IMPACT OF INTERNATIONAL HUMAN RIGHTS STANDARDS ON NATIONAL LEGISLATION: JAPANESE PERSPECTIVE

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INTRODUCTION

Article 98 of the 1946 Japanese Constitution provides:

> This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.
>
> The treaties concluded by Japan and established laws of nations shall be faithfully observed.[1]

According to the established scholarly opinion, an international treaty has a status in the Japanese legal system that is intermediate between the Constitution and national legislation.[2] This means that the Constitution is superior to the international treaty but that the international treaty is superior to national legislation. Such an interpretation reflects the second sentence of Article 98 of the Constitution, quoted above.

This hierarchy of laws does not mean that national legislation incompatible with an international treaty is thereby rendered null and void. According to Japanese court decisions, as will be seen later, an international treaty does not confer rights on individuals directly; it only imposes obligations on the state parties to that treaty. This does not mean that international treaty provisions have not, in some matters, had substantial influence on the Japanese legal system[3]; it simply means that the overall impact on the judicial system has been rather limited.

This tendency can be seen in the context of human rights protection. In many cases, Japanese courts have declined to hold a provision of national legislation to be incompatible with international human rights instruments. This reluctance of

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[1] Japanese Constitution, Promulgated on November 3, 1946 and entered into force on May 3, 1947.

[2] Koji Sato, *Nihonkoku Kenpou Ron* [Treatise on Japanese Constitution] (Tokyo: Seibun dou, 2011) at 89.

[3] For example, the result of the following led to the total reformation of the Japanese liquor tax law: GATT/WTO: *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* (November 10, 1987) online: World Trade Organization <http://www.wto.org/english/tratop_e/dispu_e/87beverg.pdf>.

the Japanese judges to declare the incompatibility of national legislation has been subject to criticism both from Japanese and foreign experts in international human rights law.

The present article discusses the impact of international human rights standards on the Japanese legal system. It begins by briefly introducing the relationship between international treaties and national legislation, especially before the Japanese courts. Through the discussion, the attitude of Japanese judges towards international human rights norms is discussed. The article then considers some typical cases to show how certain international human rights standards have had a strong impact on Japanese national legislation. It focuses on the particular issue of social security by presenting analysis of relevant case decisions. This focus departs from the more usual practice of discussing the impact of international human rights standards through the lens of civil and political rights. By focussing on social security issues, particularly public assistance, this article aims to demonstrate that the impact of international human rights, especially in relation to economic, social and cultural rights, is much broader than it is usually thought. The article concludes with a brief conclusion.

INTERNATIONAL HUMAN RIGHTS STANDARDS WITHIN THE JAPANESE LEGAL SYSTEM

In this section, there are three points to discuss. Subsections 1 and 2 address the approach of Japanese judges to the application of international treaties in domestic proceedings and thereby makes clear a general reluctance to incorporate international standards into domestic law, especially in human rights cases. The practical impact of international human rights standards is examined in subsection 3. The focus is not so much on the judges but on other aspects of the Japanese legal system. For example, the Japanese government amended discriminatory domestic legislation as a result of media coverage and in response to recommendations made by UN bodies. Notwithstanding such impacts, important issues remain unresolved in the Japanese legal system.

1. Status of International Treaties Before Japanese National Courts

Pursuant to Article 98 of the Japanese Constitution, an international treaty becomes part of Japanese law upon ratification without the necessity of any legislative act to give it force as part of domestic law (theory of general acceptance).[4] As mentioned above, a treaty has superior legal effect in the Japanese legal system to ordinary domestic legislation but is subject to the superior law of the Constitution. This hierarchy does not necessarily mean, however, that legislation is null and void

[4] Hisashi Oda, *Japanese Law*, 3d ed (Oxford: Oxford University Press, 2009) at 41.

because it conflicts or is inconsistent with a provision of an international treaty to which Japan is a state party.[5]

What then is the consequence when national legislation is found to be in conflict with an international treaty? Can litigants succeed in their claims by arguing that a provision of national legislation is a nullity because of an inconsistency with a provision of a treaty? In other words, what effect does a Japanese court give to a treaty?[6] The general answer is quite simple: a Japanese court will not give effect to such a claim because a treaty, by its nature, creates only legal obligations between states. A Japanese court will only directly apply a treaty in domestic proceedings if it is properly characterized as "self-executing".

The theory of the "self-executing" treaty derives from American jurisprudence. In the Japanese context, two requirements must be met in order for a treaty to be characterized as "self-executing" and thereby directly applied by Japanese courts: (i) whether the parties have not excluded the direct applicability of the treaty as a whole (exclusion of direct applicability as a whole) and (ii) whether the treaty provision in question is sufficiently precise and complete in itself as to be directly applicable (precision of the terms).[7]

In most cases which have addressed the issue, the treaty in issue does not contain individual rights in a clear way so as to characterize the treaty as "self-executing". Notwithstanding this practical limitation, the doctrine of the "self-executing" treaty has had such a strong influence on the Japanese judiciary that it became a *de facto* barrier to the direct application of international treaties in domestic law.

A typical example can be found in *X v Government of Japan*, a case concerning compensation for injuries suffered by persons during the Second World War (WWII).[8] At that time, about 40,000 prisoners of war were detained by Japanese

[5] Recently, the Japanese Government ratified the *UN Convention on the Rights of Persons with Disabilities*. In the process of ratification, the Japanese government enacted laws in order to comply with the duties enshrined in the Convention. These included a general law for persons with disabilities, together with a law that prohibits discrimination based on disabilities.

[6] A national law that is contrary to an international obligation does not constitute an excuse. This is enshrined in the 1969 Vienna Convention on the Law of Treaties (Articles 27 and 46). Since the main topic here is the domestic application of a treaty before the national court, that issue is not dealt with here.

[7] Yuji Iwasawa, *International Law, Human Rights, and Japanese Law* (Oxford: Oxford University Press, 1998) at 46-47.

[8] *X v Government of Japan*, [1998], November 30, 1998, Tokyo District Court, 1685 HANREI JIHŌ [Journal of Chronicles of the important cases in Japan] 19; *X v Government of Japan*, [2001], October 11, 2001, Tokyo High Court, 1769 HANREI JIHŌ 61.

military forces in concentration camps in the Dutch East Indies (now Indonesia). Dutch ex-prisoners of war claimed compensation for the injuries they suffered through inhumane treatment and for their forced labour during their periods of detention. The plaintiffs filed a civil action against the Japanese government, invoking Article 3 of the 1907 *Hague Convention Concerning the Laws and Customs of War on Land*,[9] as well as customary international law. Before the Japanese national court, the plaintiffs argued that Article 3 of the Hague Convention created a direct right to individual compensation for their treatment and forced labour.[10]

The Tokyo District Court rejected the claim based on the Hague Convention because the Convention does not stipulate any detailed formalities for individuals to claim individual rights. According to the Court, Article 3 provides that a belligerent party is liable to pay compensation in the case of a violation of the Convention but it does not provide detailed procedural formalities for such compensation, nor the right of individuals to receive compensation.[11] The 1907 Hague Convention is itself silent on an individual right to compensation and the *travaux préparatoires* (drafting history of the treaty) did not indicate that the parties to the treaty intended to confer the right to reparations on individuals. On appeal, the Tokyo High Court affirmed the reasoning of the District Court and also concluded that the second condition for self-execution was not satisfied.[12] Similar analysis is found in cases dealing with international human rights conventions.

The Japanese Code of Civil Procedure limits the grounds of appeal to the Supreme Court of Japan to claims based on a contravention of a provision of the Constitution.[13] The Code does not recognize, as a ground of appeal, a claim based on an international treaty. The same limitation appears in the Code of Criminal Procedure.[14]

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[9] Adopted on October 18, 1907, 36 Stat. 277 (entered into force on January 26, 1910). Article 3 provides:

> A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

[10] According to Iwasawa, "Friz Kalshoven wrote an Opinion on the 1907 Hague Convention for the plaintiffs and testified as a witness [on their behalf] before the Tokyo District Court", Iwasawa, *supra* note 7, at 181. Clearly, Professor Kalshoven, relying upon the *travaux préparatoires*, was of the opinion that the Convention grants a right for compensation to individuals.

[11] *X v Government of Japan*, [1998], *supra* note 8.

[12] *X v Government of Japan*, [2001], *supra* note 8.

[13] *Code of Civil Procedure*, Law No. 109 of 1996 (adopted on June 26, 1996, finally amended on May 8, 2012). Article 312, paragraph 1 of the Code.

[14] *Code of Criminal Procedure*, Law No. 131 of 1948 (adopted on July 10, 1948, finally amended on November 27, 2013). Article 405 of the Code.

In general, Japanese judges have been reluctant to apply international norms to domestic cases. One of the reasons for this reluctance may be the fear that Japanese national legislation will be overturned by the external legal order not familiar to Japanese jurists, including both practising lawyers and judges. As noted above, the theory of self-execution serves as a *de facto* barrier to a claim grounded in the provisions of an international human rights treaty but that does not mean that respect for international human rights has no place in the Japanese legal system. Though Japanese courts do not rely on international instruments directly to protect human rights, the courts instead tend to the view that the provisions of human rights treaties are equivalent to the relevant human rights provisions in the Constitution; therefore, Japanese courts need not adjudicate such claims based on the treaties directly.

This approach requires careful attention. First, not all of the human rights provisions found in the Constitution are the same as international human rights standards. For example, it is often said that the definition of discrimination for the purposes of the Constitution does not reflect the concept of gender, as enshrined in the 1979 Convention on the Elimination of All Forms of Discrimination against Women [15] and 1965 Convention on the Elimination of All Forms of Racial Discrimination[16]. Secondly, there are differences as to the normative scope of rights. For example, the Japanese government does not recognize a right for non-Japanese nationals who are resident in Japan, even persons with permanent resident status, to return to Japan as his or her country. This position is contrary to the generally accepted interpretation of the 1966 International Covenant of Civil and Political Rights (ICCPR) which expressly provides for a right of return.[17] Another example of difference related to the general restriction of rights. Like the Canadian Charter of Rights and Freedoms, the Japanese Constitution contains a general rights limitation clause which grounds limitation with the concept of "public welfare".[18] There are many instances of rights expressed in international human rights instruments which have no corresponding limitations clause.

[15] Adopted December 18, 1979, 1249 UNTS 13 (entered into force September 3, 1981).

[16] Adopted March 7, 1966, 66 UNTS 195 (entered into force January 4, 1969).

[17] Adopted December 16, 1966, 999 UNTS 171 (entered into force March 23, 1976). Article 12, paragraph 4 of the ICCPR stipulates: "No one shall be arbitrarily deprived of the right to enter his own country." In the General Comment on the CCPR, "the right to enter his own country" is broader than the concept of "country of his nationality" (General Comment No. 27: Freedom of Movement (Article 12), UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999), at para. 20). Japanese courts, relying upon the principle of state sovereignty, restrict the right exclusively to "the country of nationality" and do not recognize the right of return for permanent resident foreign nationals; compare *Morikawa Catherine v Government of Japan*, [1992], November 16, 1992, Supreme Court, 166 SHŪMIN [Collection of Civil Judgments of the Supreme Court] 575.

[18] Japanese Constitution, *supra* note 1. See the Articles 12 and 13 of the Constitution, *infra* note 28.

Thirdly, and more importantly, the courts approach to assimilating international human rights standards with Japanese constitutional rights has its own challenges because, in effect, it completely ignores the international standards. It follows that inconsistencies between the Constitution and international human rights standards are immunized from judicial review and there is no external and critical review of the Constitution based on consistency or compatibility with international human rights standards.

Given this legal context, it was difficult for Japanese litigants to challenge domestic legislation on the basis of incompatibility with Japan's international treaty obligations, especially Japan's international treaty obligations in relation to human rights. Of course, there are several cases where judges at the District Court level recognized the direct applicability of the ICCPR[19] by finding that the relevant provisions of the ICCPR were "self-executing" by their nature or wording.[20] However, given the narrow scope of the concept of a "self-executing" treaty, reliance on international human rights standards to ground a successful challenge to domestic legislation is difficult.

2. Indirect Application of International Human Rights Standards

Recently, a new approach has developed for the domestic application of international human rights standards. This approach is often referred to as indirect application. The theory of indirect application originates from the application of constitutional rights between individuals (horizontal application of human rights norms). In the absence of a general recognition of the application of human rights norms in Japanese law (except in certain limited areas), judges relied upon general provisions of the Civil Code, including in relation to tort and public order, to rationalize the recognition of the applicability of constitutional rights between individuals. This is well illustrated by acceptance of a different retirement age applicable to men and women, a difference at one time commonplace in Japan. A group of women challenged this as unconstitutional and filed a civil action against their employer seeking equality with the male employees. In its judgment, the Japanese Supreme Court interpreted the public order provision of the Civil Code (article 90) in conjunction with the constitutional recognition of the principle of non-discrimination (article 14 of the Constitution).[21] Based on its interpretation of these general provisions, the Japanese Supreme Court held the labour contract null and void in so far as it discriminated on the basis of sex in setting different retirement ages for male

[19] Iwasawa, *supra* note 7 at 118-119.

[20] *Ibid* at 51.

[21] *X v Nissan Motors Co. Ltd*., [1981] March 24, 1981, Supreme Court, 35:2 MINSHŪ [Supreme Court Civil Cases Reporter] 300, 998 HANREI JIHŌ 3.

and female employees. Today, discrimination on the basis of sex is clearly prohibited in Japanese labour law.[22]

The same approach is taken in cases involving international human rights standards. Typical examples are found in racial discrimination cases. For example, in one case, a woman of Brazilian origin was refused entry to a jewellery shop when the owner recognised she was not Japanese. The owner justified this act of discrimination by claiming that foreigners, at that time, were committing robberies and he had posted a sign which read "No foreigners admitted". The woman brought a civil action claiming damages based on the tort law provisions of the Civil Code. The District Court recognised the claim, finding that the discriminatory act in question constituted tortious misconduct.[23] The District Court noted that racial discrimination is prohibited under the Japanese Constitution though it is not considered to be a criminal offence. Another District Court decision applied the same approach to the case of a man with Japanese nationality but non-Japanese origin who was denied entry into a public bath facility because of his nationality.[24]

The same approach has been applied to disputes governed by administrative law, a situation in which the Constitution has direct application. One such case concerned minority rights in the context of proceedings concerning expropriation of land. The government had decided to construct a dam in Hokkaido, a northern region of Japan, and had initiated legal proceedings to expropriate land for the construction project. A group of plaintiffs, members of ethnic minorities in the Hokkaido area, sought an injunction to prevent the expropriation. They claimed that the expropriation and construction would jeopardize their cultural connection to the land[25] and that the expropriation proceedings had failed to give appropriate consideration to the connection between the land and their cultural life and activities. In the absence of any express constitutional provision protecting minority rights, the plaintiffs invoked Article 27 of the ICCPR (protection of minority rights provision) to support their challenge to the administrative proceedings.

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[22] Labour Standard Law, Law No. 49 of 1947 (adopted on April 7, 1947, finally amended on June 27, 2012). Article 4 of the Law provides:

> An employer shall not engage in discriminatory treatment of a woman as compared with a man with respect to wages by reason of the worker being a woman.

[23] *X v Y*, [1999], October 12, 1999, Shizuoka District Court, Hamamatsu Branch, 1718 HANREI JIHŌ 92.

[24] *Arudou Debito v Y & Otaru City*, [2002] November 11, 2002, Sapporo District Court, 1806 HANREI JIHŌ 84.

[25] *X v Committee on Expropriation of Hokkaido & Government of Japan*, [1997] March 27, 1997, Sapporo District Court, 1598 HANREI JIHŌ 33 [Nibudani Dam case]. For the summary of the judgment in English, see the anonymous translation (1998) in 41 THE JAPANESE ANN. INT' L L. 92; Tokushiro Ohata & Takahide Nagata, "Illegality of the Expropriation of Ainu Land in View of Their Rights as an Indigenous People: The Nibudani Dam Case" (1997) 18 WASEDA BULL. COMP. L. 99.

The District Court held that the claimed minority rights could be protected through article 27 of the ICCPR.[26] According to the judgment, notwithstanding that the Constitution does not expressly protect minority rights, a legal basis for such protection can be found in the clause of the Constitution concerning the individual "right to life, liberty, and the pursuit of happiness" (article 13). The Court decided that the interpretation of such a right can be informed by the object and purpose of international human rights standards, including Article 27 of the ICCPR, which serve, as a guiding principle, to identify the purpose of human rights standards. The Court held that the administrative decision-maker had not acted in good faith when evaluating the cultural impact caused by the dam construction. As a result, the Court quashed the decision in favour of the expropriation.[27]

Though these cases illustrate that international human rights standards can be incorporated into domestic law though the "indirect application" approach, there are significant and inherent problems that should be considered. First, the willingness, and in some instances, eagerness of some judges to incorporate international standards in their reasoning is a welcome development. This willingness gives an opportunity to review national standards from other viewpoints. Nevertheless, this approach poses a serious question: does the Court's approach really amount to the "application" of international human rights standards? In some cases, it is quite obvious that the judge could have reached the same conclusion without any reference to international human rights standards. In such instances, the reference to international human rights standards may serve only to support the legitimacy of the decision in the matter.

Given this legal context, it was difficult for Japanese litigants to challenge domestic legislation on the basis of incompatibility with Japan's international treaty obligations, especially Japan's international treaty obligations in relation to human rights. Of course, there are several cases where judges at the District Court level recognized the direct applicability of the ICCPR by finding that the relevant provisions of the ICCPR were "self-executing" by their nature or wording. However, given the narrow scope of the concept of a "self-executing" treaty, reliance

[26] *supra* note 17. Article 27 provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

[27] In this case, the Court declared the illegality of the decision. However, the judgment came after the dam in dispute was already constructed. Therefore, the Court simply declared the illegality of the decision, but it did not declare that the decision to construct the dam was null and void, according to Article 31 of the Administrative Litigation Procedure Law.

on international human rights standards to ground a successful challenge to domestic legislation is difficult.

Second, the international human rights norms in question are not always applied in the same way they would be applied as international law. For example, in the Nibudani Dam case, above, the parties asserted and the District Court purported to apply article 27 of the ICCPR. Yet, article 27 does not permit a state to limit minority rights in the interest of 'public welfare'. The District Court panel acknowledged that the exercise of any constitutional right is subject to the general limitations of rights provided in articles 12 and 13 of the Constitution[28] and stated: "the right under Article 27 of the ICCPR is not absolute and may be restricted for reasons of public welfare as specified in Articles 12 and 13 of the Japanese Constitution." This interpretation is not compatible with internationally recognized human rights standards.

3. Impact of International Human Rights Standards on Japanese Legislation

Although Japanese judges have generally been reluctant to incorporate international norms into the domestic legal system, international human rights norms have had a strong impact on the Japanese legal system. In some instances, international human rights norms provided a form of external "pressure" promoting domestic law reform. In the 1970s and the end of the Vietnam War, Japanese society and the Japanese legal system faced an influx of immigrants who fled that country and came to Japan as refugees seeking permanent residence. The Japanese legal system of that era assumed that non-Japanese nationals would return to their country of origin and did not have an established system to respond to the needs of refugees. It was in this context, that Japan in 1981 became a party to the 1951 Refugee Convention and, as a direct consequence, in the 1980s abolished the then existing regime of exclusive social security. Under the then social security system, for example, only persons of Japanese nationality were eligible for state-run medical insurance. The governing law was amended to abolish this restriction in order to comply with the duty imposed by Article 23 of the Refugee Convention to provide "same treatment" in respect of "public relief and assistance" as provided to nationals.[29] Japan's ratification of this

[28] Japanese Constitution, *supra* note 1. Articles 12 and 13 of Japanese Constitution stipulate:

> Article 12: The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.

[29] Adopted July 28, 1951, 189 UNTS 137 (entered into force April 22, 1954). Article 23 of the Convention provides:

> The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Convention also contributed to the establishment of a permanent refugee asylum system as a result of amendments to the Japanese immigration law. As a result, more than 10,000 Vietnamese were accepted as refugees.

International human rights norms continued to impact domestic legislation as Japan ratified other treaties. For example, ratification of the Convention on the Elimination of all Forms of Discrimination against Women[30] in 1985 contributed to the reform of legislative provisions which discriminated on the basis of sex and resulted in equal treatment between men and women in relation to the opportunity to work.[31] Before these reforms, it had been possible to discriminate in employment advertisements by expressly excluding applicants of either sex. Such advertisements, and the legislation which permitted them, negatively impacted on women seeking employment. Now such discrimination is legally prohibited.

Recently, the Japanese Supreme Court addressed discrimination based on birth in the context of inheritance legislation.[32] The Court declared inconsistent with the Constitution an article of the Civil Code which provided that a child born out of wedlock did not have the same right of inheritance as a legitimate child.[33] This article had been the subject of international criticism, especially in the periodic reporting national systems of the UN human rights Conventions.[34] Opponents of this domestic law often insisted that it be abolished as inconsistent with internationally recognised human rights standards. In its reasons for decision, the Supreme Court referred to the Convention on the Rights of the Child[35] and to foreign legal practice to support its conclusions. It is questionable, however, whether it is appropriate to characterize this case as an example of domestic incorporation of

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[30] Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 15.

[31] Law on Securing of Equal Opportunity and Treatment between Men and Women in Employment, Law No. 113 of 1972 (total reformation was conducted in 1985, final revision on June 27, 2012).

[32] *X v Y*, [2013], September 4, 2013, Supreme Court, 67:6 MINSHŪ 1320, 2197 HANREI JIHŌ 10.

[33] Civil Code, Law No. 89 of 1896 (adopted on April 27, 1896, finally amended on December 11, 2013). Article 900, subsection (iv) of the Code provides:

> If there are two or more heirs of the same rank, their shares in inheritance shall be determined by the following items: (…) (iv) if there are two or more children, lineal ascendants, or siblings, the share in the inheritance of each shall be divided equally; provided that the share in inheritance of a child [born] out of wedlock shall be one half of the share in inheritance of a child [born] in wedlock, and the share in inheritance of a sibling who shares only one parent with the decedent shall be one half of the share in inheritance of a sibling who shares both parents. [emphasis added]

[34] For example, Concluding observations of the Human Rights Committee, UN Doc CCPR/C/JPN/CO/5 (18 December 2008), at para. 28; Concluding observations of the Committee on the Elimination of Discrimination against Women, UN Doc CEDAW/C/JPN/CO/6 (7 August 2009) at paras 17-18.

[35] Adopted November 20, 1989, 1577 UNTS 3 (entered into force September 2, 1990).

international human rights standards. The Court's conclusion on the point, to be sure, could have been reached without referring to the international instruments. But, having been the subject of expressions of international concern, it is equally likely that international human rights standards were a factor in the Court's conclusion that the legislative provision was inconsistent with the Constitution. Soon thereafter, the provision in issue (Article 900 (4)) was abolished as part of a revision of the Civil Code.

That international human rights standards have had some impact on the Japanese legal system does not mean that all human rights issues have been similarly resolved. The continued existence of the death penalty under Japanese law is one such unresolved issue in spite of strong expressions of concern on the basis of international human rights standards.[36]

4. Brief Summary

As discussed, Japanese judges have been reluctant to apply international human rights standards unless they are self-executing but have recently been more open to the indirect application approach. Yet, the full realization of rights is far from satisfactory. Japanese judges approach international human rights norms as different in nature, essentially because such standards result from international processes rather than as the product of domestic legal professionals, and, therefore, tend to see these norms as a type of 'threat' to their legal order. Many international lawyers have tried to persuade the judges to the contrary, but so far their efforts have been in vain.

Most domestic cases addressing international human rights standards involved disputes in relation to civil and political rights. Existing case law has not found economic, social and cultural rights to be suitable subjects for either direct or indirect application. This attitude can be attributed to the nature of such rights. As the text of the International Covenant on Economic, Social and Cultural Rights (ICESCR) makes clear, realization of these rights are to be made 'progressively', and 'to the maximum of available resources'.[37] Thus, states enjoy a wide discretion ("margin of appreciation") as to the scope and content of their systems of social welfare as an expression of their sovereignty.

[36] Concluding observations of the Human Rights Committee, *supra* note 34 at para 16.

[37] Adopted December 16, 1966, 993 UNTS 3 (entered into force January 3, 1976). Article 2, paragraph 1 of the ICESCR states:

> Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

A progressive nature of economic, social and cultural rights is an impediment to the acceptance of a role for international human rights standards before Japanese national courts. This approach makes it difficult to claim an incompatibility of national legislation with international human rights standards, especially in the field of social security even though international rights discourse favours the realization of economic, social and cultural rights. The same tendency can also be seen in the national context, although the realization of rights does not occur in the same way as in the international context.

SOCIAL SECURITY AND HUMAN RIGHTS – A CASE ANALYSIS

In this section, case analysis will be presented focusing on social security. As mentioned earlier, discussion of international human rights norms is usually related to civil and political rights rather than economic, social and cultural rights. This implicitly sends a message that such rights do not have the same legal significance as civil and political rights. But, it is important to note that there is no hierarchy of rights at international law and that economic, social and cultural rights are also accorded a tendency of effective protection in rights discourse; for example, in relation to public assistance. In this regard, two points should be noted. First, a level of protection for such rights exists in the Japanese legal system which is consistent with that in the international legal regime. Second, many scholars are of the opinion that there is little room for international human rights standards applicable to social security because a large measure of discretion is accorded to the state governments to determine the scope and content of its social security system. Careful examination of international cases confirms that international human rights standards play a role even in the field of social security. One of the reasons for this is the principle of non-discrimination. The court case to be discussed in this section falls within that topic: that applicability of the principle of non-discrimination in relation to access to social security. Through the examination of the case, it is possible to know the *status quo* and its challenges in the Japanese social security system as seen from the human rights perspective.

1. Preliminary Considerations

Article 25 of the Japanese Constitution declares the right to a minimum standard of living in the context of economic, social and cultural rights.[38] The Japanese social welfare system is constructed in such a way as to realize the object and purpose

[38] Constitution of Japan, *supra* note 1. Article 25 states:

> All people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

enshrined in this constitutional provision. According to the established jurisprudence, Article 25 obliges the government to promote and protect the social welfare system though the legal nature of the provision remains as a sort of general "program".[39] As a result, no substantive individual rights are created by virtue of article 25.[40] Notwithstanding the absence of individual rights in article 25, the state has an obligation to protect the rights in question through properly drafted substantive legislation. Such legislation is to be tested against the object and purpose of the constitutional objective consistent with the discretion accorded to government. In brief, a wide margin of discretion is accorded to government and little room is left to the human rights protected by the constitutional provision. As a result, there is a tendency in Japanese legal thought to regard economic, social and cultural rights as not justiciable.

This tendency in domestic law to so regard economic, social and cultural rights is also found in international law. As noted above, the progressive nature of the ICESCR justified the view that the realization of economic, social and cultural rights is not an appropriate subject for judicial review. Accordingly, jurists recognized a sort of "dichotomy": civil and political rights on the one hand and economic, social and cultural rights on the other hand. Since the 1990s, this view has begun to change as is well illustrated by the 1993 Vienna Declaration of Human Rights which emphasizes the unity and indivisibility of human rights.[41]

The jurisprudence of regional human rights courts shows a willingness to protect economic, social and cultural rights. For example, except for the right to form a labour union (Article 11), the European Convention on Human Rights has no provision for such rights. Despite this lack of express inclusion in the Convention, the European Court of Human Rights has adjudicated many cases involving economic, social and cultural rights on the basis of other provisions of the Convention, including: the right to a fair trial (Article 6), the right to a private and family life (Article 8), the principle of non-discrimination (Article 14), and the right to property (Article 1 of Protocol 1). By expanding the normative scope of these provisions, the European Court of Human Rights has addressed cases concerning

[39] *Asahi v Government of Japan*, [1967], May 24, 1967, Supreme Court, 21:5 MINSHŪ 1043, 481 HANREI JIHŌ 9.

[40] Oda, *supra* note 4 at 90.

[41] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, UN Doc A/CONF.157/23 (25 June 1993). Paragraph 5 of the Declaration states:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

matters of social security and/or social welfare.[42] A similar approach is also found in the jurisprudence of the Inter-American Court of Human Rights. The Inter-American Convention on Human Rights contains an express provision on the general protection of economic, social and cultural rights (Article 26). The Inter-American legal system also includes the Protocol of San Salvador which clearly protects certain economic, social and cultural rights. Although the Inter-American Court has not had an occasion to consider Article 26 in cases involving social security and/or social welfare claims, it did recognize such claims based on substantive clauses found in the Convention: the general obligation of states (Article 1), the right to property (Article 21), and the right to a fair trial (Articles 8 and 25).[43]

It should also be noted that the UN Human Rights Committee has addressed cases involving claims for economic, social and cultural rights even though its jurisdiction is firmly grounded in the International Covenant on Civil and Political Rights. The legal basis for such claims has been found in Article 26 of the ICCPR, which declares the right to equality before the law, a concept distinct from the principle of non-discrimination enshrined in Article 2.[44] The UN human rights system saw a further development on 10 December 2008 with the adoption of the Optional Protocol to the ICESCR which entered into force in 2013.[45] This Protocol recognizes the right of the Committee on Economic, Social and Cultural Rights to receive and examine individual complaints. The trend is clear. The UN and regional human rights systems increasingly favour the protection of economic, social and cultural rights.

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[42] Frédéric Sudre, "La protection des droits sociaux par la CEDH: un exercise de 'jurisprudence fiction'?" (2003) 55 RTDH 755; Luke Clements & Alan Simmons, "European Court of Human Rights: Sympathetic Unease" in Malcolm Langford, ed, Social Rights Jurisprudence: Emerging Trends in International and Comparative Law (New York: Cambridge University Press, 2008) 409; Ida Elisabeth Koch, Human Rights as Indivisible Rights (Leiden: Martinus Nijhoff Publishers, 2009).

[43] Tara J. Melish, "The Inter-American Commission on Human Rights: Defending Social Rights Through Case-Based Petitions" in Langford, *ibid* at 339; Melish, "The Inter-American Court of Human Rights: Beyond Progressivity" *ibid* at 372.

[44] CCPR, General Comment No. 18: Non-discrimination, para. 12; reprinted in UN Doc HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008), at 197-198.

[45] Adopted on 10 December 2008, UN Doc A/63/435 (11 December 2008), (entered into force May 5, 2013). To date, the Optional Protocol has been signed by forty-five countries and ratified by twelve. Canada and Japan are not, at present, signatories to the Optional Protocol and no case (communication) has to date been filed pursuant to its provisions. For the drafting history of the Protocol, see, Claire Mahon, "Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2008) 8 HRLR 617; Malcolm Langford, "Closing the Gap? An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2009) 27:1 NJHR 1; Yutaka Watanabe, "Shakaiken kiyaku sentaku giteisho no saitaku [Adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights]" (2010) 42:3&4 HOSEI-RIRON [Niigata University Journal of Law and Politics] 63.

2. Social security as a Human Right

This section focuses on the right to social security; specifically, the legal eligibility of foreign nationals, who are also permanent residents of Japan, to receive public assistance. As noted above, the Japanese system of social security is grounded in Article 25 of the Constitution.[46] The public assistance system is non-contributive in nature (that is, individuals do not make contributory payments or insurance premiums) unlike other social programs such as health (medical coverage or medicare) and unemployment insurance. Before 1950, when the present public assistance program came into existence, Japanese public authorities considered the legal foundation of public assistance to be as an *ex gratia* payment, instead of as a human right. The change in the law in 1950 was understood as recognition of the right to receive public assistance, a right grounded in Article 25 of the Constitution.

When enacted, Article 2 of the Public Assistance Law expressly limited access to the public assistance system to persons of Japanese nationality.[47] Nonetheless, in 1954, the Ministry of Health and Welfare (now Ministry of Health, Labour and Welfare) issued an intra-ministry instruction that foreign nationals were eligible for public assistance to the same extent as Japanese nationals. The instruction (administrative measure) was not issued pursuant to an express provision of the Public Assistance Law so, as a result, foreign nationals do not possess the right to claim and receive public assistance. Recent statistics show that, pursuant to the 1954 intra-ministry instruction, some 3% of all recipients of public assistance in Japan are foreign nationals.

The next section of this article discusses a case presently before the Japanese courts that, from the perspective of the principle of non-discrimination, considers the right of permanent foreign national residents to receive public assistance.

[46] Public Assistance Law, Law No. 144 of 1950, finally amended on December 13, 2013. Article 1 of the Law clearly states this point as follows:

> The purpose of this Act is for the State to guarantee a minimum standard of living as well as to promote self-support for all citizens who are in living in poverty by providing the necessary public assistance according to the level of poverty, based on the principles prescribed in Article 25 of the Constitution of Japan.

[47] Article 2 of the Law provides:

> All Japanese nationals may receive public assistance under this Act (hereinafter referred to as "public assistance" in a non-discriminatory and equal manner as long as they satisfy the requirements prescribed by this Act. (The present translation is partly different from the official translation as modified by the author.)

3. *X v Oita City*

X, the plaintiff, is a woman of Chinese nationality who was born in Japan and speaks only Japanese. She is a married to A, a man of Chinese nationality, and both X and A are permanent residents of Japan. X and A ran a restaurant in Oita, but after A became sick and unable to work, their only income consisted was that generated from lands and apartment buildings owned by A and his father.

Later, A developed dementia and was hospitalized. B, A's brother, moved into their house and started living with her. He denied X any benefit of the income derived from her husband's lands and apartment buildings and physically abused her. In fear, X fled her home and has not returned. She was subsequently hospitalized but has been unable to pay the cost of her medical care.

When the local municipal government recommended that she apply for public assistance, X did so but the local social welfare office rejected her application after it determined she did not meet the low income threshold due to the amount of money in her and her husband's bank account. When her efforts to have this decision reversed proved unsuccessful, X commenced a suit against the local government.

The District Court dismissed her suit and held the decision to have been justified on the basis that the Public Assistance Law clearly limits eligibility to persons of Japanese nationality.[48] The Court also determined that the availability of assistance was simply *ex gratia* in nature and not grounded in an enforceable right. The Court, therefore, dismissed X's claims, including that based on Article 9 of the ICESCR considered in conjunction with the Constitution.

The Fukuoka High Court, in allowing her appeal, concluded that, as a permanent resident foreign national, X was entitled to receive public assistance.[49] According to the judgment, notwithstanding the text of the legislation, a certain category of foreign nationals is entitled to be accorded equal treatment to that of Japanese nationals. The Court held that the Public Assistance Law should apply, mutatis mutandis, to foreign nationals having permanent resident status in Japan.

[48] *X v Oita City*, [2010], October 18, 2010, Oita District Court, 1534 CHINGIN TO SHAKAIHOSHOU [Journal of Wage and Social Security] 22. For a brief summary of the judgment in English, see the anonymous translation (2012) in 55 Japanese Yearbook of International Law 556.

[49] *X v Oita City*, [2011], November 15, 2011, Fukuoka High Court, 1561 CHINGIN TO SHAKAIHOSHOU 36.

The High Court judgment also concluded on the merits that X was in such urgent circumstances as to justify the application to receive public assistance. The High Court found that the District Court judgment had erred in its evaluation of her circumstances. Although X and her husband had money in their bank account, she was prevented from accessing that account by the actions of her brother-in-law. For the same reason, X had no access to the assets of her husband, A, or those of his father. The High Court evaluated X's application based on her actual financial circumstances which, it concluded, were sufficiently urgent as to justify granting her public assistance. Presently, the local municipal government has appealed X's case to the Supreme Court; that appeal is pending.

4. Critical Analysis of the Case

The District Court dismissed X's argument based on Article 9 of the ICESCR and concluded that Article 9 does not grant specific rights to individuals. The Court held that Article 25 of the Constitution permits government to exercise with a wide margin of discretion in relation to a social security regime, including the determination of which persons are eligible for public assistance. It concluded that, even though Japanese Public Assistance Law precludes assistance to foreign nationals, this exclusion did not constitute "discrimination" within the meaning of Article 14 of the Japanese Constitution[50]. On appeal, the High Court did not really address the ICESCR argument but applied an approach more compatible with international human rights norms. This approach will now be examined briefly.

Consistent with Article 2, paragraph 1 of the ICESCR, a state can freely decide its economic policy, together with its social security regime. In 2008, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 19 on the Article 9 right to social security.[51] The comment recognizes that Article 9 does not oblige a state to create an open-ended and non-contributive social security system. Arising out of this, two points merit attention. The first point relates to the Article 2, paragraph 1 undertaking of states "to take steps… to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant…." This undertaking must be read in the

[50] Japanese Constitution, *supra* note 1. Article 14 provides:

> All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.
>
> Peers and peerage shall not be recognized.
>
> No privilege shall accompany any award of honour, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

[51] CESCR, General Comment No. 19: The Right to Social Security (art. 9), UN Doc E/C.12/GC/19 (4 February 2008).

context of the Committee's General Comment No. 3 in which the Committee emphasizes the importance of the principle of non-discrimination in the field of economic, social and cultural rights.[52] The Comment actually builds on the Article 2, paragraph 2 of the ICESCR obligation of state parties to guarantee the rights contained in the Covenant "without discrimination" on a number of proscribed grounds, including "nationality".

The second point is that the Committee, in its General Comment No. 19, specifically addresses the right to equality in the context of a national social security program. The Committee concluded as follows:

> Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.[53]

Yet, notwithstanding this clear direction, the Japanese government and the Japanese legal system continues to deny public assistance to foreign nationals on the basis that the country of one's nationality should be responsible for his/her social security. While this contention has its supporters, it must be questioned whether it is really fair to apply an arbitrary distinction to justify the exclusion of a certain category of foreign nationals from access to basic and non-contributory social assistance programs. In the case just discussed, X was refused public assistance on the basis that she did not have Japanese nationality. One must ask if a distinction on this basis is justified.

As mentioned, Article 2, paragraph 2 of the ICESCR prescribes the principle of non-discrimination, including on the ground of "nationality" and, in General Comment 20, the Committee affirms there should be no discrimination based on nationality.[54] This approach is consistent with that applied in other contexts. For example, in Europe, it is assumed that different treatment based only on nationality amounts to 'discrimination' unless a stringent justification is shown.[55]

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[52] CESCR, General Comment No. 3: The Nature of States Parties' Obligations, paragraph 5, reprinted in UN Doc HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008) at 8.

[53] CESCR, *supra* note 51 at para 37 [emphasis added].

[54] CESCR, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), para. 30, UN Doc E/C.12/GC/20 (2 July 2009).

[55] For the case involving discrimination based on nationality in the field of non-contributive social benefit, see, *Koua Poirrez v France*, Reports of Judgments and Decisions 2003-X.

Yet, Japanese judges appear to be generally unaware of this. In the X case, discussed above, the judges addressed the matter only in the context of Article 25 of the Constitution and ignored the fundamental principle of non-discrimination. Such a judicial attitude to claims for access to public assistance programs must be reconsidered in light of General Comments Nos. 9 and 20 to the ICESCR.

5. Brief Summary

Several important considerations arise from analysis of *X v Oita City*. First, it is the first case to clarify the status of permanent resident foreign nationals in regards to access to public assistance under Japanese law. The High Court's judgment is compatible with international standards, but warrants a more detailed examination from an international perspective. Second, in its reasons for decision, the Court did not examine the principle of non-discrimination in depth. This is significant because the principle of non-discrimination has been interpreted in international and regional cases than have been recognized by Japanese courts.

Applicable international standards, to be sure, do not obligate states to establish specific social security regimes. At the same time however, it is abundantly clear that a state's social security system is not to be administered in a discriminatory way. In *X v Oita City*, the plaintiff did not have Japanese nationality but she was born in Japan and had lived in Japan for quite a long period of time. In these circumstances, X did not have any relationship with her country of nationality. It would be better, in such a situation, to consider X to be a *de facto* national of Japan.

CONCLUSION

This article has addressed the impact of international human rights standards on the Japanese legal system. In a word, Japanese courts have been quite reluctant to apply international human rights instruments directly. Instead, Japanese courts tend first and foremost to rely on the domestic Japanese legal system and, only secondarily, to incorporate international standards into domestic law.

International human rights instruments are sometimes viewed as a sort of 'threat' to the Japanese legal system. But in the age of globalization, interaction across borders can be seen even in judicial matters. In the context of the 1980 Hague Convention on Child Abduction (*Convention on the Civil Aspects of International Child Abduction*), a sort of 'network' has developed between judges in the contracting parties whereby the judges are able to exchange information as well as the situation in the domestic legal system in their respective countries. Japan recently ratified the Convention and has adopted new national legislation to implement the Convention. The experience may provide an opportunity to review and learn lessons

from the experience of Japanese judges in relation to international human rights as they relate to domestic cases before the courts of Japan.

As demonstrated by the jurisprudence in relation to access to public assistance programs, the relevance of international human rights standards is not limited to civil and political rights. In the absence of a substantive obligation to interpret national legislation in conformity with international law, critical analysis from the perspective of international human rights standards presents the opportunity to reconsider the validity and legitimacy of certain national legal systems, as demonstrated by the analysis in the *Marleasing* case in the European context.[56]

[56] Case C-106/89, *Marleasing S.A. v. La Comercial Internacional de Alimentacion S.A.*, [1990] 1990 ECR I-4135. The European Court of Human Rights reaffirmed the obligation on national courts of the EU system to interpret national laws in a manner to achieve the result envisaged by an EU directive.