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Inside and Outside the New Global Community

Human Rights Discourse in Japan and Beyond

Issues surrounding the "ownership" of human rights discourse are examined in relation to the variety of ways in which this discourse is utilized. It is argued that the instrumentalist language of human rights discourse skeletonizes social reality, while creating interpretive communities and opening up spaces for the dispossessed. To the extent that the discourse enables the creation of a symbolic community, it leads at the same time to the exclusion of some people through the boundary drawing process.

[*human rights, discourse, symbolic community, globalization, re-contextualization*]

Constituting one historically specific way of conceptualizing the relations of entitlement and obligation, *the model of rights is today hegemonic, and imbued with an emancipatory aura*. Yet this model has had complex and contradictory implications for individuals and groups whose claims must be articulated within its terms. (Cowan et al. 2001:1, emphasis mine)

Human rights discourse is powerful and pervasive, and combines two seemingly contradictory characteristics: an emancipatory capacity with a hegemonic, homogenizing and reductive tendency. Even though human rights are represented as pertaining to all human beings, some people and groups are excluded from enjoying them. This paradoxical quality, as well as the widespread use of the discourse, deserves anthropological attention. The relation between anthropology and human rights has been a complex one, often filled with ambiguities and ambivalence (cf. Dembour 1996). The anthropological debate, once focused on universalism of human rights versus cultural relativism, has now moved on to other issues, such as the practice of human rights (Preis 1996) in different contexts. Nevertheless, the shadow of the previous debate still hovers over many current human rights

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works, while cultural relativism has become a part of a number of powerful political discourses which interact with human rights discourse. This happens as certain parts of anthropological work, tools and discourses are appropriated, often by human rights groups (Riles 2006).

One of the paradoxes of the human rights concept, singled out by Dembour, is that formulation of human rights has not yet realized, while, at the same time, the idea of universal human rights has been asserting the status of an “eternal truth” (1996:20). This kind of assertion of timelessness is often characterized as one of the characteristics of ideologies.¹ Thus, it might be fruitful to analyse human rights discourse with respect to its “ideological” uses, as formulated in the question: “whose” discourse is it? In other words, is human rights discourse an instrument of domination of the more influential societies, elites, the particular transnational market forces, or a tool of emancipation for those in need and the means of protecting individuals from states and, increasingly, transnational actors and corporations in a globalising world (Wilson 2006)? This first aspect of human rights discourse will be labelled “hegemonic”.

Another “ideological” aspect of human rights discourse is its role in the symbolic construction of community (cf. Cohen 2004) which will be examined in the context of the creation of a global culture of human rights. I argue that if the creation of human rights culture is understood as a symbolic construction of community, it can be expected that through the process of symbolic construction boundaries will be marked, thus leading to the exclusion of some groups and individuals. In the final section of this paper I will examine examples from the Japanese context in relation to issues of the symbolic construction of community, exclusion, power and translation, in an attempt to shed light on some of the questions posed above, especially in relation to the “hegemonic” and “ideological” aspects of the discourse.

The notion of human rights

Rights themselves are a specific notion that came into being in a particular historic context (as a modern Western concept), indeed, as Jones puts it “there have been worlds without rights” (1994:1). The idea of human rights is historically related to the idea of natural rights (Jones 1994:72), and some authors equate the two, such as John Finnis who uses the terms

¹ Ideologies in the sense used here serve as a part of self-definition and maintaining the identity of a group with the aim of protecting the interests of the group (Van Dijk 1998:26).

synonymously (1988:198). In opposition to legal positivism, which is based on the analytical separation of law from morality, natural law theory conceptualizes law as primarily a moral phenomenon, and traditionally seeks a grounding for law in “nature” or “the natural order of things” (Cotterrell 2003:115-119) and as such *per definitionem* applying to everyone. This view of human rights is closely connected to the understanding that, conceived as valid or morally justified claims, they are a subclass of moral rights and therefore exist prior to and independently of institutions and institutionalized rules (Martin 2005:39).

Natural law theories are usually founded on a certain assumption of human nature or human essence, from which the rights are derived, although understandings of human essence or nature are conceptualized in a variety of ways (e.g. based on the rationality of humans). From an anthropological point of view, this poses a problem, since “no natural characteristic constitutes a reason for the assertion that all human beings are of equal worth. Or, alternatively, that all the characteristics of any human being are being equally a reason for this assertion” (Macdonald 1984:36-37). Not only this aspect of the natural law theories has been criticised, but also its fundamental understanding of rights as prior to institutionalized rules – “whether or not they are embodied in systems of positive law” (Jones 1994:81), in contrast to the theories which conceptualize rights as socially recognized practices (Martin 2005:38-39). Nevertheless, some of the authors have been seeking middle ground, defining human rights as extralegal – “not because they correspond to ‘natural’ moral rights but because they serve to articulate political claims which make sense in a particular social context” (Dembour 1996:33).

What this sketchy outline indicates is that the notion of rights in the human rights syntagm is hardly unambiguous: as Dembour points out, it sometimes refers to enforceable legal rights, while “it arguably refers more often to moral rights which have not yet found their way in legally binding provisions, but hopefully will” (1996:32). In other words, it can be argued that the understanding of human rights as existing prior to their institutionalization or enforcement, i.e. as the “rights possessed by all human beings simply as being human beings” (Jones 1994:81) is perhaps the dominant view in human rights discourse.

Human rights do not exist?

Although human rights are usually conceptualized as rights of all human beings by virtue of them being human, independently of the institutionalization or enforcement of these rights, some authors argue that the only

way in which human rights can be understood is as socially recognized practices. Some authors, such as Donovan and Anderson, go so far as to claim that there are no human rights *per se*, because moral obligations do not inhere in persons but in relationships (2003:163). Moreover, Donovan and Anderson conclude that not only human rights do not exist *per se*, but that this fact can be used in favour of human rights advocates' endeavours, because it absolves them from seeking justifications for rights (for example, some kind of "human nature" or "essence") (2003:164). What is really meant by the statement that human rights do not exist as such? An answer to this question is indicated by Cowan, who explains that universal human rights do not exist "in the sense that rights, including so-called universal ones, are not natural and eternal but always emergent and culturally specific" (2001:27). Thus, the position illustrated by these examples emphasizes the aspect of human rights as socially constructed and produced, as a social practice (Preis 1996). Human rights, therefore, are said not to exist in the phenomenal world, in much the same way as Grillo reminds us of culture, using Vershueren's words: "Though culture is a universal human phenomenon (...) cultures do not exist in any real sense of 'existence'" (2003:160). This is the position underlying Dembour's assertion that rights exist only because they are talked about (1996), implying that they are socially and discursively produced, or even immanent in social relations as a particular form of power, as Wilson argues (1997:14).

The position that prevails in much recent anthropological work emphasizes the historicity of human rights as a concept that came into being in the context of the rise of the modern nation-state (cf. Wilson 1997:16). The historicity of human rights is acknowledged even by authors who nevertheless argue for their universal validity, such as Donnelly² (2003). An approach that investigates human rights as a discourse would therefore seem to be an important part of the anthropological analysis of human rights.

Human rights discourse as a legal discourse

The contemporary discourse³ of human rights has been described by many authors as being predominantly legal (Evans 2005; Hastrup 2001b and

² It must be noted that Donnelly argues for the universality of human rights with the source in man's moral nature, a position which is far from being univocally accepted among anthropologists (2003:14).

³ Definitions of discourse are numerous, ranging from linguistic, focusing on the sequences of verbal exchange (e.g. Van Dijk 2001), to broader philosophical approaches

2006) and as such having certain features pertaining to the language of law in general, as outlined by Bourdieu – the neutralization effect (created by the use of passive and impersonal constructions), and the univerzalizacija effect (created by the use of indefinites and the intemporal present, fixed formulas and locutions, etc.) (1987:820). The Universal Declaration of Human Rights (in further text – UDHR), which is considered to be the central document in human rights discourse, begins with the statement:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in spirit of brotherhood. (UDHR, Article 1)

Kirsten Hastrup gives an interesting reading of Article 1 and draws attention to the natural law underlying this positive legal instrument and to the discrepancy between the two sentences in the article, the first one stating that human beings are entitled to human rights as a fact, and the second one phrased as an imperative. This imperative form undermines the self-evidence of the first part of the article, moving the statement from the realm of what is to the realm of what *ought to be* (2001b:4). She concludes that “legal language, including the language of human rights, celebrates the normative and transcendent, in spite of its positive claims” (2001a:12).

She furthermore argues that human rights discourse is based on modernist assumptions – the faith in progress and Reason, as well as the idea of development towards community based on rationalistic premises of shared values. The human rights, that are a part of these shared values, are at the same time phrased as an unquestionable ahistorical truth but not yet realised (see Dembour 1996:20). Hastrup then concludes that

the language of rights contains both a modernist historical outlook and a timeless mythical charter for global coexistence; by being timeless, human rights are in a sense beyond history. This is in fact a precondition for universalist aspiration, which also of necessity takes us beyond positive law. (Hastrup 2001a:10-11)

One of the characteristics of human rights discourse is thus that it is historically specific, but it conceptualizes and represents rights as eternal

building on the work of Michel Foucault, who understands discourse as a system of representation, producing meaning and meaningful practice (see Hall:72-3). In this article I use discourse in this broader sense, as a conceptual tool for unifying various forms of communication about “human rights”, including but not limited to media reports, legal cases, political statements etc.

and timeless – it can perhaps be argued that this is one of the factors that contribute to it being such a powerful discourse.

This is not the only paradox inherent in human rights discourse – it is formulated to protect persons from the unrestrained power of the state – but it is also used to express claims in relation to other individuals and groups and regulate relationships between them. Moreover, although the discourse of human rights emphasizes equality between humans, many people are *excluded* from the enjoyment of their basic human rights, as is the case with refugees, because it is so closely tied to the context of the nation state (Dembour 1996). It conceptualizes people as having equal value, as individuals, but in practice large categories of people are excluded from protection. The law distinguishes between economic and political refugees, where the first group is not protected at all, being potentially very large in number. The second category is only partially protected under Geneva Convention on the Status of Refugees: the signatory states do not have to allow the political refugees into its territory, but cannot send them back if they are within its boundaries.

In other words, although the ideology of human rights does away with the concept of the state to concentrate on the equal value of all human beings, its practice relies on the way in which individuals are classified in relation to a state. (ibid.:29)

These paradoxes can be translated into the question of the legality of human rights – in other words, human rights can be understood as legal and extralegal at the same time: legal in being formulated through declarations and conventions, often formulated in legal language, in being tied to the context of the state; but at the same time being extralegal. Using the same example of refugees, Dembour argues that the reason for denying rights to people like refugees is not that they are not “legally considered human”, but that the argument should be understood the other way round, that the human rights are basically not legal, and therefore not binding, especially the Declarations. In relation to this last point Dembour (1996) compares the UDHR and the European Convention of Human Rights and shows that the language of the European Convention is more precise and sets up mechanisms for the enforcement of rights, but is less comprehensive than the UDHR.

She closely examines Article 3 of the UN Declaration, dealing with the right to life: “Everyone has the right to life, liberty and security of person”, and its equivalent in the European Convention, Article 2, which begins: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is pro-

vided by law.” After elaborating precisely the conditions for these exceptions it creates a mechanism for its enforcement, such as a Court, and as such it uses a more precise language with this aim of legal enforceability. Yet these precise formulations are significantly more restrictive (ibid.:30). This is just one among many examples indicating that legality, which is tied to the enforceable or at least instrumental aspect of rights, leads to reductiveness and can be constraining for the actors.

Another issue underpins the previous analysis: how is it possible that people can claim their rights as human and be denied those rights as refugees *at the same time*? A part of the answer can perhaps be found in the work of Franz von Benda-Beckmann, who reminds us that “Human beings become citizens, strangers or indigenous peoples by cultural and legal constructions” (1997:3). He further argues that in the same society a variety of different legal and normative orders is likely to be operating simultaneously. Moreover, “within the same political organization there may be a number of normative constructions of the interrelationships between different normative orders” (von Benda-Beckmann 1997:16), thus invoking a complex notion of *legal and normative pluralism*.

This also brings us to the matter of the construction of personhood in human rights discourse. It has often been argued that a legal language constructs the person as a responsible, accountable individual (La Fontaine 1985), and Merry shows the importance of conforming to the

image of responsible personhood: an autonomous choice-maker, rationally determining her best interests, self-governing and self-disciplining. This is the bourgeois legal subject,⁴ crafted at considerable cost from the socio-cultural variability of the world during the Enlightenment in Europe and transplanted through colonial processes. (Merry 2002:341)

Moreover, the human rights discourse operates with “a conditional definition of the legally protected self” which means that persons claiming rights are redefined within the discourse and in order to be able to enjoy their rights have to act like responsible, autonomous subjects – like “good victims” (Merry 2003). She concludes that although claiming rights might empower the new subjects and give them responsibilities for resistance as opposed to the discourse which denies their identities, they also enter a particular kind of society (a sort of “interpretive community”) which is fragmented and exclusive (ibid.:363). Nevertheless, actors are not confi-

⁴ Collier et al. argue that the bourgeois law by claiming to treating everyone equally both ignores the differences and produces them, by constructing the realm outside the law where inequality flourishes (Collier et al. 2002:212).

ned to this new identity and they often move in and out of it (cf. Merry 2003).

This has led some authors, like O'Donovan, to examine the notion of the rights bearing subject which is often characterised as being abstract because "[the legal subject] purports to be universal (...) [and at the same time he is] criticised for his lack of human embodiment, for his lack of diversity (...). It is said that in his abstraction and in his particular choices he excludes women, children, the oppressed and dispossessed" (1996:353). The rights-bearing subject – as constructed in the human rights discourse – is fundamentally individual, and the human rights are envisaged as individual rights. Recently there has been an attempt to include group rights within the framework of human rights, but Hastrup shows how introducing cultural and group rights can undermine the aims of the human rights: "granting rights to particular groups on the basis of their distinction introduces an element of exclusion that potentially subverts the principle of equality" (2001b:182). Therefore, the concept of person underlying the human rights discourse, especially to the extent to which it is a legal discourse, basically continues to be linked to the image of a responsible subject, an accountable individual. In this sense, human rights discourse as a legal discourse does not reflect the diversity of social life. Moreover, it has often been argued that the legalist language is a particularly reductive one and that it does not adequately represent common good (Hastrup 2006:27). One of the main reasons why the discourse as it is does not *represent* common good or communal values, especially in particular local contexts, is that legal languages are not suitable for representation because they need to be transparent in order to be efficient (ibid.:25).

Thus, while Hastrup emphasizes that human rights discourse as a legal language cannot be representational, it does have the ability to "bring into existence that of which it speaks" (2006:20) and reminds us of Geertz's understanding of law as "a way of imagining the real" (Geertz 1983), thus invoking the power of language as a performative resource:

While no legal language can make a claim to representing the world, it can still suggest a particular way of imagining it, and thereby gradually make it real. If human rights law reduces or condenses global complexity to a particular and rather narrow genre of statements, it also – by the same stroke – becomes part of that same complexity, and a significant factor in its transformation. (Hastrup 2001a:21)

Underlying the points raised by all the authors mentioned in this section is fundamentally a question about the nature of the human rights discourse as a legal one, a question also raised by Wilson on representing human

rights violations: this legalistic language is effective because it speaks to the institutions of the nation state, it is a language that can be understood by the state agencies (Wilson 1997:154). Wilson thus draws attention to the way in which the power of human rights discourse is somehow tied to its form, more precisely, the legality of its form and the emergent question: *whether the effectiveness of the discourse of human rights is inescapably tied to its legalism?* The instrumentalism of the legal language is a double edged sword, as has been argued above, creating particular conceptions of personhood, abstract and decontextualized and having the same kind of dehumanizing capacity as the “language of abusive forms of governance” (Wilson 1997:155) but at the same time creating “interpretive communities” with a shared language and opening up spaces for the dispossessed and members of *muted groups* (cf. Ardener 1977:xii).

In his analysis of human rights reports Wilson points to the prevailing legal rhetoric and notes that a significant *decontextualization* occurs in the reports almost as a rule:

Documenting human rights violations is about reporting evidence, not creating a narrative, since it is incomplete and is abstracted from the motivation and intentionality of actors. (1997:145)

In other words – social narrative is *skeletonised* by the law (cf. Geertz 1983). Moreover, the reports construct a specific kind of personhood, they “tend to bifurcate individuals into either victims or perpetrators, but these same individuals might wish to assert another alternative identity (e.g. survivors, freedom fighters)” (Wilson and Mitchell 2006:5). In her analysis of Wilson’s observation, Marilyn Strathern agrees that descriptions of victims strip them of specific social circumstances, such as family and class background, but argues that what is taking place is

not so much detachment from social context as such, a logical impossibility, but the removal of an entity from one context into another. The victim is re-described in the kind of bare detail similar to presumption of (human) equality before the law, the new social context being the universe of others who have suffered human rights abuse. (2004:230)

I agree with the perspective proposed by Strathern and I think that the *re-contextualization* mentioned here is occurring within a new context which is an abstract one, a kind of “imagined community” (cf. Anderson 1983).

Issues of power in human rights discourse have been raised by Tony Evans, who argues that human rights are best understood as three different discourses that are overlapping each other: philosophical, political and legal, the last one being dominant. Evans examines what interests are served by the dominance of the legal discourse over the other two

and asserts that it “acts to reify the freedoms necessary to legitimate market discipline by providing a framework that is promoted as immutable and binding” (2005:1062). The Foucauldian concept of discipline he invokes “refers to a mode of social organization that operates without the need for coercion” (ibid.:1054). Discipline is, thus, internalized and sustained through surveillance, in the case of *market discipline* through surveillance “undertaken by international and regional agencies – for example, the World Trade Organization (WTO), the World Bank, the European Union (EU), and the North American free Trade Agreement (NAFTA)” (ibid.:1057). In his opinion the consequences of human rights discourse are obscured, because

while the discourse makes claims for the pursuit of human dignity and community, it also provides the context where free will, equality within exchange relations, and property converge to create social relations characterized by selfishness, gain and private interests, rather than the pursuit of human dignity and community. Despite the mechanisms of self-discipline at the center of market discipline, there remains a need for authoritative expert pronouncements and idioms when norms are transgressed [which] (...) is the central role of international law. (ibid.:1057)

This argument seems to set the stage for looking into the question of what kind of discourse is human rights discourse: is it primarily a hegemonic one, as Evans’s argument suggests, or is it in the first place an emancipatory and protective discourse? The enforceability of human rights discourse relies on its legality, based on an instrumentalist language which is particularly restrictive, redefining persons as rights-bearing subjects and excluding some at the same time. These issues of exclusion are inseparable from the origin of human rights as a tool for the protection of individuals and groups from the unrestrained rule of governments within the nation-state framework.

Rights and globalization: Creation of a global community?

Human rights discourse and the processes of globalization are connected on many levels: firstly, globalization processes have contributed to the spreading of the discourse of human rights which emerged in particular historic circumstances in the West. Thus, the discourse of human rights has often been described as hegemonic, but at the same time “global rights discourses are appropriated in local communities and (...) global discourses are themselves constructed out of local struggles” (Merry 2002:303). Furthermore, Wilson reminds us that we should not think of

globalization merely as “a process of homogenization and integration, but [as involving] a proliferation of diversity as well” (1997:12). Perhaps looking at these multilayered ties can help to elucidate certain aspects of both “globalization” and human rights discourse.

The criticism of human rights as being primarily individual rights and therefore promoting individualist, liberal values is well known. The origin of human rights as an instrument for the protection of individuals against the state and even the majority wishes embodied in governmental policies (Cotterrell 2003:161) is rarely disputed. Nevertheless, it is often argued that, by being individual, human rights are not necessarily individualist, and that furthermore the idea of human rights is tied to the notion of common good⁵–

human rights are not held solipsistically by isolated Leibnizian monads but by socially situated individuals, in virtue of their shared humanity and social consciousness of the moral significance of human dignity. (Duquette 2005:60)

Moreover, it has even been argued that human rights discourse is a basis for creating a culture of human rights in the sense of a “community of values” and that this culture of human rights is becoming global.

Kirsten Hastrup analyses the concept of a global culture of human rights in the context of morality and the creation of universal morality. On the one hand we are engulfed by images of human suffering in distant parts of the world, on the other hand new techniques of distancing have been created:

(...) globalization not only connects but also disconnects people from each other. Somewhat paradoxically, the satellite-borne images of sufferers elsewhere on the globe tend to fix them as eternal “others” rather than “like us” (...) Intellectuals likewise contribute to the dehumanization of the global space by repeatedly referring to the process of globalization as if devoid of human agency (...) (2006:18)

Hastrup also argues that the “culture of rights” represented as a global culture is a rhetorical figure, a myth representing history and human-made as unquestionable and natural, the point that she makes in relation to the creation of universal morality as mentioned by Zygmunt Bauman

⁵ John Finnis shows how certain expressions (on the example of UDHR) within human rights discourse emphasize communitarian values like “public morality and public order” and stresses that “the human rights can only be secured in certain sorts of milieu – a context or framework of mutual respect and trust and common understanding” (Finnis 1989:216).

(Hastrup 2001b:2, 2001a:8). Furthermore, she adds that every culture, in order to be conceived as a whole has to be represented and perceived as such, in other words, the feeling of community has to be symbolically created (cf. Cohen 2004) and a language is usually a basis for the creation of a shared communal feeling, but as argued earlier, the legalist language of human rights is a particularly reductive one and not well suited for representation (2006:22).

In my view, if the creation of human rights culture is understood as a symbolic construction of community, it can be expected that through the process of symbolic construction boundaries will be marked, thus leading to the exclusion of some groups and individuals. It has been noted that the human rights discourse has both of these features – it creates an “interpretive community” as mentioned above, but although it asserts universal humanity, it is often exclusive in practice, perhaps due to the fact that in their legal aspect human rights are tied to the nation-state. The boundaries of political communities are a focus of the work of Seyla Benhabib in which she examines the tension between the universality of human rights claims as opposed to the exclusivity of particular national identities, “between the expansive and inclusionary principles of moral and political universalism, as anchored in universal human rights, and the particularistic and exclusionary conceptions of democratic closure” (2004:21).

Moreover, the democratic legitimacy of the state seems to be built on this very tension, nation-states granting rights within a particular (bounded) political community, but legitimized by conforming to universal human rights principles (Benhabib 2004:44). This aspect of human rights discourse can be understood as basically ideological. This sort of ideology is invoked in the situation of a loss of orientation, as Clifford Geertz argues (1973:219), which can in turn be related to processes of globalization and rapid change in the contemporary world. Hastrup refers to this aspect of human rights discourse as *the glue of communities* (2001b:7).

The idea of human rights as a global culture can be connected to the wider notion of cosmopolitanism, the human rights “revolution” after 1945 being heralded as its greatest achievement (Bauböck 2002:115). As the exclusionary practices resulting from the discourse of human rights can be partially understood as a consequence of its tie to the context of the nation-state, it is interesting to note that “[i]n contrast to multiculturalism, cosmopolitanism is now increasingly invoked to avoid the pitfalls of essentialism or some kind of zero-sum, all-or-nothing understanding of identity issues within a nation-state” (Vertovec and Cohen 2002:3).

Cosmopolitanism in this sense, “largely following Kant, (...) refers to a philosophy that urges us all to be ‘citizens of the world’, creating a worldwide community of humanity committed to common values” (Vertovec and Cohen 2002:10). As the human rights model seems to fit perfectly the intention of advocates of cosmopolitanism, it might be useful to take a look at some of the criticism pointed toward ideas of cosmopolitanism: “communitarians say that commitments to broad cosmopolitan ideals represent a view that ‘embodies all the worst aspects of classical liberalism – atomism, abstraction, alienation from one’s roots, vacuity of commitment, indeterminacy of character, and ambivalence towards the good’”. The argument set out by Martha Nussbaum that can be used in defence of cosmopolitan ideals is: “we think of ourselves not as devoid of local affiliation, but as surrounded by a series of concentric circles” and multiple affiliations (cf. Vertovec and Cohen 2002:12).

Finally, it might be interesting to look at a tendency mentioned by Vertovec and Cohen, towards a proactive approach in promoting a shared set of values, a sort of cosmopolitan community (2002:2); doubtless, this does resemble the hegemonic aspect of human rights discourse, which brings us once again to one of the central questions underlying this analysis: whose discourse is it – is it primarily a dominant, hegemonic discourse or a discourse of the disempowered, an emancipatory discourse of the dispossessed? Hopefully, at this point it is clear that there can be no simple answer to this question. Although it is difficult to dispute the fact that the human rights discourse is a powerful, if not hegemonic one which produces exclusions, Merry reminds us that it has also been appropriated and reappropriated by various groups: “Groups such as indigenous peoples, ethnic minorities, and women (...) as well as military officials and government employees (...) use human rights language and techniques” (2006:38) serving some of them as an emancipatory discourse, others as a legitimating discourse.

The argument against an understanding of human rights discourse as primarily a “hegemonic” one is made by Richard Wilson, based on the concept of legal pluralism as being present in all societies: “being subject to overlapping local, national and transnational legal codes. These normative orders are (...) hierarchised according to shifting power inequalities” (1997:11). Furthermore, he argues that “[j]ust because a cultural form is global, it does not mean that everyone relates to it in the same way – its interpretation depends on local and individual value distinctions” (ibid.:12). In examining this issue – the hegemonic and ideological aspects of the discourse, as well as the ones discussed in the previous chapters, it might be useful to look at a particular example – the example of Japan.

Human rights discourse and Japan

Although the “universalism of human rights vs. cultural relativism” debate has slowly moved out of the focus of theoretical attention in the 1990s (even though it was not finally resolved), it took a particular form in the East Asian context. It was based on a cultural relativist position which has been formulated in terms of “Asian values”: the argument underlying it is a derivative of the argument that “runs that the individual logic of the human rights ideology does not suit the more communitarian logic of Non-Western societies” (Dembour 2001:59), in particular with the “Asian values” of community and harmony which are asserted to be superimposed on individual interests.

Inoue argues the inauthenticity of “Asian values” and labels the discourse based on this concept and rejecting human rights as inadequate for Asian societies as an *Orientalising* (Said 1978) discourse, resting on the abuse of “Western normative language” (Inoue 1999:30). Inoue singles out three main fallacies of the “Asian values” discourse: it draws power from asserting the sovereignty of the state, although it is a concept originated in the West, like the human rights concept which it rejects for its origin; secondly, East Asian governments sometimes consider human rights as temporarily unattainable, at least until subsistence is assured and significant development achieved, but “they fail to see the importance of political liberties for the realization of rights to subsistence” (ibid.:35). Finally,

The Asian values discourse does not confine itself to a strategic manipulation of Western principles. It goes further to assert Asian cultural uniqueness, based on the old dualism of Asia as the Orient and Euro-American countries as the Occident. (ibid.:37)

“Asian values” rhetoric, similar to the cultural relativist critique in general, is based on the underlying “essentialist” view of cultures as bounded and static entities that “determine individual and collective identities and the subject’s place in social and political schemes” (Grillo 2003:160, emphasis IK). Cultural relativist discourses in Japan (both scholarly and public) are part of a wider body of work known as *Nihonjinron*. *Nihonjinron* genre is a very popular body of works about Japanese (it means literally “discussions of the Japanese” or “treatises on Japaneseness”). As Kelly explains,

the term refers particularly to a publishing boom of national character studies in Japan that has engaged academic scholarship and the mass media for the last 30 years – “Who are we Japanese” the *Nihonjinron* literature asks, and it answers the question not for the historical moment but for all time. (1988:365)

Thus, the *Nihonjinron* discourse has at least one characteristic of ideology – historical particularities represented as timeless truth. This is precisely what has been argued by many social scientists writing about this genre – that it is a cultural ideology (Dale 1986; Marfording 1997).

This genre is very wide and it covers topics ranging from language, decision-making and economic success to Japanese sensitivity, but as Dale argues in his book with an expressive title “The Myth of Japanese Uniqueness”, there are some common characteristics of this vast literature:

In contrast to modern empirical research on Japan, the *Nihonjinron* are characterized by [several] major assumptions or analytical motivations. Firstly, they implicitly assume that Japanese constitute a culturally and socially homogeneous racial entity, whose essence is virtually unchanged from prehistorical times down to the present day. Secondly, they presuppose that the Japanese differ radically from all other known peoples. (1986:35)

Dale points to some common underlying ideas that are used to explain and define Japanese “uniqueness” and shows that many of these essentialist conceptualizations of Japanese culture are connected with some form of biological determinism, or give explanations in terms of historical means of production. One thing these various writings have in common is their construction in opposition to the other, usually the West.

It can be argued that this conceptualisation in contrast to some other entity is a widespread mechanism through which groups construct their identity, and that is precisely the context in which we should analyse the discourse of “uniqueness” of Japanese culture – as one way of “symbolic construction of community”, to use Anthony Cohen’s term. Moreover, Cohen asserts that “the symbolic expression of community and its boundaries increases in importance as the actual geo-social boundaries of the community are undermined, blurred or otherwise weakened.” Thus, the proliferation of works implying or explicitly asserting the “uniqueness” of Japanese culture in the period after the “opening-up” of Japan can be understood in the context of her internationalization (cf. Hook 1992:2). This is the context in which the “Asian values” discourse, which *a priori* rejects human rights as Western, should be understood (cf. Marfording 1997).

However, rejection of oversimplified polarized value oppositions connected to “essentialized” understandings of culture does not mean a denial of the specificity of the “local” context. In the case of Japan, this is the context of plural normative and legal systems that have developed over time, in what could be described as “layers”, with various influences from the outside in different historic periods. The concept of rights did not exist in the Japanese language prior to its introduction in the 19th century,

when the concept was introduced from the translation of an international law text into Chinese. The characters used in this new translated concept implied “consideration of profit”, which hardly had positive connotations for Japanese (Ishida 1986:12-13). The term was used in the Meiji Constitution of 1889, but in the beginning denoted primarily the rights of the state in relation to other states, in the international context into which Japan was forced, and it mostly did not refer to personal rights – “domestic society in Japan would have to adjust its laws and political structures in order to actualize the idea of personal rights – precisely the issue dominating the Japanese politics between 1874 and 1890” (Howland 2002:129). This was a period when Japan was often depicted as backward and even inferior because of the lack of protection of personal rights, (e.g. women’s rights), both in the international and domestic political discourses (Saso 1990:40).

In post-war Japan the fundamental document for the analysis of the context for human rights is the Constitution (that expresses commitment to human rights) written under occupational forces in 1947, but although the Japanese people as a whole were not involved in its adoption, it has not been revised up to this day (Neary 2002:20). The national referendum on constitutional reform has recently been made possible by the passage of the new national referendum law, but the changes proposed are not likely to influence the parts important for this analysis. Moreover, it is interesting to note that Prime Minister Abe, calling for a “bold review” of the Constitution, pointed out that “[t]he fundamental values – the principle that sovereignty rests with the people, basic human rights and pacifism – these have become accepted common values of the Japanese people over the 60 years [since the Constitution was passed]” (Nihon Keizai Shinbun 2006, 13 November). This relatively recent example can perhaps be interpreted as the case of legitimizing use of human rights discourse, as a legitimation for the state and government actions both in the international context and in relation to its citizens.

Nevertheless, this does not mean that foreign concepts and legal framework were introduced from outside and remained unchanged. Williams, in his book on “The Rights to Life in Japan” shows that

the foreign concept of the right to life has been modified in the course of internalization both by structures inherent in Japanese society and by that society’s tendency to emphasize the particular social nexuses which stand against the right to life provision. (1997:100)

This can be explained in terms of normative and legal pluralism – Williams shows that the new legal system coexists with the previous ones,

which are not completely abolished and parts of these lower, older, layers sometimes permeate the new system superimposed on them (ibid.:100). Thus, looking at a formal and institutional level the “hegemonic” aspect of human rights discourse might be present to some extent, the present legal system in Japan being to some extent a result of the pressure of international society, but can hardly be understood as absolute, because

the local appropriation of transnational institution (...) transforms underlying cultural categories and practices. However, at the same time, the appropriated institution is itself adapted and transformed. (Merry 2001:49)

In the institutional context, translation seems to be an extremely important aspect of local (re)construction of the human rights framework, especially in a case like this, where the term “rights” itself was not known and had to be introduced through translation. An interesting case in point is given by Goodman with respect to the introduction of the UN Convention on the Rights of the Child into Japan:

It is of no little significance that there exist in Japan three competing Japanese translations of the Convention (...) – by the government, by the Japanese Branch of UNICEF and by the Kokusai Kyoukuhou Kenkyukai – each of which represents most closely the interpretation of the Convention that each group would like to see implemented. (Goodman 1996:110)

This example of the control over the discourse can be linked to the ideological aspect of the discourse and the process of *recontextualization* which involves “an act of control, and in regard to the differential exercise of such control the issue of social power arises” (Bauman and Briggs 1990:76).

Translation is just one part of a wider process of recontextualization, labelled “vernacularization” by Merry, referring to the ways in which transnational ideas are reshaped and adapted to local institutions and meanings. She introduces another useful term – indigenization, referring to

shifts in meaning – particularly to the way new ideas are framed and presented in terms of existing cultural norms, values, and practices. Indigenization is the symbolic dimension of vernacularization. (2006:39)

These notions can both be related to the wider notion of cultural translation and questions of how concepts can be translated between social and cultural contexts. The main problem with cultural translation, as Edwin Ardener pointed out, is maintaining the distinction; otherwise we are facing the threat of the “paradox of total translation” or “a total remapping of the other social space in the entities of the translating one” (Ardener 1989:178).

Along these lines, Hastrup reminds us that cultural translation “must be about disequation rather than equation. Cultural translation is about maintaining distinctions, not about obliterating them” (2001a:16). This is a problem that anthropologists face all the time, and it seems to be the problem that human rights advocates and activists face in various local contexts, having to balance between two poles of presenting human rights, both as something familiar and as something introduced as new – presenting human rights in a way that is likely to be adopted and understood but presenting them as a part of an existing framework that does not help to foster change and does not open the space for emancipatory action (see Merry 2006:41). The different translations of the Declaration of the Rights of the Child mentioned above are likely to be distributed along this continuum, the one whose intention is to introduce change perhaps less presenting the rights of the child as something already present as a norm.

One aspect of *vernacularization* of human rights was indicated in the book “The Ritual of Rights in Japan”, an analysis of “new rights” movements and patient’s rights in particular by Feldman, in which he shows that

rights talk in Japan appears most likely to be used in conflicts where there is more than one individual who believes s/he is aggrieved. Because the cultural myths about rights powerfully suggest that asserting rights is a sign of selfishness and conceit, people are understandably reluctant to individually (...) assert their rights. (2000:163)

His book shows how the human rights discourse in Japan is gaining prominence in recent times, but is used in a quite different way than in the American context: litigation, for example (especially in the individual cases) is still rare and not widely acceptable. Thus, although human rights discourse is introduced from the outside and is gaining a certain impetus, it is also providing certain groups with a language to express their position, but is used in a specific way within the “local” context.

A specific use of the discourse in the Japanese context, as in the case of claiming (personal) rights in groups, rather than individually, can to some extent be linked to the issue of the construction of personhood. Although it has been shown that it is important to avoid the danger of “essentializing” certain cultural traits, as in the case of “Asian values” rhetoric, it can still be asserted that human rights discourse is tied to a very specific notion of the person, constructed as an autonomous, responsible, rights-bearing subject or individual. On the other hand, even if we reject the idea that the Japanese have a specific kind of self, “socio-centric self”, a kind

of self dependent on others, as opposed to Western “egocentric self” (cf. Lindholm 1997), as well as other disputed concepts bringing us back onto the terrain of *Nihonjinron*, it can be noted that the concept of person underlying human rights discourse in general is to some extent at odds with some of the values prevailing in Japanese society with the importance placed on cooperation and group belonging (Nakane 1967) – although, of course, these social values are not absolute, the same in all segments of society and unchanging. Finally, it should not be forgotten that although it is reasonable to look at human rights discourse within the framework of Japan as a unity – a nation-state (because of the importance of institutional context) it is necessary to remember that Japan is not a homogeneous society (as of course no society ever is), even though it is often represented as such. In fact, as Wiener argues in his book “Japan’s Minorities: The Illusion of Homogeneity”, Japan is inhabited by diverse populations and minorities that were not only excluded but also concealed under the master narrative of cultural and racial homogeneity (1997). Furthermore, although the ruling elites and the *Nihonjinron* literature often depict Japanese society as classless (Okomoto and Rohlen 1988; Nakane 1967), the social diversity should not be underestimated. This is important in the context of an analysis of human rights discourse because the uses of discourses vary among different social groups within the same society; the government can use such discourse as a part of their legitimizing strategy, while some “muted” or discriminated groups can use it as an emancipatory tool (as in the case of “new rights” movements in Japan). Moreover, the position of minority groups is closely related to the issues of exclusion in the case of human rights discourse in the nation-state context, as discussed above.

In relation to the central question underlying this analysis, “whose discourse is it?”, it can be concluded that human rights discourse in Japan serves different groups and persons and to a variety of purposes. Firstly, it has been introduced under the influence of international society, which represents a “hegemonic” aspect of the discourse. Secondly, it has also been used for legitimation by the state and the government, both in relation to its citizens and the international society, thus reflecting an “ideological” aspect of human rights. The discourse has also been used by persons and groups seeking to improve their position, like the participants of “new rights” movements. Although the discourse is based on a certain concept of person as a responsible, autonomous rights-bearing subject, and is to some extent alien to the Japanese context, it has not remained unchanged, neither on the grass-root level (cf. Feldman 2000) nor on the institutional one (cf. Williams 1997).

Concluding remarks

It has been shown that the human rights discourse is to a large extent legal and as such is quite reductive, which has led to the question of whether the effectiveness of the discourse is tied to its form. Doubtless, to the extent to which the effectiveness of the discourse is understood in terms of its enforceability, its legal form with all its negative “skeletonizing” (cf. Geertz 1983) effects seems unavoidable. However, human rights discourse is not confined to its legal aspect; it also serves in many other contexts and is used in a variety of ways by different actors, and opens up spaces for thinking about rights which have not yet been realized and might not be enforceable but provide an emancipatory space.

Even though the capacity of human rights discourse for acting as a basis for a *global* culture of human rights, a kind of *worldwide* imagined community of values is disputable (for a number of reasons, one of them being the reductiveness in terms of representation of social variability and semantic hollowness of the legal language it is based on; cf. Hastrup 2001b), it can be argued that it does offer ground for agreement⁶ and serves as a shared language, thus creating some kind of “interpretive community” (Preis 1996). At the same time, and in a way which can be understood as typical of the symbolic construction of community (cf. Cohen 2004), it creates boundaries and exclusions: by constructing persons as rights-bearing subjects and thus constructing conditional definitions of subjectivity, and excluding those who do not conform to this construction or do not fit in it; and also because of the paradoxical nature of the discourse, which is in its instrumental aspects still largely tied to the context of the nation-state, thus excluding those with an unclear relation to the state, such as refugees.

In asking “whose discourse it really is” we are in fact posing a question about the ways the discourse can be used, depending on who uses it. There are at least four elementary ways in which the human rights discourse is used: firstly, to protect individuals and groups from oppression by the state, the primary aim in the historical context of the creation of the discourse after the Second World War; secondly, to promote the interests of individuals in relation to other individuals (as was shown in the case of battered women claiming their rights in relation to their husbands and to

⁶ Martha Nussbaum argues that the language of rights plays a significant role in public discourse for a number of reasons, one of them emphasizing the aspect of human rights as a ground for agreement: “the language of rights preserves a sense of the terrain of agreement” (Nussbaum 1997:296).

society in general, as described by Merry 2003); thirdly, the use of human rights discourse as a legitimation for democratic nation-states, and finally the use of the discourse as pressure against the state in an international regime, which could be labelled as a “hegemonic” aspect of human rights discourse (e.g. in the case of Japan after the Meiji Revolution when Japan was characterized as backward).

Thus, it is clear that discourse can be used in various ways by different groups, as has been shown using various examples from the Japanese context. Moreover, as the analysis of the various conceptualizations of the notion of human rights shows, the discourse itself is not homogeneous, because it rests on a plurality of conceptualizations, theoretical elaborations and justifications of rights. Nevertheless, despite the fact that the discourse itself comprises different “dialects” (Glendon 1991:xi) and can be put to a variety of uses, there is a good reason to conceptualize it as unitary, because its representation as unity is part of the discourse’s pervasiveness and power. In fact, this unity of a discourse and its variability from within are not in contradiction, because it is perhaps necessary for a discourse asserting universality to be flexible or “fluid”. Finally, as Wilson (2006:78) points out, “the doctrinal ambiguity of human rights talk provides one explanation for its apparent success in bringing together a broad range of distinct, and sometimes openly contradictory, kinds of political claims.”

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Unutar i izvan nove globalne zajedice. Diskurs ljudskih prava u Japanu i drugdje

Sažetak

U članku se razmatraju pitanja "vlasništva" nad diskursom ljudskih prava i nudi njegova antropološka analiza, posebice s obzirom na njegove pravne izvanpravne aspekte. Središnje pitanje "čiji je diskurs ljudskih prava", odnosi se na različite načine na koje se koristi. S jedne strane, radi se o utjecajnom diskursu koji za posljedicu nerijetko ima isključenost određenih kategorija ljudi, dok je ga s druge

strane preuzimaju i za svoje svrhe koriste različite skupine. Diskurs se, u tom smislu, prevodi u novim okolnostima i rekontekstualizira, što je prikazano na primjeru Japana. Instrumentalistički jezik ljudskih prava *skeletonizira* društvenu stvarnost, dok istovremeno omogućuje stvaranje *interepretativne zajednice* i otvara prostor za obespravljene. Njegova učinkovitost kao pravnog jezika često je upravo povezana s njegovim ograničavajućim aspektima. Štoviše, stvaranje simboličke zajednice koju omogućuje samo je po sebi popraćeno isključenjem nekih osoba u tijeku procesa povlačenja granica. U zaključku, prividne kontradikcije i paradoksi ljudskih prava interni su i inherentni diskursu samome.

[*ljudska prava, diskurs, simbolička zajednica, globalizacija, rekontekstualizacija*]