The Concept of Rights in Modern Japan

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Abstract and Keywords

This chapter aims to investigate the acceptance of “rights” in nineteenth-century Japan by examining divergent interpretations of political concepts between the West, especially Europe, and East Asia. After the arrival of US warships in 1853, facing the imminent threat of Western power, Japanese scholars and statesmen raised fundamental normative issues concerning the legal and moral concepts shaping the Western world—essentially posing the question, “What is Western civilization?” They grappled both theoretically and practically with Western political thought, employing the vocabulary and concepts provided by their own East Asian legal, moral, and political traditions, such as Confucianism, in a variety of ways. Given the differences between Western and Asian legal traditions, especially, the idea of “rights” was one of the hardest to accept. This chapter examines how some key Japanese intellectuals and politicians, including Nishi Amane, Nakae Chomin, and Fukuzawa Yukichi, confronted the complex plurality of rights in jurisprudence and discourse of European thinkers such as Simon Vissering, Jean-Jacques Rousseau, and John Stuart Mill and how they used it to reconsider specifically the legal culture of East Asia. In the course of this intellectual struggle with an alien culture, these Japanese thinkers sought to liberate European political theory from a closed historical identity and imbue it with new meaning in a new context. This is a history of comparative political theory concerned with the cross-cultural phenomenon of the nineteenth-century encounter of non-Western intellectuals with the ideal and the reality of “the West.”

Keywords: rights, legal culture, East Asia, jurisprudence, Confucianism, Fukuzawa Yukichi, Nishi Amane, Nakae Chomin

Introduction

HUMAN rights are acknowledged as universal principles in many parts of the world. Even so, people of different nations have divergent ideas regarding how to root the notion of fundamental human rights in the political culture of their countries, and there is considerable variation in how such rights are interpreted. Imported political concepts, created by societies with different linguistic, religious, and legal traditions, undergo transformation

and reinterpretation. How was the notion of “rights” originally diffused from Europe and re-examined in the non-Western world, particularly in East Asia? This chapter aims to investigate the acceptance of rights in nineteenth-century Japan by examining divergent interpretations of political concepts between the West, especially Europe, and East Asia.

The arrival of US warships in 1853 brought about a series of treaties of amity and commerce with the Western nations and an irrevocable transformation of the world of Tokugawa, Japan. Less than 15 years later, a regime that had endured for more than 250 years rapidly collapsed, and in 1868 a new government was established in a process known as the Meiji Restoration, or what some historians call the Meiji Revolution (Watanabe/Noble 2012, xiii–xiv). Knowledge flooded into Japan from the West, and Japan embarked on building a modern nation-state (see Takii 2003).

The “opening” of Japan brought full-scale, direct contact with the different culture and traditions of the Western world. Experiencing this massive transformation, Japanese scholars and statesmen grappled both theoretically and practically with Western political thought, employing the vocabulary and concepts provided by their own tradition in a variety of ways.[1] Facing the imminent threat of Western power, they raised fundamental normative issues concerning the legal and moral concepts shaping the Western world—essentially posing the question, What is Western civilization?—while at the (p. 395) same time undertaking a radical reexamination of East Asian legal, moral, and political traditions. In the course of this encounter with an alien culture, these Japanese thinkers sought to liberate European political theory from a closed historical identity and imbue it with new meaning in a new context. It was necessary to find viable options to ensure the survival of their nation while constructing new institutions and a new social ethos. For comparative political theory, the opening of the country set the stage for one of the most fascinating experiments in the history of political thought, possessing world-historical and cross-cultural significance.

Needless to say, Japanese intellectuals were confronted with the difficult challenge of understanding and defining Western political concepts in their own words and rooting them in their own society. Given the differences between Western and Asian legal traditions, the idea of rights was one of the hardest to accept. In Volume 2 of his work *Seiyō jijō* (Conditions in the West), Fukuzawa Yukichi (1835–1901), a prominent nineteenth-century intellectual, lamented that the Japanese had no proper term for the notion of rights (Fukuzawa 1870, 486). One of his contemporaries, the scholar and bureaucrat Mitsukuri Rinsho (1846–1897), agreed that there was no appropriate Japanese equivalent (Ōtsuki 1907, 101). As a result, a variety of terms, such as *ken* 権, *kenri* 権利, *kenri* 権理, and *tsūgi* 通義, were used to translate rights. This entry sheds light on the inflection of the early usages of these concepts in East Asia to their later use as a translation of rights. Furthermore, I examine how some key Japanese intellectuals and politicians, including Nishi Amane, Nakae Chōmin, and Fukuzawa Yukichi, confronted the complex plurality of rights in jurisprudence and discourse of European thinkers such as Simon Vissering, Jean-Jacques Rousseau, and John Stuart Mill and how they used it to reconsider specifically the legal culture of East Asia. Their intellectual struggle with Western political theories

remains significant with regard to the interpretation of rights in contemporary Japan and around the world.

The Plural Lives of Rights in East Asia and Europe

An important issue raised by previous research is the problems that arise when translating Western terms into Japanese. Nowadays, the English word *rights* is translated as *kenri* 権利 in Japanese. However, it is noteworthy that before its accelerated engagement with Western culture in the eighteenth and nineteenth centuries, 権利 (Japanese, *kenri*; Chinese, *quanli*) had been used with a completely different meaning in the East Asian world. The word *quanli* 権利 appears in classical Chinese texts such as the *Xunzi* (Xunzi, ca. fourth century BCE, 22) and *Shiji* (Sima Qian, ca. third century BCE, 2130), where it expresses "power" or "interest" from a negative point of view: The Chinese character *quan* 権 (Japanese, *ken*) signifies power, authority, or expediency, and *li* 利 (Japanese, *ri*) means interest or profit. This more negative connotation of the terms was (p. 396) widely shared among the Japanese in the Tokugawa period. For example, the seventeenth-century Japanese Confucian, Kaibara Ekiken (1630–1714), condemned the desire for *ken* and *ri*, authority and profits, as a cause of conflict and instead emphasized "the Way" (道 Japanese, *michi*; Chinese, *dao*), based on our humanity and virtue (Kaibara 1711, 143). In contrast, scholars such as Sunzi (ca. sixth century BCE, 6), the ancient Chinese military strategist, stressed the importance of *quan* and *li* from the perspective of the art of war. Even here, however, the word *quan* did not connote rights, but power and expediency (see Table 18.1).

Table 18.1 Rights in Japanese and Chinese

Chinese character (Kanji)	English translation	Japanese romaji transliteration	Chinese pinyin transliteration
権	Power, authority, expediency	*ken*	*Quan*
利	Utility	*ri*	*Li*
理	Reason	*ri*	*Li*
義	Justice, righteousness	*gi*	*Yi*

Yanabu Akira (2003) is one of the most distinguished scholars to examine the translation of rights in nineteenth-century Japan. According to him, in the history of Western political thought, the notion of rights is sharply opposed to power. Theories prevalent in modern Europe argued that rights were based on natural law, as distinct from the artificial laws established by the governmental powers of the day (Yanabu 2003, 80). But Yanabu insists that in late nineteenth-century Japan, as a result of the diffusion of the term *kenri* to translate rights, notions of rights and power mingled in this single word. As a result, *kenri* was occasionally misconstrued to mean “power” (Yanabu 2003, 92–106). His argument suggests that this was intimately related to a Japanese legal culture prioritizing state power over individual rights (see also Izuhara, 1982).

Certainly this is a valid argument. However, from the perspective of comparative political theory, some problems remain. First, previous research has not fully clarified why *ken* or *kenri* (Chinese, *quan* or *quanli*) was used as a translation of rights. Furthermore, turning our attention to European intellectual history, we realize that the notion of rights in the Western world has diverse meanings implying power and profit. In *Natural Rights Theories*, Richard Tuck (1979, 20–31, 58–81) found the seeds of modern ideas of rights—in the sense of some type of “sovereignty over the material and moral world”—in currents of thought linking William of Ockham, Jean Gerson, and Hugo Grotius, who defined *ius* as the exercise of *potestas* (power) or *facultas* (capability) in accordance with reason. Moreover, by the middle of nineteenth century, when Japan opened to the world, Jeremy Bentham and John Stuart Mill’s utilitarianism and German historical jurisprudence had already risen to prominence in Europe. As Alexandre Passerin d’Entrèves (1951, 95–111), Leo Strauss (1953, 13), and H. L. A. Hart (1983, 181) have observed, these schools of thought were critical of natural rights (p. 397) theory—the theoretical wellspring of the American Declaration of Independence and the French Declaration of the Rights of Man—and so the influence of that theory declined. Contemporary Japanese intellectuals were familiar not only with natural rights theory, but also with a broad range of other intellectual tendencies in nineteenth-century Europe. For instance, in 1875, Ono Azusa (1852–1886), a leading scholar associated with the Freedom and People’s Rights Movement (*jiyū minken undo* 自由民権運動), translated Joël Emanuel Goudsmit (1813–1882)’s *Pandectensysteem* (1866) into Japanese as *Roma ritsuyō* (*Essentials of Roman Law*), basing his work largely on R. de Tracy Gould’s English translation of Goudsmit, *The Pandects* (1873). As we shall see, this work was grounded in rich sources of German historical jurisprudence developing out of the studies of Friedrich Carl von Savigny (1779–1861). In it, Ono defines rights as the power (*seiryoku* 勢力) given to the will of a person. This is not a mistranslation; it is firmly grounded in the original text: “A Right in its subjective sense is the power given, by right in the objective sense, to the will of a person, relatively to a certain object” (Goudsmit/de Tracy Gould 1873, 38–39; Goudsmit/Ono 1875, 30). Thus, the notion of right in the West has diverse meanings that cannot be reduced to a single concept, and we must investigate not only the issues of translation but also the various ways in which nineteenth-century Japanese scholars and politicians grappled with Western political theory.[2]

Dutch Studies and the Chinese Translation of Western Books until the Middle of the Nineteenth Century

Although the American “black ships” are credited with opening Japan to the world in 1854, Japan’s relationship with the West predates their arrival by some three hundred years, to the early trade with Portugal and Spain. Moreover, in the Tokugawa period, trade relations with the Netherlands encouraged a flourishing interest in *Rangaku* (Dutch studies), a term that connoted the Western sciences—especially physical sciences such as astronomy, medicine, and pharmacology—and keen demand for Dutch–Japanese dictionaries such as the *Doeff–Halma Dictionary* (Doeff 1833). In that dictionary, the word *right* (*recht*) was translated as *suji* 筋 (a term connoting reason, rationale, or justice). Yet at the time, rights were not considered a crucial notion for understanding Western culture, and the translation *suji* did not take root in Tokugawa Japan (Doeff 1833, vol. 6, 304; see also Verwaijen 1996).

Systematic studies of Western jurisprudence and political theory would await the arrival of the US warships. In 1856, in response to Perry’s arrival, the Tokugawa shogunate established the Bansho Shirabesho, or Institute for the Study of Barbarian [Western] Books (which had earlier roots in Bansho Wage Goyō, or the Government Office for (p. 398) Translation of Barbarian Books, founded in 1811), and it was scholars associated with this institute who led the dramatic expansion and diffusion of knowledge concerning the Western disciplines of law, politics, and economics at the dawn of modern Japan. Among their activities, the study mission to the Netherlands of two of these young scholars, Tsuda Mamichi (1829–1903) and Nishi Amane (1829–1897), might be described as truly epochal (Ōkubo 2010).

Tsuda and Nishi were sent to Leiden in 1862 as the first students dispatched to Europe by the Tokugawa shogunate and for two years received direct, systematic, comprehensive instruction in European jurisprudence and political theory from professor Simon Vissering (1818–1888) in the Faculty of Law at Leiden University. Upon their return to Japan, they worked to introduce European legal systems and the social sciences to Japan. They had taken notes in Dutch on Vissering’s lectures, which they translated as *Taisei kokuhō ron* (*Lectures on Constitutional Law*) and *Bankoku kōhō* (*Lectures on International Law*), published in 1868. The knowledge acquired during their sojourn in the Netherlands would exert an immense influence on the creation of the new Meiji state and on the development of scholarship in modern Japan. In these books, they chose *ken* 権 and *kenri* 権利 for the equivalent of rights (*recht*). This triggered the diffusion of these words through Japan, though they were not the first scholars to use these translations.

It is noteworthy that the Chinese terms *quan* and *quanli* (Japanese, *ken* and *kenri*) had previously appeared in works published in China and imported to Japan. Confronting the threat from the Western powers during and after the First Opium War (1839–1842), the Chinese scholar-official Wei Yuan (1794–1857) compiled *Haiguo tuzhi* (*Illustrated Treatise*

on the Maritime Kingdoms), which contained information about the national resources of the Western countries, accompanied by numerous maps, historical descriptions, and geographical details. A reference in this work to a passage in Emerich de Vattel's *Le Droit des gens* concerning "the right of making war and peace" of a sovereign state was translated into Chinese as *xingbing jianghe de quan* 興兵講和的権, using the character *quan* (Wei Yuan 1852, vol. 83, 21 chō-ura).

Moreover, the words *quan* and *quanli* were also used for the translation of right in *Wanguo gongfa* (*Public Law of All Nations*), a Chinese translation by the American missionary William Alexander Parsons Martin (1827–1916) of *Elements of International Law* by the American jurist and diplomat Henry Wheaton (1785–1848), one of the most influential books in East Asia concerning European international law. Immediately after its publication in Beijing, it was reprinted in Japan in 1865 by the Tokugawa shogunate's institute for Western studies, to which Tsuda and Nishi belonged as scholars. Martin's translation makes copious use of the word *quan* 権, employing it to translate not only right (*quan* or *quanli*) but also *sovereignty* (which he translated as *zizhu zhiquan*自主之権, *zhuquan* 主権, or *guoquan* 国権), *the State itself* (*guoquan* 国権), *power* (*quan* 権), *the monarchical form of government* (*junquan* 君権), and so on. This was closely connected with the essence of European international law in nineteenth century, in which non-European states had to build up a national power (*guoquan*) equivalent to that of the Western powers to exercise their rights (*quanli*) as sovereign states (*zhuquanguo*) (p. 399) (Wheaton 1855, 29–31; Wheaton/Martin 1865, vol. 1, ch. 2, sec. 5–6, 17 chō-ura–19 chō-omote). Thus, a correlation can be discerned among *zhuquan*, *guoquan*, *junquan*, and *quanli* (or sovereignty, the state, monarchy, and rights) in the context of international relations in nineteenth-century East Asia.

But why was the word *quan* 権 adopted? In ancient Chinese texts such as the *Guanzi* (Guanzi, ca. seventh century BCE, vol. 4, 1418), the word *guoquan* 国権 meant the absolute power and authority to govern the state and defend it against external enemies. This did not necessarily signify right in the Western senses. But in the preface of the *Wanguo gongfa*, contemporary international politics based on the principle of the balance of power was compared with the situation during the Spring and Autumn and the Warring States periods (eighth century–third century BCE) in ancient Chinese history (Wheaton/Martin 1865, vol. 1, "preface," 1 chō-omote). For scholars in nineteenth-century East Asia, the theory and behavior of Western sovereign states apparently evoked the classical Chinese political discourse on law (*fa*) and power (*quan*).

It is striking that, by referring to these Chinese books, Tsuda and Nishi expanded the application of the word *kenri* 権利 to the translation of not only the rights of nations or monarchies in the context of international law, but also the rights of individuals within a country. Let us turn our attention for a moment to their studies in the Netherlands.

Tsuda Mamichi and Nishi Amane: Study in the Netherlands

During their stay in Leiden, Tsuda and Nishi were privately tutored by Vissering, who made a special curriculum for them consisting of five separate courses in natural law, international law, constitutional law, political economy, and statistics. The Netherlands that Tsuda and Nishi visited at the beginning of the 1860s had recently experienced liberal reforms, including a revision of its constitution. In March 1848, King Willem II, fearful of the repercussions of the February Revolution in France that overthrew the monarchy of Louis Philippe, suddenly shifted from his absolutist stance and formed a committee to revise the constitution, headed by Johan Rudolph Thorbecke (1798–1872), a prominent professor in the faculty of law in Leiden University and a liberal leader. The revised constitution, promulgated in November 1848, introduced a truly constitutional monarchy, with a responsible cabinet and direct election of members of the lower house. In this way, the Netherlands achieved a moderate political reformation and established a liberal system (Riel 1982; Ōkubo 2010, ch. 1).

As a legal scholar, Thorbecke was influenced by German historical jurisprudence and rejected not only the system of absolute monarchy, but also theories of natural rights and of the social contract, which he saw as ahistorical revolutionary ideologies attempting to radically undermine the existing political order (Thorbecke, 1831, 189; see also Kossman, 1982; Poortinga, 1987). For Thorbecke, the primary concern of jurisprudence should instead be the analysis of constitutional law as a form of positive law. With the advent of Thorbecke’s approach, the abstractions of natural rights theories became a relic of the past in the Dutch academic world. They were replaced by a concern with (p. 400) practical sciences favoring empirical investigation, and the work of Auguste Comte and John Stuart Mill was enthusiastically received (Otterspeer 1992, 227–232; Kossman 1978, 259–263). Tsuda and Nishi’s academic adviser, Professor Vissering, studied under Thorbecke and became his successor at Leiden University after Thorbecke was appointed minister of home affairs in the new cabinet in 1849.

Vissering placed the lectures on natural law at the beginning of his five-course curriculum for Tsuda and Nishi, which was for them an introduction to the fundamental concept of rights in European jurisprudence. In these lectures, Vissering taught that natural law is law based on the nature of man as a social being, in the context of which each individual has equal legal rights (Vissering 1863–1865a, 4–7). Yet when seen in connection with his five-course curriculum, it is obvious that he did not recognize natural law as a philosophical principle from which the whole legal system could be deduced. In addition, Vissering rejected social contract theory as fallacious in his lectures on constitutional law (Vissering/Tsuda 1868, 119).

With regard to constitutional law, he defined the intent of the constitution as being that of “enhancing the well-being of the entire nation and working to maintain its independence; protecting the rights and security of the citizens; upholding order throughout the land; uniting popular energies to extend the way of mutual assistance and social life; and by so doing, to foster and expand the national interest” (Vissering/Tsuda 1868, 141). It was in

the lectures on political economy that Vissering elucidated the principles of "mutual assistance and social life," relying on the theories of Adam Smith, Jean Baptiste Say, John Stuart Mill, and others. The political economy that Tsuda and Nishi learned from him took as its point of departure "the instinctual desire" of human beings "to fulfill their needs." The principles of social prosperity on which liberal economic theory depends are derived from fulfillment of these individual needs through free economic activity and trade. According to him, the well-being of the individuals comprising society and the public utility of society as a whole are naturally harmonized in the free and autonomous operations of social life (Vissering 1860–1865; 1863–1865b; see Ōkubo 2010, ch. 3). These are the fundamental principles supporting the civilization of Europe.

In those days, there was no appropriate equivalent in Japanese for *social life*, *society*, or, in Dutch, *maatschappij*. The problem of how to construe the concept of society as something distinct in nature from the state or government is one of the most essential issues in the history of modern Japanese political thought. Tsuda and Nishi translated it as *sōsei sōyō no michi* 相済相養の道 or *aiseiyō no michi* 相生養の道. They probably referenced the term from Confucian texts such as the Qing dynasty scholar Dai Zhen's (1724–1777) *Zhongyong buzhu* (Supplementary Notes on the *Zhongyong*, Dai 2010, 51), which glosses the phrase 天命之謂性, 率性之謂道 ("What Heaven has conferred is called THE NATURE; an accordance with this nature is called the path of duty") as "life exists, and thus the way of mutual livelihood exists (有相生養之道)."

Returning to the lectures on constitutional law, we find that from the perspective outlined above, Vissering investigated the mutual legal rights and duties of the state and its citizens and emphasized the importance of the division of state power into (p. 401) administrative, legislative, and judicial branches. He divided the *rights of the people* (which Tsuda translated as *kokumin no kenri* 国民の権利) into civil rights, protecting people from government infringement, and political rights. The former include the rights to life and liberty; the rights to freedom of thought, religion, assembly, and the press; the right to property; and the right to equality under the law (Vissering/Tsuda 1868, 141–145). Regarding political rights, and especially the right to vote, Vissering insisted on the need for gradual reform, giving consideration to the diversity of national history, culture, traditions, and civilization. He taught Tsuda and Nishi that "the laws regulating the election of legislative representatives vary according to the degree of civilization evidenced in the constitutional laws of each country" (Vissering/Tsuda 1868, 146).

The traces of Tsuda and Nishi's intellectual struggle with the jurisprudence of Vissering can be discerned in Tsuda's "Taisei hōgaku yōryō (An overview of Western law)," written as explanatory notes introducing his translation of Vissering's lectures on constitutional law, *Taisei kokuhō ron*, and in Nishi's *Hyakuichi shinron* (New essay on the unity of all teachings, 1874a).

In "Taisei hōgaku yōryō," Tsuda began with the explanation of the etymology of the European words *right*, *droite*, and *recht*. According to him, *recht* in Dutch and German and *droit* in French contain the meaning of rights and law in English, and they derive their

origin from *ius* in Latin. Furthermore, in the historical development of jurisprudence, the notion of right, *droite*, and *recht* originally derived from *righteousness* (*shojiki* 正直) and later acquired the implication of the extension of individual liberty (Tsuda 1868, 113–114). Tsuda points out that in Europe, with the progress of civilization, people have obtained equal rights under the law and eliminated the evil legal conventions and punishments that cruelly deprived the people of their human rights (*jinken* 人権) in the past. Having stated this, Tsuda directly confronts the problem of the Japanese political culture of his day: "In our country, samurai still hold the power (*ken* 権) to kill a commoner who they say has offended their honor" (Tsuda 1868, 115). Similarly, in *Hyakuichi shinron*, Nishi attacked East Asian legal traditions as deriving from "a country which from ancient times has delighted in enslaving its people and whose national character does not flinch when its people lose their human rights" (Nishi 1874a, 261). In this passage, Nishi translates *human rights* as *hito toshite hito taru no ken* 人として人たるの権. Thus, Tsuda and Nishi sharply criticized the absence of the notion of rights in the Japanese legal tradition, clearly contrasting the rights originating in the Latin *ius* with the power that the samurai or the privileged classes invoked to take the lives and property of the people.

As they argued, the Chinese character *quan* 権 (Japanese, *ken*) originally had the meaning of the weight on a scale or balance. From there, it evolved to mean power, force, or authority. However, essentially, it continues to imply the significance of equilibrium or balance.[3] In Europe, the Greek and Roman goddess of justice has a scale in her right hand, symbolizing equality and fairness, and a sword in her left, which represents power. The sword without the scale is brute force; the scale without the sword is the impotence of law. From the perspective of comparative political theory, it is noteworthy that, in East (p. 402) Asia, these two main elements of which the legal world was composed were both embodied in the character *quan* 権. In fact, in a later translation of Rudolf von Jhering (1818-1892)'s *Der Kampf ums Recht* (*The Struggle for Law*, 1872) into Japanese, Nishi noted interesting passages, such as the following: "it is that Justice (*seigi* 正義) who, in one hand holds the scale (*kenko* 権衡) in which she weighs the right (*kenri* 権利), and in the other carries the sword with which she executes it" (Jhering/Nishi n.d., 331).

Nishi Amane and Utilitarianism

In this way, at the dawn of modern Japan, when European and East Asian traditions intersected, Nishi and Tsuda tried to establish the notion of law as a system of rights. After the Meiji Restoration, while both men won posts within the new government bureaucracy, they also joined Fukuzawa Yukichi, Kato Hiroyuki, Mori Arinori, and others in forming the Meirokusha (Meiji Six Society), a voluntary association of scholars founded in 1874, whose goals were to create a public sphere for open debate concerning social problems and for the dissemination of knowledge to the general public.

Nevertheless, the introduction of the term *kenri* 権利 elicited strong reactions from some government officials. For instance, when Mitsukuri Rinshō, a member of the Meiji Six Society, was engaged in a government project for the translation of French civil law, he adopted the word *minken* 民権 as the equivalent of *droit civil*. However, another govern-

ment official objected to this, saying, “it is impermissible for the people (*min* 民) to have power (*ken* 権) versus the government” (Ōtsuki 1907, 102) Thus the use of the character *ken* 権 as a translation of rights provoked the question of who held real power (*ken*) in ruling the state. Meanwhile, the so-called Freedom and People’s Rights Movement spread among people throughout the country, who demanded their political rights and the establishment of a popularly elected national assembly. Some radicals of the movement appealed to force to capture the legislative power. It is significant that government politicians and the radicals of the Freedom and People’s Rights Movement were diametrically opposed in their politics, but shared a similar notion of *ken* 権 based on the logic of power for ruling the state. This conflict between the government and the Freedom and People’s Rights Movement continued till the enactment of the Meiji Constitution.

In this atmosphere, Nishi Amane, informed by Vissering’s lectures, criticized the radical movement to establish a popularly elected parliament on the basis of Rousseau’s social contract theory and insisted on the need for more gradual and methodical institutional design (Nishi 1874b, 239–240). He then proceeded to deepen his investigation into the European notion of rights and establish a thorough engagement with contemporary philosophy, including Auguste Comte’s (1798–1857) positivism and the thought of John Stuart Mill (1806–1873), examining the principle of utility (*ri* 利) as a foundation for the notion of rights (*kenri* 権利). The highlights of this philosophical activity were Nishi’s essay “Jinsei sanpō setsu” (The three human treasures), serialized in *Meiroku zasshi* (*Journal of the Meirokusha*) beginning in June 1875 (Nishi 1875), (p. 403) and his translation of Mill’s *Utilitarianism* (1863), titled *Rigaku* 利学 and published in May 1877.

In “Jinsei sanpō setsu,” Nishi introduced Mill’s theory of “Utility, or the Greatest Happiness Principle,” saying that “the objective of social intercourse is public interest; and public interest is the aggregate of private interests,” while rejecting the standpoint of conventional morality with its emphasis on “humility, generosity, humbleness, modesty, unselfishness, and lack of desire” (Nishi 1875, 515–516).

As Nishi’s words indicate, the arrival of utilitarian thought in early Meiji Japan almost inevitably necessitated the revisiting of a debate that had been carried on since antiquity within the Confucian tradition concerning how one should “discriminate between *yi* 義 (Japanese, *gi*) and *li* 利 (Japanese, *ri*),” where *yi* signifies what is usually translated into English as righteousness or justice, while *li*, as above, refers to utility, interest, and benefit. For instance, in his commentary on *Mencius*, Zhu Xi (1130–1200), seen as one of the founders of neo-Confucianism in the twelfth century, explained that *yi* is rooted in what is intrinsic to the human mind and constitutes the basic principle of humanity, or the Way, *dao*. In contrast, *li* is rooted in the desire to gain some benefit from the standpoint of utility and signifies self-interest, or selfishness (Zhu Xi n.d., 202). Thus, in neo-Confucianism, righteousness or justice is accorded greater value than interest or utility; it is *yi* that is believed to be grounded in *li* 理 (Japanese, *ri*), the fundamental principles that Zhu Xi and his fellow neo-Confucians held to be constitutive of moral as well as cosmic order.

Nishi Amane's embrace of utilitarianism opposed this Confucian discourse and tried to shed light on the positive significance of the pursuit of utility (*ri* 利) and self-interest. But how did Nishi envision the reconciliation of private and public interests? Might not the individual pursuit of self-interest interfere with the interests of other individuals and violate the norms of society as a whole? His answer to what served as the connecting link between private and public interest was "the way of social life" or "fraternal social life" (*aiseiyō no michi* 相生養の道). Nishi said that from the perspective of "philosophical principles" (*tetsuri* 哲理), what could "transform heterogeneity into homogeneity" (Nishi 1875, 530)—in other words, create the conditions in which apparently antithetical opposites might be harmonized—was none other than "fraternal social life" or *aiseiyō no michi*.

This is because, looked at philosophically, fraternal social life is invariably mutually cultivated and an urgent necessity in the human world before government has yet been established. Now, fraternal social life is extremely broad and extremely active in the civilized countries. It may well be said that what men call government only presides impassively over the community (Nishi 1875, 524).

From this utilitarian standpoint, Nishi reexamined the notion of rights in his manuscript "Genpō teikō" (Essentials on the principle of law), based on the fifth chapter of Mill's *Utilitarianism*. According to Nishi, all beings desire pleasure and dislike pain and suffering. When their interests (*ri* 利) or those of their associates are harmed, people desire to retaliate against and punish the perpetrator. In this sense, human beings are no different from animals. But human beings have broader sympathies and intelligence (p. 404) that enables them to comprehend the community of interest between themselves and their society. Because of this, people come to perceive issues as involving the norms of society as a whole and not merely personal injuries or resentments, and thus the notion of justice (*gi* 義) is formed. One form in which this awareness of justice is manifested is in the idea of a right (*kenri* 権利). Therefore, the protection of rights is directly connected to the defense of general utility, and thus laws are established (Nishi n.d., 146–157). In this way, Nishi elucidated that the concept of rights (*kenri* 権利) was based on utility (*ri* 利) and that justice (*gi* 義) also aims for a conjunction with utility.

Guided by Mill's utilitarianism, Nishi defended the civil rights of the people to enjoyment of their prosperity and strove to open up new vistas for an intellectual discourse seeking a fusion of the principles of *gi* (justice) and *ri* (utility), in place of Confucianism and the East Asian legal tradition. As Nishi pointed out (Mill/Nishi 1877, vol. 1, "Setsu," 4 chō-omote), these arguments implied a critique of the theory of natural law. Yet this did not mean a complete and absolute turn away from Vissering's teachings. As we have seen, Vissering emphasized to Nishi and Tsuda the importance of a liberal economy based on a pursuit of individual interests as the foundation of civilization. In this sense, Nishi's struggle with Mill's utilitarianism may be seen as an extension of the insights he gained from his study in the Netherlands.

Fukuzawa Yukichi and Nakae Chōmin

Unlike Nishi Amane, Fukuzawa Yukichi addressed the essence of the European notion of rights by grappling intellectually with the natural law theories that flourished a generation before his own. He explained in his translation of the Declaration of Independence of the United States that the notion of rights originally implied moral good and meant one's duty as a human being endowed by God with reason (Fukuzawa 1866, 323). Moreover, in Volume 2 of his work *Seiyō Jijō* (Conditions in the West), published in 1870, Fukuzawa introduced the discourse on rights of William Blackstone (1723–1780), a leading eighteenth-century English jurist, though an abridged translation of his *Commentaries on the Laws of England* (1765–1769), which contained the following argument. "The primary and principal objects of the law are RIGHTS and WRONGS," and rights (*seiri* 正理) "are annexed to the persons of men, and are then called *jura personarum*, or *the rights* (*tsūgi* 通義) *of persons*" (Fukuzawa 1870, 493). Form this point of view, he emphasized that the notion of rights comes into existence on the basis of reason (*ri* 理) or justice (*gi* 義) and translated it as *tsūgi* 通義 or *kenri tsūgi* 権理通義 (see Anzai 1995; Iwatani 2003; Miyamura 2005; Craig 2009).

Another figure who deepened this argument over rights and contributed to the investigation of social contract theory was Nakae Chōmin. In contrast to Nishi, Nakae was directly critical of the adoption of utilitarianism in early Meiji Japan and had a highly positive assessment of the Confucian distinction between justice (*gi* 義) and utility (*ri* 利). In his article "Ron kōri shiri" (On public and private utility, Nakae 1880), Nakae pointed out that the Chinese ancient sages Confucius and Mencius had seen justice as more (p. 405) important than utility. He then criticized Bentham's and Mill's utilitarianism. According to Nakae, although the utilitarians claimed that public welfare is the aggregate of private interests, such discourses were nothing but false statements defending selfishness: "Justice (*gi* 義) is certainly the essence, while utility (*ri* 利) is the practical application" (Nakae 1880, 22–23).

From this perspective, Nakae translated Jean-Jacques Rousseau's (1712–1778) *Du contrat social* (The social contract, 1762) as *Min'yaku yakukai* 民約 訳 解 in 1882. In it, he emphasized the superiority of Rousseau over the utilitarians: "Bentham speaks only of utility, while Rousseau also speaks of what is just" (Rousseau/Nakae 1882, 91). He then attempted to interpret Rousseau's social contract theory through the lens of traditional Confucian respect for morality. Rousseau insisted on a principle of self-governance, by which the people participated directly in the making of the laws and therefore obeyed the laws they themselves had made. In the state of nature, people enjoy their natural liberty, which is limited only by the force of the individual. On the contrary, in the civil state, through the social contract, they lose their natural liberty but instead gain civil and moral liberty, which are limited by the general will (Rousseau/Nakae 1882, 75, 97–98). All of the people discuss equally what is public justice, setting aside their selfish private interest, and enact laws that represent the general will. Thus, they overcome the slavery of desire and

obedience to selfishness, truly becoming masters of themselves and establishing their autonomy by obeying laws that they have imposed on themselves as rational beings.

Here, Nakae found a fundamental compatibility between Rousseau and Confucianism. For him, Rousseau's political theory was based on a conception of moral liberty in which the individual did not succumb to the dictates of his desires but instead learned to discipline and govern his own heart and mind—which represents a considerable overlap with the concept of justice (*gi* 義) in Confucianism (see Miyamura 1989; Watanabe 2010).

According to Nakae, People's rights were also established on these normative principles of justice (*gi* 義), not on the theory of utility (*ri* 利). While he used the character *ken* 権 as the Japanese translation for rights, he boldly underlined the distinction between rights (*ken* 権) and power (*chikara* 力). In the third chapter of the first volume of *Min'yaku yakukai*, Nakae asserted that rights emanate from reason (*ri* 理) and justice (*gi* 義) in self-government, not from force and power (*chikara* 力), by his translation of Rousseau's statements: "Force is a physical power, and I fail to see what moral effect it can have," and "Force does not create right" (Rousseau/Nakae 1882, 80–83; Miyamura 2005).

In his later years, Nakae made the following declaration:

> Political right is the ultimate principle, liberty and equality the ultimate justice… . These principles were discovered long ago in China by Mencius and Liu Zongyuan (773–819); they are not the monopoly of the West.
>
> (Nakae 1901, 177)

Thus, to Nakae, the theory of political rights and liberty is rooted not only in the West but also in the East Asian tradition. Nakae considered the notion of rights in intimate (p. 406) connection with reason (*ri* 理) and justice (*gi* 義) and sought to bridge principles of democracy and Confucianism by re-examining the Confucian argument on the distinction between justice (*gi* 義) and utility (*ri* 利), as well as by re-evaluating Rousseau's theory of the social contract. From this standpoint, he engaged in the Freedom and People's Rights Movement, which criticized the despotic rule of the Meiji government and demanded the expansion of the rights of the people to participate in politics.

Ono Azusa and His Quest for the "Thread of Civil Rights"

Ono Azusa was another central figure in the Freedom and People's Rights Movement who did pioneering work introducing to Japan the study of Roman law as explicated by contemporary European historical jurisprudence, which arose as a critique of social contract theory. Then, in contrast to Nakae Chōmin, who connected the notion of rights with the will to justice, Ono attempted to constitute it from within Japanese history.

Ono studied in the United States and Great Britain from 1870, and following his return to Japan in 1874, he translated Joël Emanuel Goudsmit's *Pandecten-systeem* (1866) into Japanese as *Roma ritsuyō* (Essentials of Roman law). Interestingly enough, Goudsmit was Vissering's colleague in the faculty of law at Leiden University. He was also a student of

Thorbecke, and his research into Roman law was inspired by being exposed, through Thorbecke, to the achievements of German historical jurisprudence.

In his preface to *Roma ritsuyō*, Ono criticized the current state of political affairs in Japan, which he characterized as one in which shallow imitation of European legal institutions—English, German and French—was running rampant (Goudsmit/Ono 1875, 4; see Ōkubo 2010). The purpose of his translation, he wrote, was to trace European legal institutions back to their origins in Roman law to elucidate the legal principles (*hōri* 法理) on which they were based.

In this book, Goudsmit and Ono expound that "*recht* (in a broad sense)" is the origin of the notion of justice, which emerges from the "universal conviction" of the people living in a community and is shaped and develops historically together with that people, along with language, manners, and customs. Then, the definition of rights in a narrow sense is deduced as follows: "A right (*kenri*) in its subjective sense is the power (*seiryoku* 勢力) given by right in the objective sense to the will of a person, relative to a certain object" (Goudsmit/Ono 1875, 10, 30). Law is an organic system of rights based on the will of the people of the community. Additionally, Ono inserted his own original explanation of the history of law in Europe, in which he traced the origins of civil rights (*minken* 民権) in the European legal tradition and pointed out that they were fostered by a political culture of popular self-government (*shūmin jichi* 衆民自治) in ancient Republican Rome (Goudsmit/Ono 1875, 10–27, see also Ōkubo 2013).

In this light, Ono attacked scholars and activists who advocated natural rights and liberty as a means to rapidly spread the movement for the augmentation of political rights. In an article called "Kenri no zoku" (The thieves of rights, 1875), he pointed out that during the French Revolution, people rose in revolt in the name of unrestricted (p. 407) natural rights. This was too radical and "greatly harmful to the way of coexistence." According to him, civil rights essentially make their appearance as legal rights through the enactment of laws based on social life (Ono 1875, 13–14).

This was his standpoint when, in 1876, he was engaged in the codification of civil law at the Ministry of Justice. But in the course of his work there, Ono keenly realized the differences in legal culture between Japan and the West. He wrote, "No doubt the concept of civil law (*minpō no isō* 民法の意想) was lacking, and did not exist in the mind of the people of Asia until modern times" (Ono 1884, 250). In East Asia, from antiquity, penal and criminal law developed historically as the commands of the ruler. Ono appreciated that in this respect the East Asian concept of the law had something in common with Bentham's and John Austin's legal positivism, which defined laws as "general commands issued by a sovereign to members" (Ono 1876, 240–243). Yet, within the legal traditions of East Asia, laws as commands of the ruler did not go beyond the bounds of penal law; the idea of a civil law that determined and defended the legal rights of the people remained underdeveloped. According to Ono, the patriarchal family system prevented the concept of civil law from developing in East Asia. Modern Western nations, by contrast, consisted of a po-

litical society founded on the principle of civil rights and organized by “independent and autonomous individuals” (Ono 1876, 299–301).

Through his experience as a legal bureaucrat, Ono reached the conclusion that the only way to establish civil law as the primary basis of the legal system was to first establish a constitution. In 1881, began writing his major work, *Kokken hanron* (General theory of a national constitution), the first two volumes of which were published in 1882, and its final volume in 1885, a work that has been called “the most widely read classic of Japanese political science” (Yamashita 1978, 124). In it, Ono rejected Rousseau’s social contract theory, but envisioned the construction of a moderate national assembly based on British-style ideas of a constitutional monarchy and a parliamentary cabinet system. He then tackled the issues of rights and history head-on.

Was it possible that Japan might be incapable of building from within the foundations for civil rights? Ono’s attempt to answer this question is Chapter 12 of *Kokken hanron*, “Honpō kodai no minken o sogen su” (Tracing the origins of civil rights in the antiquity of our nation). Here, Ono ventured to use a “microscope” to reinvestigate Japan’s legal history to retrieve the “thread of civil rights” (*minken no meimyaku* 民権の命脈) within it. For instance, there was the so-called decree of the bell and box, dated 646 and mentioned in the *Nihon shoki* (Chronicles of Japan). According to Ono, this system, in which the government of the day hung up a bell and provided a box to receive petitions and hear people’s grievances, demonstrates that people had the institutional freedom “to discuss political matters publicly.” There was also Article 4 of the *Jōei shikimoku* (1232), the administrative code of the Kamakura shogunate. This declared that provincial military governors (*shugonin*) may not arbitrarily confiscate the private property of a person, calling it an offense, even if that person has committed a crime. This is evidence, Ono said, of the survival of “the principle that officials exist for the people, not the people for officials.” The thread of civil rights running through Japanese history had been for a time imperiled under the military government of the Tokugawa period. (p. 408) But even then, it continued to be passed down within the “minds of the people” as legal tradition. This tradition was revitalized and brought to fruition by the Meiji Restoration, with the opening of the country and exposure to Western political theory. The post-Restoration flourishing of the Freedom and People’s Rights Movement and activities seeking the establishment of a national assembly and a constitution came about as an extension of this legal tradition—what was referred to in his day as *the budding of constitutionalism* (Ono 1882–1885, 114–123).

However, Ono never abandoned his critical scrutiny of the Japanese legal tradition. In the final chapter of *Kokken hanron*, he once again criticized the patriarchal family system in Japan. According to him, even if a constitutional system was established, a truly constitutional nation could not come about until the legal tradition that looked to patriarchal control had been overcome and a political society replete “with a spirit of self-government and independence” had been constructed. This had to be done by the hands of the people themselves (Ono 1882–1885, 571–573).

Thus, Ono's intellectual struggle over the issue of rights and history in Japan was charged with a sharp tension. His encounter with the works of contemporary historical jurisprudence lead him to investigate the roots of the European legal tradition. In line with this inquiry, he endeavored to create a new political culture of self-government and to nurture the budding constitutionalism of contemporary Japan by reaching back into the origins of the Japanese legal history to revive the living essence of civil rights within it and calling for the construction of a civilized society founded on those rights.

Rights from the Meiji Era to the Present

Although Ono Azusa put his soul into the establishment of a constitutional system, he would not live to see the promulgation of Japan's first modern constitution, the Constitution of the Empire of Japan (or Meiji Constitution) in 1889. He passed away in January 1886, four months after publishing the final volume of *Kokken hanron*. After his death, Kaneko Kentarō, who was involved in drafting the Constitution of the Empire of Japan with Itō Hirobumi, said in a eulogy to Ono that *Kokken hanron* "was of the strong opinion that it was not right to advance European and American theories unless on the basis of Japanese history and so took national history as its foundation" and remarked, "Prince Itō has read Ono's *Kokken hanron* very closely," and "the Japanese Constitution owes greatly to Mr. Ono's study" (Waseda Daigaku Bukkyō Seinenkai 1926, 57–58).

Whether through Ono or not, the Meiji Constitution certainly incorporated the insights of Western constitutional theory "on the basis of Japanese history." However, the Meiji Constitution differed greatly in character from Ono's constitutional ideas, both in actual institutional mechanisms and in spirit. Ono stressed the importance of the system of parliamentary government and condemned patriarchy, while the Meiji Constitution was centered on the supreme authority of the emperor: "The Emperor is sacred and inviolable"; "The sovereign power of reigning over and of governing the State is inherited by the Emperor from his ancestors and by him bequeathed to his posterity." (p. 409) The people were regarded as "subjects" (*shinmin* 臣民) of the emperor, with their rights as subjects protected by the emperor through the constitution and laws.

Furthermore, in the course of the dispute over the compilation of the Civil Code that occurred between 1889 and 1892, Hozumi Yatsuka, professor at Tokyo Imperial University, held that "we are a country that respects the rules of the ancestors and one where the family system prevails; therefore, authority and the law are derived from the family" (Hozumi 1891, 110–111, see also Matsuda 2016). This view led him to find an overlapping of Japan's "rules of the ancestors" and "Roman family law," which he evaluated positively, as opposed to Ono Azusa. He insisted that "the rights of subjects" were "granted by the power of sovereign state (*kokken* 国権)" and "they could possess and enjoy equal rights only when they were absolutely obedient to the national power" (Hozumi 1910, vol. 1, 360–369). Thus, the authority of the household head was stipulated in the Meiji Civil Code, forming the idea of a family state supporting the Meiji Constitution. The process of formation of this Meiji state system can perhaps be considered a watering

down of the struggle between the legal traditions of Europe and Japan engaged in by thinkers such as Ono, Nishi, Tsuda, Fukuzawa, and Nakae.

After Japan's defeat in World War Ⅱ, the Meiji Constitution was replaced by a new, democratic constitution under the occupation policies of the General Headquarters of the Supreme Commander for the Allied Powers. This new constitution, promulgated in 1946, adopts the principle of popular sovereignty and states that "the fundamental human rights (*kihonteki jinken*, 基本的人権) by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate."

Yet even though the new constitution was based on a draft drawn up by General Headquarters, we must not overlook the fact that research by the General Headquarters team included items such as the private draft constitution presented by the Kenpō Kenkyūkai (Constitution Research Association), which was grounded in the intellectual legacy of political arguments among Meiji-period scholars and Freedom and People's Rights Movement thinkers (see Koseki 2009, 38–71, 100–101). Even now, the question of how to define the concept of rights and how to root it within political society remains a crucial issue in Japan. The discussion concerning the notion of rights that arose with the opening of the country thus continues to have immense significance for studies of comparative political theory.[4]

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Notes:

([1.]) See Maruyama (1959), Matsuzawa (1993), Miyamura (1996), Howland (2001), Matsuda (2008), Craig (2009), and Watanabe (2010). Their studies, which focus on the multilayered structure of the diffusion and reception of knowledge between Europe and East Asia, have expanded beyond the boundaries of Japanese intellectual history.

([2.]) Some researchers (e.g., Feldman 2000) have questioned whether the notion of rights—as distinct from a specific vocabulary for rights—existed in Japan before the encounter with the Western world, in political institutions such as the estate system known as *shiki*, or in social movements such as peasant rebellions. However, this chapter will not delve deeper into this subject. There are numerous studies concerning the legal and political history of medieval and early modern Japan. See Nakata (1943, 1984), R. Ishii (1960), Asakawa (1965), Kawashima (1967), Maeda (1975), Bix (1986), Hiramatsu (1988), Higuchi (1996), Fujiki (2010), and S. Ishii (2012).

([3.]) Mencius, one of the most prominent Confucians in the third century BCE, when asked "if one's sister-in-law is drowning, may one save her with his hand," replied that "for men and women, in giving and receiving, not to touch one another is according to *li* 礼 (ritual). To save a sister-in-law from drowning by using one's hand is a matter of *quan* 権 (expedience)." (Mencius n.d., 82). In this case, *quan* 権 means weighing the pros and cons to act in the most effective way in practice, even if this deviates from principle. How to understand this relation between *quan* 権 (expediency) and *li* 礼 (ritual), or *dao* 道 (the Way), became a significant issue among Confucian scholars, in whose arguments the Chinese character *quan* 権 also implied the meaning of a scale used for measuring the gravity of things or matters.

([4.]) This chapter was partly based on the author's Japanese article, Ōkubo (2016), and supported by JSPS KAKENHI Grant JP15K03286.

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