustration of how the domestic institutional landscape and political dynamics can impact rights' implementation and why finer lens than the ones of the existing norm diffusion literature need to be adopted when trying to account for human rights.

3. The puzzle of Japan's prison law revision delay

In May 2005 Japan's Prison Law (*Kangoku hō*) was revised for the first time after nearly a century since promulgation, bringing the Japanese regime for treatment of convicted prisoners more in convergence with the contemporary international standards. Although an agreement had existed among stakeholders for several decades that such a revision is needed, all legislative attempts prior to this had fallen flat. On three occasions a bill had reached parliament, in 1982, 1987, and 1991, only to be shelved each time without deliberation. Clearly, there were forces that inhibited coordinated plans for enactment.

Despite its growth as a major economic and minor military player, for a long time after WWII Japan did not seek to assume a position of influence within the UN commensurate with its economic power. This lack of zeal for engaging more fully with the emerging international human rights regime was clearly illustrated by Japan's late accession to the UN Commission on Human Rights (UNCHR), 26 years after being admitted to the UN, as well as its repeated forgoing of the opportunity to be represented on it even after joining (Ogata, 1987). Moreover, seeing human rights as an essentially domestic matter, the Japanese government had been one of the most outspoken opponents of the adoption of new UN instruments, reluctant to become party to them and, even for the few treaties that it had endorsed, produced reports that were generally of an exceptionally poor quality (Peek, 1992; Neary, 2002). With respect to prisoners in particular, Tokyo did not ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which contains specific provisions for persons kept in captivity, until 1999. Neither did it move to ratify the Optional

Protocol to CAT, which is concerned with securing transparency of how detainees are treated by making states agree to inspections of all such places by the UN, when it was adopted and opened for countries' signatures in 2002.

Nevertheless, as Japan joined the ranks of the developed countries in the 1970s, a sense began to emerge within its circle of jurists and Ministry of Justice (MoJ) officials that reforms are necessary to the criminal justice system so that it is reflective of the country's new status. Within the relevant statutes, the 1908 Prison Law appeared to be in high priority for revision within both the Correctional Bureau (CB) at the MoJ and the Japan Federation of Bar Associations (JFBA) and other human rights activists. The sense of urgency to revise this law stemmed from three main factors.

First, unlike much of the other criminal justice legislation, this law had not been touched during the Allied Occupation led by General McArthur in the 1940s and 1950s, and since the global standards had significantly moved on in the meantime, with instruments such as the Standard Minimum Rules for the Treatment of Prisoners[1] having been adopted by the UN at the First Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and then approved, and re-approved with an expanded scope, by the Economic and Social Council of the in 1957 and 1977 respectively, the need to achieve revision seemed particularly urgent.[2]

Second, the law had become something of an embarrassment even domestically by virtue of its outdated language. For one, the very title of this law contained the word *kangoku*, which equates in English to the medieval 'gaol', and which, as one spokesperson in parliament commented, conjures up ghastly images of medieval holes to the Japanese mind.[3] In order to avoid giving the impression that the treatment of prisoners in Japan has remained at the level of the cruel retributive practices of the past (as opposed to the more novel philosophy of rehabilitation), it seemed desirable for this word to be replaced with the more modern expression *keiji shisetsu* ('penal facilities').

Third, and relatedly, the law itself was written in the *katakana* alphabet, which the modern Japanese person was not accustomed to reading. This created a violation of the so-called *nullem crimen* principle – the idea that punishment should not be meted out where crime has not been defined by law in a way that is comprehendible to the average person on the street.

Common awareness of the outdated nature of the Prison Law led the CB staff and the bar – arguably the two main stakeholders in the issue – to seek agreement with one another as to the way in which to forge ahead with revision. With the CB having established in 1976 a deliberative committee that incorporated lawyers (whose political allies in parliament were the opposition), the details of an agreed-upon draft-bill, the Penal Facilities Bill (*Keiji Shisetsu Hōan*), emerged that would be submitted for the first time in 1982 by the ruling Liberal Democratic Party (LDP).[4] To give concrete examples of some of the changes proposed for convicted prisoner treatment in this draft-bill: (1) the right to meet visitors was to be expanded so that it was no longer only relatives who could be seen by the inmate; (2) it would be accepted that an opportunity needs to be given every weekday to inmates to exercise outdoors; (3) the inmate's right would be recognized to receive medical treatment that is of the same standard as that of hospitals in the society at large; (4) except for those who have re-offended, the right to send letters and to conduct phone conversations would be affirmed; and (5) the right to

[1]This is also known as the 'Nelson Mandela Rules' or the 'Magna Carta of prisoners'. The text of these Rules can be accessed at: https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf. Retrieved on 10 August 2020.

[2]One noteworthy aspect of the law which contrasted greatly with the new trend internationally for treating prisoners was the way their living conditions and benefits were determined. In particular, the behavior of prisoners in Japan was not regularly assessed so as to determine whether change should be made to the privileges they are allowed to enjoy. Indeed, although this had become the practice in many developed nations, in Japan the treatment of prisoners continued to be determined in accordance with their length of service in prison (Kaido 2006: 2–4). The implication of the regulations remaining on this standard was that there were no incentives for inmates to improve their behavior.

[3]Shinkichi Ukeda, Diet Committee, House of Representatives, 29 July 1976.

[4]This was based on a Proposal to Serve as a Framework for Amending the Prison Law (*Kangoku Hō Kaisei no Kosshi to Naru Yōkō*), Judicial Council, November 1980.

send confidential complaints in cases of maltreatment would be expanded, with the highest authority to which a direct appeal could be made being the Justice Minister.

It is worth noting with regard to this draft bill that there had been an input in it by domestic civil society groups that existed or were beginning to form around this time in Japan. In particular, they liaised with international NGOs and the UN to seek improvements in the domestic prison conditions. Early such groups included the Forum 90, which, primarily aimed at eliminating the death penalty,[5] the Japan Civil Liberties Union (*Jiyū Jinken Kyōkai*), which had a broad human rights campaign agenda and on prisoners' rights front were pushing for, among other things, Human Rights Watch to visit Japanese prisons for inspection (which it eventually did (HRW, 1995)), the Centre for Prisoners' Rights (*Kangoku Jinken Sentā*, CPR), which was formed by two lawyers – Kaido Yūichi and Kikuta Kōichi – who were particularly active in disseminating statistics and individual case information about abuse within the Japanese prison estate.[6]

As for the JFBA, to ensure they also partake in the law's revision, they had submitted, in September 1975, a Proposal for a Criminal Detention Bill (*Nichibenren keiji kōkin hō yōkō teian*) to the incumbent Justice Minister. The Association intended this Proposal as an indication of how it would like the Prison Law to be revised. MOJ had twice before this point produced amendment draft bills, once in 1968 and once in 1972, although neither of these ever reached the Diet. So as to make sure that MoJ's does not draft their bill and to communicate to them their demands, they made this publicity statement, requesting that the law is called the Correctional Administration Law (*Gyōkei hō*) (after the nature of the treatment rather than the types of detention facilities), that it clarifies the rights and legal status of prisoners, and that it provides for the installation of a mechanism for filing complaints to a quasi-governmental organ.

This publicity statement had not gone unnoticed and, in order to appease the JFBA, the incumbent Justice Minister Osamu Inaba had set up a sub-committee at MoJ's Judicial Council (*Hōsei shingikai*),[7] in March 1976, a panel to consider the issue of Prison Law reform. With an outspoken criminal justice commentator being appointed as the panel's Chair (Professor Ryūichi Hirano of the University of Tokyo), and other members consisting of members of the JFBA with rich experience of working within the prison system, the deliberations had been conducted under the three banners of 'modernization', 'internationalization', and 'legalization' (*kindaika*, *kokusaika*, and *hōritsuka*), with a Proposal of the Prison Law having been produced at the end.

Following this failure in promulgation, the Penal Facilities Bill was submitted twice more – in 1987 and in 1991, although on each occasion the result was the same, that is, the bill was dropped with the dissolution of the parliament. It would not be until 2005, on MoJ's fourth attempt, that promulgation would be finally attained.

Given that the 2005 amendment was the source of improvement in the protection of prisoners' rights, it is important to account for this delay in promulgation. The literature on human rights norm diffusion reviewed earlier does not sit squarely with the fact that the Japanese state organ that is in charge of delivering prisoner treatment, that is the MoJ, was pushing for a more prisoners' rights-friendly legal overhaul. This literature assumes that the state is reluctant to adopt new human rights norms and that the transnational advocacy networks have to push it, kicking and screaming, to come in line with the international framework. The Ministry's persistence in submitting this draft bill to the parliament on so many occasions attests to its desire to bring the law governing the administration of detention facilities more up to date with international standards. There is a clear contradiction between the assumptions of the spiral model and the moves taken by the MoJ in the direction of reform, so clearly a different approach would better suit this case.

[5]Forum 90 website: www.jca.apc.org/stop-shikei/epamph/dpinjapan.html. Retrieved on 10 May 2009.
[6]CPR Newsletter, No. 40, 15 February 2005, pp. 2–3.
[7]This is the so-called Judicial Council Sub-committee on Prison Law (*Hōsei shingikai kangoku hō bukai*).

4. A domestic institutional approach

The forces inhibiting human rights implementation can clearly run deeper than a recalcitrant state or Ministry. For this reason, this author adopts a domestic institutional approach to the question of Japan's prisoners' rights implementation. By identifying a deadlock in discussions between the JFBA and the National Police Agency (NPA) with regard to a clause contained within the Prison Law pertaining to criminal suspects – detainees whose status is different from that of convicted prisoners, I highlight the importance of legal ties/bonds in human rights implementation.

To elaborate with regard to this clause for criminal suspects, its incorporation in the Prison Law in 1908 was for pragmatic reasons. Specifically, this clause, which stated that police detention cells could be used *in lieu* of MoJ detention ones, was meant to be only a temporary measure that would alleviate the shortage of the latter type of infrastructure at a time when a new criminal procedure required suspects to be held close to courts (Croydon, 2016*a*). Once this facility substitution became legal, however, the scene was set for it to take on the unintended character of a matter-of-fact, indefinite practice. This is precisely what happened half a century later, upon the Allied Forces' departure. Returning suspects to police station cells after their presentation to a judge on the third day since arrest, instead of sending them off to detention houses (as dictated by the occupiers' Code of Criminal Procedure), appealed to police authorities as an attractive investigative tool that could compensate for the loss of powers they had experienced during the Occupation – it allowed continuous interrogation of the suspect on the police's own terms. With the law-enforcement officers capitalizing on this loophole, and in the presence of economic incentives for the MoJ to delegate suspect detention, a positive feedback mechanism was triggered toward entrenchment: the more substitution was used, the greater the divergence grew between the police facilities in existence and the detention houses that would be needed to do away with this policy.[8] This divergence ultimately reached a point where stakeholders, including lawyers who had worked toward abolition with partners abroad, began to see the maintenance of the system as a *fait accompli*.

The substitute jurisdiction over remand prisoners given to the NPA in 1908 was a key factor in prisoners' rights policy-making during this period, which was characterized by three failed Prison Law reform attempts. In the debate that took place in the 1980s and 1990s, nearly all aspects of the prison system were overshadowed by the substitute prison system and the issue of how the relevant single clause in the original law ought to be revised. During the time when MoJ was working on turning the Proposal of the Prison Law reform body it had set up, the NPA prepared its own draft bills that would be submitted in conjunction to the MoJ's one, arguing that separate rules ought to be produced for police facilities. Every submission of the MoJ bill in parliament was consequently mirrored by a submission on the NPA's part that sought, beyond MoJ's provision that 'suspects could be kept in custody in the detention facilities established at the prefectural police, as an alternative to [MOJ] facilities',[9] to install rules for suspects treatment. Although MOJ's bill was not tied to the NPA's, the two were technically seen as a set with the former permitting for the exceptional use of substitute prison and the latter providing regulations that ought to be followed there.[10] It was the furor of the JFBA, which lobbied the opposition, over this perceived change for the worse of the Prison Law (*Kangoku hō kaiaku*) that led to the stagnation of the reform.

The failure of the bar association and the police agency to come to an agreement over whether to preserve or abolish the facility-substitution clause in the Prison Law in the 1980s and the 1990s, when, as described already, the MoJ initiated reform to update this aging legislation, meant that the cause of promoting convicted prisoners' rights was taken hostage by the suspects' issue. These two parties only conceded to revise the part of the Prison Law pertaining to prisons and convicted inmates, with a

[8]This can be inferred from material submitted by MoJ, Judicial Affairs Committee, House of Representatives, 6 December 2005.

[9]Article 166.

[10]Interview with lawyers active in the prisoners' right arena Yūichi Kaido and Maiko Tagusari, 18 July 2007, Tokyo, JFBA Headquarters.

neutral stance taken on the thorny facility-substitution clause, after a major prison scandal in Nagoya put the correctional administration crisis into the public eye (Croydon, 2016*b*), making further procrastination of reform untenable.

More concretely, in the aftermath of the said scandal at Nagoya Prison, which involved prisoners' fatalities caused by guards, the pressure on the government to change the Prison Law soared. To achieve this goal, the MoJ, together with the NPA and the ruling LDP were compelled to split the Prison Law revision process into two stages – first dealing in a constructive manner with the part of the legislation relating to convicted prisoners, and then pushing the thorny remainder on police custody through parliament.

In particular, in March 2003, the Justice Minister, Mayumi Moriyama, convened a Council – the so-called Correctional Administration Reform Council (*Gyōkei Kaikaku Kaigi*) – to deliberate the necessary changes to the Prison Law.[11] The diverse membership of this body (which incorporated former judges, a journalist, a university president, a lawyer, media representatives, and businessmen, gained the approval of prisoners' rights advocates, such as the Center for Prisoners' Rights, United Prisoners, the Anti-Death Penalty Forum 90, the Japan Civil Liberties Union (JCLU), and Amnesty International Japan) earned the approval of many critics (Moriyama, 2004). With the controversial substitute prison system not part of their remit, the Council members could devote all of their time to the job of discussing prisoner treatment. After interviewing both guards and prisoners, as well as studying the prison systems of other countries, the Council issued a proposal for revision in December 2003. Much of the content of this proposal echoed the ideas contained in the earlier two versions of the revision bill, with many among the prisoners' rights advocates giving it a positive appraisal, for '[confirming] that the basic idea of prisoners' treatment is the respect of their humanity'.[12] Toward the objective of achieving a passage of that bill, the police agency reluctantly conceded to withhold from participation until the part of the law relating to prisoners has had a chance to be updated.

In the spring of 2005, the MoJ's bill was ready and its announcement met with the approval of the JFBA. As per the agreement that had been stricken with the NPA, no bill on criminal suspects was submitted in conjunction to the MoJ's bill on prisons and prisoners – a departure from what had happened in the case of the submissions in the 1980s and the 1990s. After less than 2 months in the parliament, and with only small changes, the MoJ's bill was enacted.

With the part of the revision pertaining to prisons having gone smoothly, consultations began between the MoJ, the NPA and the JFBA with regard to amending the provisions on criminal suspects. Unlike the endorsement that the Correctional Administration Reform Council had received for discussing issues relating to sentenced prisoners, the scope, style, and content of the new negotiations, undertaken by the Council Concerning the Treatment of Remand Prisoners (*Miketsu Kōkinsha no Shogū nado ni Kan Suru Yūshikisha Kaigi*),[13] were quickly condemned by the JFBA, among others. Furthermore, when the proposal on suspect treatment changes was released in the spring of 2006, it came as a disappointment to the human rights advocates that the *status quo* would be retained, that is, that the facility-substitution practice would continue. Based on this proposal, a bill to complete the updating of the Prison Law was shortly submitted to the parliament by the NPA. Even though this bill met with substantial objections by the opposition (lobbied by the JFBA and other domestic human rights advocate organizations), insofar as it simply reaffirmed the current state of affairs with regard to suspects, it managed to make it through parliament.

Having documented the protracted Prison Law revision process, it is pertinent to acknowledge that the bill on prisons and prisoner treatment by MoJ that was passed in 2005 contained certain improvements that had not been seen in the three earlier submissions. Most notably, modeled on a similar framework that has existed in the UK for some time, a system of Boards of Visitors for Inspection

[11]For further details on this Council, including the record of their deliberations, see: www.moj.go.jp/shingi1/kanbou_gyokei_kaigi_index.html. Retrieved on 2 August 2020.

[12]Interview with Aya Kuwayama from the Center for Prisoners' Rights.

[13]For details on this Council see: www.moj.go.jp/KYOUSEI/SYOGU/index.html. Retrieved on 2 August 2020.

of Penal Institutions (*Keiji shisetsu shisatsu iinkai*) was adopted for the purpose of safeguarding the transparency of operation and availability of right's redress for prisoners. However, by and large this last bill closely resembled the earlier ones submitted in the 1980s and the 1990s. It is thus legitimate to say that a comparison between what differs in the environment surrounding these legislative attempts serves as a tool to separate a human rights' impacting factor. In other words, the finding that it was the NPA involvement (over the suspects' issue) that was lacking on the fourth occasion when there was an impetus to revise the Prison Law allows us to understand that institutional–infrastructural factors matter to human rights implementation.

To sum up the material presented above, the delay in Japan's Prison Law revision (and thus prisoners' rights implementation) was caused by an institutional tie. Concretely, the stumbling block for the prison estate overhaul was a deadlock in discussions between the JFBA and the NPA with regard to a clause contained within the Prison Law pertaining to criminal suspects – detainees whose status is different from that of convicted prisoners. As a counterfactual it could be said that had it not been for the so-called 'substitute prison' clause that permits the replacement of the MoJ detention houses for the NPA's detention cells, the revision of Japan's 1908 Prison Law would most likely have happened as many as three decades before it actually did. Ultimately, what was required for the abovementioned stalemate to be resolved was the near meltdown of the Japanese correctional administration: following a scandal at Nagoya Prison that involved maltreatment of inmates by guards and multiple inmate fatalities, the political leadership intervened to ensure that the revision process is split in two, with the thorny part on suspects' detention being tabled until the agreed changes on prisoner treatment could be instituted.

5. Conclusion

This paper began with a reference to the tendency in political science, as observed by the philosopher Michael Freeman, among others, to avoid the concept of human rights. I first outlined the argument of this thinker that this evasion is due to the misplaced fear on the part of these scholars that the moral undertones of the human rights concept would taint their findings, thereby compromising their position as 'scientists'. I then described the gap that has been left as a result of this evasion by political science in our understanding of human rights implementation. In particular, I provided a review of the main, although limited in scope, attempts hitherto to isolate the factors impacting, positively or negatively, the implementation of human rights. I also noted, with Freeman, that the legalistic approach to human rights, which currently dominates the associated discourse (i.e., the analysis of human rights as legal claims and entitlements), cannot serve as a replacement for the empirical kind of work on human rights that only political scientists, and indeed other social scientists, can do. It is only social scientists, I agreed with Freeman, by virtue of their familiarity with methods of causal inference, who can uncover, for the reference of policy-makers around the world or others with influence in the decision-making process, factors impacting human rights implementation.

In order to take the project of human rights political science one step further, this paper then drew attention to the case of prisoners' rights in Japan. From what was presented with regard to prisoners' rights in Japan, it becomes clear that the descriptive/predictive power of the spiral model is not great in this case, as it cannot really explain the delay in implementation observed. In particular, there is little evidence that the transnational human rights advocacy networks were influencing policy-making in the way outlined by the creators of this model, with Japan being pushed in incremental steps toward a gradual harmonization with the UN regime. Furthermore, even though the model might cope well in characterizing a number of features of the prisoners' rights discourse over the last 30 years, the significant variance between the level of implementation of the rights of prisoners and suspects at the turn of the century greatly undermines its potential for useful inference. There is a great contrast indeed between the parts of the reform for convicted and remand prisoners in 2005 and 2006, respectively – nothing in Risse *et al.*'s predictions can account for this divergence.

With regard to the issue of substitute prison too, the spiral model's heuristic power is inadequate. Although explaining the lack of progress toward abolishing it is beyond the scope of this paper, since,

as it has been argued herewith, it is linked to the issue of prisoners' rights implementation, it warrants explaining that soon after WWII the system had become so embedded that even if the relevant authorities theoretically understood that it threatens the rights of suspects they could not transition to abolishing it (for more on this topic see Croydon, 2016*a*, 2016*b*). With the broad-brush approach of the spiral model, there is no room for accounting for this. The inherent pitfall in that model is that it is based on an assumption about a simple oppositional relationship between the state and human rights' advocates – this misses out the subtle interplay that might exist between different elements of each side. With no change imminent on the substitute prison front, it does not seem very likely that the envisioned gradual passage toward rule compliance, which the creators of the spiral model would predict with regard to this issue, will automatically follow from the efforts of domestic NGOs and their international allies.

As explained at the outset of the substantive part of this paper, what is pertinent from the case of Japanese prisoners to the discussion of human rights implementation is how a broad-based consensus for the reforms that came to pass just after the turn of the century had been in place for three decades. Indeed, the draft-bill on prisoners' treatment that the legislature passed in 2005, and which brought about improvements in terms of rights' protections and promotions for convicted prisoners, significantly overlapped with those submitted in the 1980s and the 1990s. The natural question thus arises as to what led to this delay in rights' implementation, and, as this paper has demonstrated, the answer to this question is the tie/bond embedded in the law between convicted prisoners and criminal suspects. To state this in concrete terms, since it was impossible for the stakeholders in the case of criminal suspect treatment to reach agreement on how to revise the associated part of the Prison Law, the project of updating the rest of that law, on which there was a general consensus (namely the part relating to convicted prisoners), was also postponed. That this institutional tie was precisely what was holding back improvements to the regime for convicted prisoners' rights is attested by the fact that as soon as a scandal compelled the legislature to order the separation of the two cases, the part pertaining to convicted prisoners saw an immediate update, although the one relating to criminal suspects continued to be a source of friction.

Going back then to the project of advancing the cause of human rights with knowledge from empirical political science, this paper has demonstrated the definitive role of the domestic institutional landscape in human rights implementation. Specifically, I have shown that in the particular case under examination, that is, of convicted prisoners' rights implementation in Japan, a spillover effect took place from the issue of police custody and criminal suspects' treatment, bringing a delay of nearly 30 years to the implementation of prisoners' rights. This spillover effect was on account of the treatment of both suspects and convicts being regulated for through a singular statute (the Prison Law). Indeed, had these two issues not been tied to each other in statutory terms in 1908, with, as explained earlier in this paper, politicians approving the substitution on a temporary basis of MoJ detention facilities with police cells so that the shortage in availability of the latter is alleviated, the reform of the prison system would have arguably happened much earlier. What becomes clear from this is that the statutory framework at the domestic level can be said to be an important factor that needs to be looked at when trying to explain the level of rights' implementation. It is inadequate to simply examine, as per the spiral model of Risse *et al.*, the interactions between transnational advocacy networks, the UN human rights bodies and the government's representatives. To gain a fuller picture of why rights policies are the way they are, attention would sometimes need to be extended to factors from the domestic institutional landscape, such as existing formal and informal rules and regulations, as they can exert constraining, or *vice versa* enabling, effect on rights implementation.

Although such institutions have recently made it back to the study of political outcomes more broadly, with the so-called 'new institutionalist' approach becoming firmly established, within the specific political science literature on human rights their role has not yet been highlighted. Indeed, although in various other subfields of political science, from public policy, to electoral behavior, to political economy, the recognition has now long existed among scholars that focusing on individual actors' political behavior can take their projects only so far and that attention needs to be extended

to institutional impediments, as they can have a sticky effect on policies, in the realm of human rights studies this observation has not yet been made. By highlighting the spillover effect from the issue of police custody and criminal suspects' treatment onto that of prisons and convicted prisoners' treatment in Japan, this paper has made the case for domestic institutional arrangements as potential forces impacting human rights implementation. I have highlighted how, when it comes to the human rights implementation of a certain group, an agency that is not on the radar of scholars as a potential factor, by virtue of its jurisdiction lying somewhere else, can, through existing statutory ties, exert a profound impact. Although it might not be a legal tie that is at play at every case where other known variables fail to account for temporal and/or spatial variation in human rights implementation, a framework for analysis clearly needs to be adopted whereby domestic political institutions broadly speaking can be incorporated. For theories of human rights implementation to be truly predictive, this extra level of complexity would need to be built in the future.

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