EFFECTUATION OF INTERNATIONAL LAW IN THE MUNICIPAL LEGAL ORDER OF JAPAN

Iwasawa Yuji*

1. Introduction
2. Treaty-making process
 - 2.1 Approval of treaties by the Diet
 - 2.2 'Treaties' and 'executive agreements'
 - 2.3 Implementation of treaties
 - 2.3.1 Publication of treaties
 - 2.3.2. Implementation of treaties
3. Position of international law in Japan
 - 3.1 Domestic validity
 - 3.2 Direct applicability
 - 3.2.1 The ICESCR
 - 3.2.2 The GATT
 - 3.2.3 Customary international law
 - 3.3 Indirect application
 - 3.4 Rank
 - 3.4.1 Relationship with statutes
 - 3.4.2 Relationship with the Constitution
4. Conclusion

1. INTRODUCTION

In the past five years Japanese courts have handed down a series of interesting decisions on the relationship between international law and national law. In 1989 and 1990 the Japanese Supreme Court denied the direct applicability of two very important treaties: the International Covenant on

* Associate Professor of International Law, Osaka City University, Japan.

Economic, Social and Cultural Rights (ICESCR)¹ and the General Agreement on Tariffs and Trade (GATT).² In 1989 in the *Siberian Internment* case, the Tokyo District Court used the term 'self-executing' to discuss the domestic applicability of customary international law.³ In 1993 in the same case the Tokyo High Court offered a more sophisticated analysis of the 'domestic applicability' of international law.⁴ In this contribution, the author will summarize the Japanese situation as regards 'Effectuation of International Law in the Municipal Legal Order' and highlight the above developments.⁵

2. TREATY-MAKING PROCESS

2.1. Approval of Treaties by the Diet

Article 73(3) of the Japanese Constitution, which was enacted in 1946, provides that the Cabinet has the authority to '[c]onclude treaties' on the condition that 'it shall obtain prior or, depending on circumstances, subsequent approval of the Diet.' Article 61 provides that the streamlined procedure for approval of budgets is also to be used for approval of treaties. Thus, procedurally it is easier to conclude a treaty than to enact a statute, let alone to amend the Constitution. It is the normal practice of the Japanese Government to obtain the approval of the Diet (Japanese parliament) before Japan

¹ Judgment of 2 March 1989, Supreme Court, 35 *Shomu Geppo* 1754.

² Judgment of 6 February 1990, Supreme Court, 36 *Shomu Geppo* 2242.

³ Judgment of 18 April 1989, Tokyo District Court, 1329 *Hanrei Jiho* 36, 32 JAIL (1989) 125, 29 ILM (1990) 391.

⁴ Judgment of 5 March 1993, Tokyo High Court, 811 *Hanrei Taimuzu* 76.

⁵ . This contribution is based upon the author's previous works, especially YUJI IWASAWA, 'The Relationship between International Law and National Law: Japanese Experiences', 63 BYIL (1993) 333. For more detailed discussion and further references on the issues addressed in this contribution, see the above article. Other literature available in English includes: L. JEROLD ADAMS, *Theory, Law and Policy of Contemporary Japanese Treaties* (1974); KAY HOLLOWAY, *Modern Trends in Treaty Law* (1967) 313-15; KAZUYA HIROBE, 'The Japanese Practice Concerning International Treaties', 25 *Archiv des Völkerrechts* (1987) 39; SAKUTARO KYOZUKA, 'Internal Enforcement and Application of Treaties in Japan', 12 JAIL (1968) 45; SHINYA MURASE, 'Reception of International Law into Domestic Law of Japan', *Proceedings of the 1990 Conference of the Canadian Council on International Law* (1990) 263; NAOYA OKUWAKI, 'Interim Report of the National Committee on International Law in Municipal Courts', 36 JAIL (1993) 100; MASAKI ORITA, 'Practices in Japan Concerning the Conclusion of Treaties', 27 JAIL (1984) 52; ISAO SATO, 'Treaties and the Constitution', 43 *Washington Law Review* (1968) 1057; YUICHI TAKANO, 'Conclusion and Validity of Treaties in Japan: Constitutional Requirements', 8 JAIL (1964) 9.

becomes bound by a treaty. To date there have been eleven cases in which the government has, exceptionally, sought the subsequent approval of the Diet.⁶

Japanese constitutional scholars have been divided on the question whether the validity of a treaty is affected if the Diet refuses to give subsequent approval. Most scholars agree that in such circumstances the treaty becomes invalid so far as Japanese law is concerned. What is more controversial is whether the international validity of the treaty is also affected. Japanese constitutional scholars tend to neglect the Vienna Convention on the Law of Treaties which was ratified by Japan in 1981. Article 46 of the Convention provides:

“A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.”

The government takes the view that the international validity of the treaty is unaffected even if the Diet refuses subsequent approval.⁷ In any event, in the eleven cases where subsequent approval has been sought, approval has in fact been given. Thus, the question remains theoretical so far.

2.2. ‘Treaties’ and ‘Executive Agreements’

Not all international agreements need to be approved by the Diet. The government can conclude international agreements without Diet approval under the power to ‘[m]anage foreign affairs’ provided for in Article 73(2). These agreements are called ‘executive agreements’. The distinction between ‘treaties’ and ‘executive agreements’ is maintained for constitutional purposes. Both are treaties under international law. In recent years more than ninety per cent of the international agreements concluded by Japan have been ‘executive agreements’.

The government decides whether an international agreement is a ‘treaty’ which requires Diet approval or an ‘executive agreement’ which can be concluded by the government alone. The government’s view has often been

⁶ ORITA, loc.cit. n. 5, at 61 n. 19.

⁷ See e.g., House of Representatives, Budget Committee, 23 June 1953, 16th Diet, 8 *Yosaniinkaigiroku* 3-4 (statement of Mr. SATO, Director General of the Cabinet Legislation Bureau).

challenged in the Diet. It was under these circumstances that, in 1974, the government enunciated in the Diet a 'unified view' with respect to the distinction between 'treaties' and 'executive agreements'. According to the government, three categories of international agreements require the approval of the Diet as 'treaties'⁸ The first category consists of international agreements which contain 'statutory matters'. This category includes the following three sub-sets of agreements: (1) international agreements which require the enactment of new statutes; (2) international agreements which require the maintenance of existing statutes; and (3) international agreements which affect the sovereignty of the state and thus modify the power of the legislature as well. The second category consists of international agreements which deal with 'financial matters'. International agreements which are deemed politically important in the sense that they provide a fundamental legal framework for a relationship between Japan and another state or amongst states in general constitute the third category; as such they require ratification. On the other hand, the following agreements need not be approved by the Diet, but can be concluded by the government alone as 'executive agreements': (1) agreements concluded within the scope of a treaty already approved by the Diet; (2) agreements concluded within the scope of existing domestic laws and regulations; and (3) agreements concluded within the scope of budgetary appropriations.

In the *Sunagawa* case the Supreme Court upheld the government's interpretation that it could conclude the Administrative Agreement under Article III of the Security Treaty with the United States⁹ without Diet approval, because the Diet had rejected a draft resolution declaring that the Agreement required Diet approval.¹⁰

2.3. Implementation of Treaties

2.3.1. Publication of Treaties

Article 7 of the Constitution provides that "[t]he Emperor, with the advice and approval of the Cabinet, shall [p]romulga[t]e treaties." Thus, when the

⁸ House of Representatives, Foreign Affairs Committee, 20 February 1974, 72d Diet, 5 *Gaimuinkaigiroku* 2, 27 JAIL (1984) 102 (statement by Foreign Minister OHIRA).

⁹ Administrative Agreement under Article III of the Security Treaty, 28 February 1952, 208 UNTS 255; Japan-US Security Treaty, 8 September 1951, 136 UNTS 211.

¹⁰ Judgment of 16 December 1959, Supreme Court Grand Bench, 13 *Keishu* 3225, 3236, 4 JAIL (1960) 103, 32 ILR 43.

Diet approves a treaty and the Cabinet ratifies it, the treaty is promulgated in the official gazette in the name of the Emperor and the Cabinet. The promulgation is a formal act needed for the treaty to have the force of law in Japan. By virtue of this act, a treaty is 'incorporated' (or 'adopted') into Japanese law. Nevertheless, the treaty retains its character as international law; it is not 'transformed' into national law.¹¹

Executive agreements, on the other hand, are published in the official gazette by way of notification by the Ministry of Foreign Affairs or other Ministry primarily responsible for the agreement. The notification is an act of a public organ to give notice of matters to the nation under authority given by statute and is to be distinguished from promulgation. Agreements which only concern the administration and do not affect the rights or obligations of Japanese nationals are often not published.¹² 'Executive agreements' which have not been published have no force of law in Japan. Their effects upon government agencies would be similar to those of governmental 'instructions'.¹³ Resolutions adopted in international organizations are usually not published. However, if a resolution is legally binding and affects the rights and obligations of Japanese nationals, it is often published.

2.3.2. Implementation of Treaties

Treaties have the force of law and prevail over statutes in Japan. Nevertheless, if there is any conflict between a treaty and domestic law, the government strives to amend the domestic law before it enters into the treaty. If there is no domestic law giving effect to the treaty, the government usually attempts to have laws and regulations enacted to give effect to the treaty. Sometimes the government takes no special measures to implement the treaty, on the theory that it has the force of law and is capable of regulating the matter directly in Japan. This was the technique used for such treaties as the 1910 Brussels Convention respecting Assistance and Salvage at Sea, the 1910 Brussels Convention respecting Collisions between Vessels, the 1929 Warsaw Convention relating to International Transportation by Air and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Even if a treaty is capable of regulating the matter directly, a special statute is sometimes enacted, rephrasing the text of the treaty in Japanese legal

¹¹ KYOZUKA, loc.cit. n. 5 at 49.

¹² SHUZO HAYASHI, 'Jōyaku no Kokunaihōjō no Kōryoku ni tsuite' [Domestic Effects of Treaties], 7 *Hogaku Kyoshitsu* (First Series) (1963) 34, 37.

¹³ HAYASHI, *ibid.* at 39.

terms and adding some new provisions. This technique was used for such treaties as the 1924 Brussels Convention relating to Bills of Lading and the 1957 Brussels Convention relating to the Limitation of the Liability of Ship-owners. Thus, corresponding domestic law usually exists for any treaty and it normally suffices to apply the domestic law. Nevertheless, the question of direct applicability of treaties remains, because if there is a conflict between a treaty and a statute, the treaty is to be given priority.

3. THE POSITION OF INTERNATIONAL LAW IN JAPAN

3.1. Domestic Validity

Article 98(2) of the Constitution provides: "Treaties concluded by Japan and established laws of nations shall be faithfully observed." It is generally believed that international law is incorporated into Japan's legal order through this article. It is self-evident that international law must be observed on the international level. If that is what Article 98(2) means, it is of little use. Therefore, it is argued that the purpose of this provision must be to order the residents and officials in Japan to observe international law. In other words, the effect of the provision is to give the force of law to international law in Japan.

An overwhelming majority of scholars supports the view that treaties have the force of law in Japan by virtue of Article 98(2). In addition to Article 98(2), they base their arguments on the following facts: (1) international law was given the force of law under the Meiji Constitution of 1889; (2) Article 73(3) of the Constitution requires approval of treaties by the Diet; and (3) Article 7(1) requires promulgation of treaties by the Emperor.¹⁴ The government has consistently taken the position that treaties have the force of law in

¹⁴ E.g., TOSHIYOSHI MIYAZAWA, *Zentei Nihonkoku Kenpō* [The Constitution of Japan (Completely Revised Edition)] (1978) 808; KYOZUKA, loc.cit. n. 5, at 50-53; KISABURO YOKOTA, 'Shin Kenpō ni okeru Jōyaku to Kokunai Hō no Kankei' [The Relationship between Treaties and National Laws under the New Constitution], 24 *Nihon Kanri Horei Kenkyū* (1948) 1, 2. Some scholars deny that treaties have the force of law in Japan, arguing that Article 98(2) only dictates the faithful observance of treaties under international law. This view, however, is held by only a few now. For details on the academic discussion, see YUJI IWASAWA, *Jōyaku no Kokunai Tekiyō Kanōsei: Iwayuru "self-executing" na Jōyaku ni kansuru Ichi Kōsatsu* [Domestic Applicability of Treaties: What Are "Self-Executing" Treaties?] (1985) 345.

Japan through Article 98(2) of the Constitution.¹⁵ The Japanese courts have endorsed that view as well.¹⁶

‘Executive agreements’ which are published in the official gazette also acquire domestic legal force in Japan by virtue of Article 98(2).¹⁷ ‘Treaties concluded by Japan’ in Article 98(2) are interpreted to encompass not only ‘treaties’ approved by the Diet but also ‘executive agreements’ concluded by the government alone. Thus, ‘executive agreements’ must also be ‘faithfully observed’ and have the force of law in Japan.¹⁸ The government seems also to take the view that published ‘executive agreements’ have the force of law in Japan.¹⁹

When Japanese is not among the authentic languages of a treaty, which is the case with most multilateral treaties, a Japanese translation is published in the official gazette together with an authentic text (usually English). Theoretically, it is the authentic text, not the Japanese translation, which has the force of law in Japan. Nonetheless, unless there is ambiguity in the Japanese text, the courts seldom refer to the authentic text, but look only at the Japanese translation.²⁰ Some statutes contain explicit provisions giving priority to treaties. For example, Article 3 of the 1954 Tariff Law stipulates that tariffs shall be imposed in accordance with the laws regulating tariffs, but ‘if a treaty contains a special provision on tariffs, that provision shall be applied.’²¹ A statutory provision giving priority to treaties merely has a declaratory effect.²²

It is established that customary international law is part of the law of Japan. ‘[E]stablished laws of nations’ in Article 98(2) is generally interpreted to mean customary international law. Literally, the concept of ‘laws of nations’

¹⁵ See IWASAWA, *ibid.* at 29-30.

¹⁶ E.g. Judgment of 28 June 1977, Supreme Court, 31 *Minshu* 511, 23 *JAIL* (1979-80) 174, which interprets and applies the Warsaw Convention on International Transportation by Air.

¹⁷ IWASAWA, *op. cit.* n. 14 at 65-66, n. 193. Some commentators deny that “executive agreements” have the force of law in Japan. MICHIO SEKI, ‘Waga Kuni no Kokunai Hō to shitenō Jōyaku’ [Treaties as National Law of Japan], 44 *Jichi Kenkyū* no. 7 (1968) 37, 46.

¹⁸ E.g. MIYAZAWA, *op. cit.* n. 14 at 808.

¹⁹ HAYASHI, *loc. cit.* n. 12 at 39.

²⁰ Compare the Judgment of 19 March 1976, Supreme Court, 30 *Minshu* 128, 21 *JAIL* (1977) 150 and the Judgment of 29 September 1989, Fukuoka District Court, 1330 *Hanrei Jiho* 15, 33 *JAIL* (1990) 176, with the Judgment of 14 June 1984, Yokohama District Court, 1125 *Hanrei Jiho* 96, 29 *JAIL* (1986) 228 (referring to the English text in brackets for the concept of “degrading treatment”).

²¹ See also Patent Law (Art. 26), Utility Model Law (Art. 55(4)), Copyright Law (Art. 5), Wireless Telegraphy Law (Art. 3), Post Law (Art. 13(1)), Unfair Competition Prevention Law (Art. 3). See generally IWASAWA, *op. cit.* n. 14 at 33 n. 106.

²² IWASAWA, *ibid.* at 30-31.

could embrace not only customary international law but also treaties.²³ Nonetheless, since Article 98(2) speaks of “treaties concluded by Japan” separately from “established laws of nations,” the latter concept is generally interpreted to refer to customary international law.²⁴ The concept of ‘established’ laws of nations is considered to be similar to the concept of ‘general’ international law in Article 25 of the German Constitution, which provides that “general rules of international law shall form part of federal law.” In order for the law of nations to be regarded as ‘established,’ it must be recognized by most states in the world, but does not need to be specifically recognized by Japan.²⁵

The Japanese courts recognize the domestic legal force of customary international law. For example, in the *Yoon Soo Kil* case, the Tokyo District Court found that the non-extradition of political offenders was an established rule of customary international law and, on this basis, annulled a deportation order.²⁶ In accordance with the view dominant in international law, Japanese courts maintain that both general practice of states and *opinio juris* are necessary before they find a rule of customary international law, but do not require that the rule is recognized by Japan.²⁷ On the whole, Japanese courts are strict in finding a rule to be established as customary international law.²⁸ For example, in the *Texada* case, the Wakayama District Court concluded that the twenty-four mile bay closing line rule stipulated in Article 7(4) of the 1958

²³ See e.g., MIYAZAWA, op. cit. n. 14 at 808.

²⁴ E.g. YOICHI HIGUCHI (et al.), *Chūshaku Nihonkoku Kenpō* [A Commentary on the Japanese Constitution] (1988) 1494; ISAO SATO, *Pocketto Chūshaku Zensho Kenpō* [Pocket Commentary Book: The Constitution] Vol. 2 (1984) 1287; YOKOTA, loc.cit. n. 14 at 10-12.

²⁵ E.g. 2 *Chūkai Nihonkoku Kenpō* [Commentaries on the Japanese Constitution] (Hogaku Kyokai ed. 1954) 1480-81.

²⁶ Judgment of 25 January 1969, Tokyo District Court, 20 *Gyoshu* 28, 14 JAIL (1970) 146; reviewed, Judgment of 19 April 1972, Tokyo High Court, 18 *Shomu Geppo* 930, 18 JAIL (1974) 171; Judgment of 26 January 1976, Supreme Court, 117 *Minshu* 15, 20 JAIL (1976) 127. The courts have recognized the customary international law principle of state immunity in many cases. E.g., Judgment of 18 July 1957, Tokyo High Court, 8 *Kaminshu* 1282, affirming Judgment of 23 December 1955, Tokyo District Court, 6 *Kaminshu* 2679, 1 JAIL (1958) 138, 23 ILR 210; Judgment of 15 March 1956, Fukuoka High Court, 7 *Kaminshu* 629.

²⁷ E.g. Judgment of 5 March 1993, Tokyo High Court, 811 *Hanrei Taimuzu* 76; Judgment of 14 March 1984, Tokyo High Court, 35 *Gyoshu* 231, 28 JAIL (1985) 202.

²⁸ SHINYA MURASE, ‘Kokunai Saibansho ni okeru Kanshū Kokusai Hō no Tekiyō’ [Application of Customary International Law in Domestic Courts], in *Yamamoto Soji Sensei Kanreki Kinen: Kokusai Hō to Kokunai Hō* [Commemorating the Sixtieth Birthday of Professor Soji Yamamoto: International Law and National Law (hereinafter cited as *Festschrift Yamamoto*)] (1991) 133, 156.

Convention on the Territorial Sea was a rule of customary international law, but the Osaka High Court reversed the decision.²⁹

The question whether 'established laws of nations' embrace international law other than treaties and customary international law has not been fully explored by Japanese scholars. Some scholars have indicated that 'general principles of law' cannot be included in the concept of 'established laws of nations' under Article 98(2).³⁰ The domestic legal force of resolutions of international organizations and judgments of international courts is not entirely clear. If they bind Japan internationally, arguably they are binding also under Japanese law by virtue of Article 98(2).³¹ The resolution of an international organization which has most often been invoked before Japanese courts is the Universal Declaration of Human Rights. Japanese courts have invariably rejected arguments based directly on the Declaration, stating that it is not legally binding.³² However, the United Nations Security Council has power to issue binding resolutions, and so far as these resolutions have been published in the official gazette they arguably have legal force under Japanese law.³³ Judgments of international courts are rarely referred to in Japanese court judgments.³⁴

Reports of the International Labour Organization (ILO) have frequently been invoked before the courts. The courts, however, have dismissed arguments based on views and reports of ILO organs, stating that they are not legally binding.³⁵ Paradoxically, the courts have tended to rely on the ILO

²⁹ Judgment of 19 November 1976, Osaka High Court, 8 *Keisai Geppo* 465, 22 JAIL (1978) 131, dismissing appeal from Judgment of 15 July 1974, Wakayama District Court, 22 JAIL (1978) 138, summarized in TAKEO SOGAWA & SHIGERU ODA, *Nihon no Saibansho ni yoru Kokusai Hō Hanrei* [International Law Cases in Japanese Courts] (1991) 155.

³⁰ E.g. MURASE, op. cit. n. 28 at 149.

³¹ See, generally, IWASAWA, loc.cit. n. 5 at 378-88.

³² E.g., Judgment of 2 March 1989, Supreme Court, 35 *Shomu Geppo* 1754, 1761; Judgment of 25 November 1983, Supreme Court, 30 *Shomu Geppo* 826, 828.

³³ See also KAZUYA HIROBE, 'Article 98 Paragraph 2 of the Constitution of Japan and the Domestic Effects of Resolutions of the United Nations Security Council', 36 JAIL (1993) 17, 32.

³⁴ Only a few courts have referred to judgments of international courts in their decision. E.g. Judgment of 27 May 1953, Tokyo District Court, 4 *Kaminshu* 755, 1 JAIL (1957) 55, 20 ILR 305 (referring to the judgment in the *Anglo-Iranian Oil Company* case); Judgment of 22 April 1982, Tokyo District Court, 28 *Shomu Geppo* 2200, 27 JAIL 148 (1984) (referring to the judgment in the *North Sea Continental Shelf* cases).

³⁵ See e.g. Judgment of 24 November 1992, Fukuoka High Court, 620 *Rodo Hanrei* 45; Judgment of 26 December 1991, Fukuoka High Court, 639 *Rodo Hanrei* 73; Judgment of 15 November 1988, Tokyo High Court, 532 *Rodo Hanrei* 77; Judgment of 26 May 1988, Tokyo High Court, 519 *Rodo Hanrei* 73.

reports in justifying restrictions on trade union rights.³⁶ General comments and views of human rights organs, such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have been invoked before the courts. Although, strictly speaking, they have no binding force, they have influenced some courts. Article 900 of the Japanese Civil Code provides that an illegitimate child's share of inheritance is half that of a legitimate child. An illegitimate child challenged this article, invoking General Comment 17 of the Human Rights Committee.³⁷ In 1993, the Tokyo High Court held the provision to be unconstitutional. Even though the court did not refer to the General Comment in its judgment, its impact was undeniable.³⁸ The Human Rights Committee's opinion has been invoked in cases of war compensation. Most Japanese laws providing relief to those who were wounded or killed in the Second World War exclude aliens.³⁹ Koreans who were conscripted and wounded in the War and now reside in Japan sued the Japanese government for compensation, invoking the opinion of the Human Rights Committee on the matter.⁴⁰ In a judgment delivered in 1994, the Tokyo District Court disregarded the opinion.⁴¹

3.2. Direct Applicability

Whether international law can be directly applied in domestic law – the question of direct applicability – should be distinguished from whether inter-

³⁶ E.g. Judgment of 25 April 1973, Supreme Court Grand Bench, 27 *Keishu* 547, translated and reprinted in part in HIDEO TANAKA, *The Japanese Legal System: Introductory Cases and Materials* (1976) 806.

³⁷ In General Comment 17, the Human Rights Committee requested states parties to indicate in their reports "how legislation and practice ensure that measures of protection are aimed at removing all discrimination in every field, including inheritance, particularly as between [. . .] legitimate children and children born out of wedlock," suggesting that discrimination against illegitimate children is prohibited also with respect to inheritance. General Comment 17 (35), *Report of the Human Rights Committee* (UN GAOR, 44th Sess., Supp. No. 40) at 173, 174, UN Doc. A/44/40 (1989).

³⁸ Judgment of 23 June 1993, Tokyo High Court, 46 *Kominshu* 43. See also text accompanying *infra* n. 81.

³⁹ For background information on the issue of war compensation, see generally YUJI IWASAWA, 'Legal Treatment of Koreans in Japan: The Impact of International Human Rights Law on Japanese Law', 8 *HRQ* (1986) 131, 173-74.

⁴⁰ *Gueye et al. v. France*, *Report of the Human Rights Committee* (UN GAOR, 44th Sess., Supp. No. 40) at 189, U.N. Doc. A/44/40 (1989) (finding that a French law which granted retired soldiers of Senegalese nationality who had served in the French Army pensions inferior to those given to retired French soldiers was a violation of Article 26 of the ICCPR).

⁴¹ Judgment of 15 July 1994, Tokyo District Court, 1505 *Hanrei Jiho* 46.

national law has the force of law in domestic law – the question of validity. In order for international law to be directly applied, it must have the force of law in the domestic legal order. Thus ‘domestic validity’ of international law is a prerequisite for its ‘domestic applicability.’ On the other hand, even if international law has domestic legal force, not all international law rules are directly applicable.⁴²

Japanese courts have tended to apply a treaty without examining its direct applicability once they have confirmed that the treaty has the force of law in Japan by virtue of Article 98(2).⁴³ The courts have, however, also refused to apply a treaty in some instances, although they have rarely used the term ‘non-self-executing.’ In those cases the courts have not engaged in a detailed explanation as to why the treaty was not directly applicable.⁴⁴ In 1989 the Tokyo District Court used the term ‘self-executing,’ examining in detail the direct applicability of customary international law.⁴⁵ In a book published in 1985,⁴⁶ the present author pointed out that the concept of ‘self-executing’ treaties had created enormous confusion. The author advocated that the concept of ‘direct applicability’ in domestic law, or ‘domestic applicability,’ should be used instead of ‘self-executing,’ and that ‘domestic applicability’ of international law should be distinguished from its ‘domestic validity.’ In 1993 the Tokyo High Court adopted the terms and the distinction advocated by the author, referring to the ‘domestic validity’ and ‘domestic applicability’ of customary international law.⁴⁷

Direct applicability of a treaty must be examined in two stages.⁴⁸ First, it must be ascertained whether the parties have not excluded the direct applicability of the treaty as a whole. The parties may express a negative intent to exclude the direct applicability of a treaty, either in the text or in the *travaux préparatoires* of the treaty. If they have done so, the treaty’s direct applicability should be denied. It is often asserted by scholars as well as by

⁴² For further discussion on the distinction between “domestic validity” and “domestic applicability” of a treaty, see IWASAWA, *op. cit.* n. 14 at 281-89; YUJI IWASAWA, ‘The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis’, 26 *VaJIL* (1986) 627, 643-49.

⁴³ IWASAWA, *op. cit.* n. 14 at 33-40.

⁴⁴ *Ibid.* at 40-41.

⁴⁵ Judgment of 18 April 1989, Tokyo District Court, 1329 *Hanrei Jiho* 36, 32 *JAIL* (1989) 125, 29 *ILM* 391 (1990) (stating: “In order for customary international law to have self-executing quality, its existence and contents must be particularly clear”).

⁴⁶ IWASAWA, *op. cit.* n. 14. See also IWASAWA, *loc. cit.* n. 42.

⁴⁷ Judgment of 5 March 1993, Tokyo High Court, 811 *Hanrei Taimuzu* 76.

⁴⁸ For details on how to determine direct applicability of treaties, see IWASAWA, *op. cit.* n. 14 at 296-337; IWASAWA, *loc. cit.* n. 42 at 653-92.

courts in various countries that whether a treaty is directly applicable depends on the intent of the parties.⁴⁹ It is, however, inappropriate to require a positive intent to make a treaty directly applicable in order to recognize its direct applicability. Such a positive intent can hardly ever be found either in the text or in the *travaux préparatoires*.

If the direct applicability of the treaty is not excluded, then secondly, each provision of the treaty must be examined. With respect to customary international law, only this second stage comes into play. In this second stage, the principal criterion to determine the direct applicability of an international law rule should be its precision. An international law rule must be precise and complete in itself to be applied by the courts. The judiciary would usurp the power of the legislature if it applied imprecise international law rules. Direct applicability of international law depends on the context in which it is invoked. Direct applicability is more easily admitted in a situation where a government action is claimed to be illegal than in a situation where a positive action by the government is sought in reliance on an international rule. Thus, the same rule may be directly applicable in one situation but not in another.

Direct applicability of international law is a question of domestic law. The same rule can be directly applicable in one state but not in another. The determination with respect to the precision of an international rule may vary from one state to another, depending on various factors. An international rule that is considered directly applicable in a state where the judiciary is afforded broad interpretative powers may not be directly applicable in a state where the power of the judiciary is more circumscribed. The extent to which the subject matter of the rule is regulated by domestic law will also affect the determination of its direct applicability. When domestic law in a particular area is firmly established, and the international rule would bring about a substantial change in the domestic legal system, the international rule tends to be considered imprecise. A rule's precision depends on the *structures d'accueil* (institutional framework) of the state, as well. An international rule which does not specify the organs or procedures necessary for its execution is not complete and cannot be directly applied. If the complementary measures have already been adopted, the rule can be deemed complete and thus directly applicable.

In 1993, apparently adopting the present author's framework of analysis, the Tokyo High Court set out the criteria to determine when international law is directly applicable in the following manner:

⁴⁹ The leading Japanese scholar who adopted this view is Professor YUICHI TAKANO. YUICHI TAKANO, *Kenpō to Jōyaku* [Constitutions and Treaties] (1960) 103-04.

The specific intent of the parties to a treaty is, of course, an important element, but moreover, the provisions must be precise. In particular, when an international rule imposes on states an obligation to act, when it involves appropriation of national expenditure, or when a similar system already exists in domestic law, then harmony with the system must be taken into full consideration, and therefore, the content needs to be all the more precise and clearer.⁵⁰

One Japanese author has contended that executive agreements cannot be self-executing.⁵¹ However, the direct applicability of executive agreements should not be denied categorically. Executive agreements which have been published acquire the force of law in Japan. As long as a provision of a published executive agreement is sufficiently precise, there is no reason to deny its direct applicability. If executive agreements could not be directly applicable, it would become difficult to manage foreign affairs speedily and effectively.⁵²

In recent years Japanese courts apparently have denied the direct applicability of the ICESCR and the GATT in their entirety. In the *Siberian Internment* case, Japanese courts have examined the direct applicability of customary international law. In the following sections these cases will be examined in some detail.

3.2.1. *The ICESCR*

In the *Shiomi* case, Japanese courts have denied the direct applicability of the ICESCR. It concerned the exclusion of aliens from the national pension scheme, which was the case until 1982. Mrs. SHIOMI initiated a lawsuit challenging the nationality restriction of the National Pension Law before the law was amended. The plaintiff argued that the rejection of her application for a handicapped welfare pension because of her nationality was contrary to the ICESCR, in particular Article 9 which provides: "The States Parties [. . .]

⁵⁰ Judgment of 5 March 1993, Tokyo High Court, 811 *Hanrei Taimuzu* 76, 87.

⁵¹ YUZURU MURAKAMI, 'Waga Kuni ni okeru Jōyaku oyobi Kanshū Kokusai Hō no Kokunaiteki Kōryoku' [Domestic Effects of Treaties and Customary International Law in Japan], 688 *Toki no Horei* (1969) 18, 24, 26, n. 20, 28.

⁵² For further discussion, see IWASAWA, op. cit. n. 14 at 65-66 n. 193. YACHI, a Foreign Ministry official, also takes the view that there is no reason to deny the direct domestic effect of executive agreements. SHOTARO YACHI, 'Kokusai Hōki no Kokunaiteki Jisshi' [Domestic Implementation of International Rules], in *Festschrift Yamamoto*, loc.cit. n. 28 at 109, 113.

recognize the right of everyone to social security.” Article 2(1) of the ICESCR provides:

“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.”

The Osaka High Court suggested that the ICESCR, as a whole, was not directly applicable because of the terms of Article 2(1). The court stated:

“This Covenant [. . .] is not a type of treaty whose contents become operative like domestic law by themselves, but a type of treaty which requires legislative procedures for its contents to be implemented [. . .]. It is apparent [from Article 2(1)] that the Covenant is premised on the assumption that the states parties will use all appropriate means [. . .] for the full realization of the rights recognized in the Covenant (including of course the right stipulated in Article 9).”⁵³

The Supreme Court rejected appeal in this case, stating: “[Article 9] [. . .] does not provide for a concrete right to be granted to individuals immediately. That is clear also from Article 2(1).”⁵⁴ When this decision is read in conjunction with the lower court judgment, one cannot escape the impression that the Supreme Court might have denied the direct applicability not only of Article 9 but also of the ICESCR as a whole.

The ICESCR, admittedly, has been regarded by many as not directly applicable because of Article 2(1).⁵⁵ It is inappropriate, however, to deny the direct applicability of the ICESCR in its entirety because of Article 2(1). The prohibition against discrimination provided for in Article 2(2) of the ICESCR is precise enough to be directly applied.⁵⁶ A clause calling for domestic implementation only reinforces the customary international law rule that a party is bound to take every measure necessary to give full effect to the treaty,

⁵³ Judgment of 19 December 1984, Osaka High Court, 35 *Gyoshu* 2220, 2282-83.

⁵⁴ Judgment of 2 March 1989, Supreme Court, 35 *Shomu Geppo* 1754, 1760-61.

⁵⁵ E.g. Belgian Conseil d'Etat, Documents parlementaires, Chambre, 1977-78, No. 188/1, at 27, 29; A. LUINI DEL RUSSO, *International Protection of Human Rights* (1971) 43; ‘The United Nations Covenants on Human Rights and the Domestic Law of the United States’, 48 *Boston University Law Review* (1968) 106, 112-13.

⁵⁶ E.g. IWASAWA, op. cit. n. 14 at 131.

and thus does not prevent the treaty from being directly applicable.⁵⁷ Nothing in the *travaux préparatoires* suggests that the parties intended to prevent the ICESCR from becoming directly applicable by means of this clause.⁵⁸ In 1990 the Committee on Economic, Social and Cultural Rights adopted General Comment No. 3, in which the Committee stated: “[T]here are a number of [. . .] provisions in the [ICESCR], including articles [2(2)], 3, 7(a)(i), 8, 10(3), 13(2),(a), (3) and (4) and 15(3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.”⁵⁹

3.2.2. *The GATT*

Japanese courts have denied the direct applicability of the GATT in the *Kyoto Necktie* case. The Raw Silk Price Stabilization Law (‘the Law’) had given a government agency (the Japan Silk Business Corporation) the exclusive right to import raw silk from abroad; no other person or entity was permitted to import silk. Necktie fabric producers in Kyoto, who had to use expensive silk sold in Japan, brought a lawsuit against the Japanese Government, demanding compensation for the losses they had incurred. The plaintiffs argued, *inter alia*, that the Law was contrary to Articles 17(1)(a) and 2(4) of the GATT. The Kyoto District Court dismissed the claim in 1984, denying, in effect, the direct applicability of the GATT as a whole. The court stated:

“[V]iolations of the GATT provisions cited by the plaintiffs will result in the violating country being forced to rectify them, suffering such disadvantages as the following: the [violating] country will be confronted with a request for

⁵⁷ IWASAWA, *ibid.* at 130-33; Iwasawa, *loc. cit.* n. 42 at 658-60. See also HANS FLORETTA & THEO ÖHLINGER, *Die Menschenrechte der Vereinten Nationen* (1978) 56; BENEDETTO CONFORTI, *International Law and the Role of Domestic Legal Systems* (1993) 30-33.

⁵⁸ See IWASAWA, *op. cit.* n. 14 at 132 n. 408.

⁵⁹ General Comment No. 3 (1990), *Report of the Committee on Economic, Social and Cultural Rights* (U.N. ESCOR, Supp. No. 3) at 83, 83-84, U.N. Doc. E/1991/23 (1991). See also ‘The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights’, 9 HRQ (1987) 122, 127; IWASAWA, *op. cit.* n. 14 at 131.

consultation from other contracting parties, or will have retaliatory measures taken. The violations cannot be interpreted to have any more effects.”⁶⁰

The Supreme Court dismissed appeal in this case in 1990.⁶¹ Although the Supreme Court did not discuss the GATT issue in detail, one probably can conclude that the Supreme Court approved the decision of the Kyoto District Court in principle. The Kyoto District Court denied the direct applicability of the GATT simply because the GATT had its own dispute settlement mechanism. This reasoning of the court is difficult to accept. Even if a treaty provides for an international procedure to ensure its fulfilment, one should not readily conclude that the treaty is not directly applicable in domestic law.⁶² When the international procedure is accessible only to states and not to individuals – as is the case with the GATT – one must be especially careful in concluding that it is not directly applicable. If it is not directly applicable, no remedy is available to individuals either on the international plane or on the national plane.

If the international procedure provided in a treaty is very flexible and leaves states room to settle disputes on grounds of political expediency, overriding the strict terms of the treaty, the treaty’s direct applicability may be denied. If domestic courts apply a treaty setting forth a political procedure, they will interfere with the foreign affairs prerogative of the government. Such practices, in turn, may defeat the purpose of establishing a political procedure.⁶³ The direct applicability of the GATT is sometimes denied because of the ‘flexibility’ of its dispute settlement mechanism.⁶⁴ The procedure, however, is quasi-judicial and resembles arbitration more than negotiation. The GATT dispute settlement procedure has proved to be quite effective.⁶⁵ This procedure is not as political as it is alleged to be, and, therefore, should not

⁶⁰ Judgment of 29 June 1984, Kyoto District Court, 31 *Shomu Geppo* 207. Neither the court nor the parties made reference to earlier decisions in other jurisdictions concerning the direct applicability of the GATT, including the decision of the European Court of Justice in *Int’l Fruit Co. v. Produktschap voor Groenten en Fruit*, 1972 *European Court Reports* 1219.

⁶¹ Judgment of 6 February 1990, Supreme Court, 36 *Shomu Geppo* 2242.

⁶² IWASAWA, op. cit. n.14 at 316-17; Iwasawa, loc.cit. n. 42 at 681-84.

⁶³ IWASAWA, op. cit. n. 14 at 316; Iwasawa, loc.cit. n. 42, at 683-84.

⁶⁴ *Int’l Fruit Co. v. Produktschap voor Groenten en Fruit*, 1972 *European Court Reports* 1219, 1228.

⁶⁵ See generally YUJI IWASAWA, *Sekai Bōeki Kikan (WTO) ni okeru Funsō Shori: Kokusai Bōeki Funsō no Hōteki Kaiketsu* [The Dispute Settlement in the World Trade Organization (WTO): Legal Resolution of International Trade Disputes] (1995).

be considered as an obstacle to recognizing the direct applicability of the GATT.⁶⁶

3.2.3. Customary International Law

Some American scholars have maintained that the distinction between self-executing and non-self-executing rules does not arise with respect to customary international law. Professor PAUST has argued, for instance, that 'customary international law does not present the 'self-executing' versus 'non-self-executing' problem,' and that 'customary law, of course, is inherently 'self-executing.'"⁶⁷ This argument confuses the issue of 'domestic validity' and 'domestic applicability' of international law. The statement that customary international law is inherently self-executing can only mean that customary international law has the force of law in the United States without the need for legislation. Some customary international law rules are too vague and imprecise to be directly applied domestically. German scholars have long recognized that while some rules of customary international law are directly applicable, others are not.⁶⁸ KIRGIS, an American scholar, admitted in 1987 that "it is apparent that certain rules of custom are, in effect, self-executing and others are not."⁶⁹

In the *Siberian Internment* case, Japanese courts have confirmed that the question of direct applicability indeed arises with respect to customary international law. In this case, former Japanese soldiers who had been detained by the Soviet Union after the Second World War in camps located in Siberia and forced to labour under the most severe conditions for a number of years, claimed against the Japanese government for settlement of credit balances earned through their forced labour, and compensation for damage incurred

⁶⁶ See ERNST-ULRICH PETERSMANN, 'Application of GATT by the Court of Justice of the European Communities', 20 *Common Market Law Review* (1983) 397, 429-34.

⁶⁷ JORDAN J. PAUST, 'Book Review', 56 *New York University Law Review* (1981) 227, 240; JORDAN J. PAUST, 'Incorporation of Human Rights into Domestic Law', in ANDRE-JEAN ARNAUD et al. (eds.), *Juristische Logik, Rationalität und Irrationalität im Recht* (1985) 367, 370; 'Jurisdiction in Human Rights Cases: Is the Tel-Oren Case a Step Backward?', 79 *Proceedings American Society of International Law* (1985) 361, 364 (remarks by JORDAN J. PAUST).

⁶⁸ E.g. RUDOLF GEIGER, *Grundgesetz und Völkerrecht* (1985) 183-84, 189-90; 2 *Grundgesetz-Kommentar* Vol. 2 (Ingo von Münch ed., 2d ed. 1983) 141-62 (contribution of ONDOLF ROJAHN); ALFRED VERDROB & BRUNO SIMMA, *Universelles Völkerrecht* (3d ed. 1984) 550-54; GUSTAV WALZ, *Völkerrecht und staatliches Recht* (1933) 274-75.

⁶⁹ . FREDERICK L. KIRGIS JR., 'Federal Statutes, Executive Orders and "Self-Executing Custom"', 81 *AJIL* (1987) 371, 372.

during their detention. The plaintiffs principally relied on Articles 66 and 68 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War, which provide that the Power on which the prisoner of war depends shall be responsible for settling any credit balance due to him from the Detaining Power and paying compensation for damage. As most of the plaintiffs had been repatriated by 1953 when the Convention entered into force for Japan, the plaintiffs had to argue that the rule contained in Articles 66 and 68 of the Convention had been established as customary international law. In 1993, the Tokyo High Court denied the customary law status of Articles 66 and 68 of the Geneva Convention. The court examined the 'domestic applicability' of customary international law in detail, stressing that rules of customary international law must be precise in order to be directly applied domestically:

"If a customary international rule is not minutely detailed as to the substantive conditions on the creation, existence, and termination of a right, the procedural conditions on the exercise of the right, and moreover, the harmony of the rule with the existing various systems within the domestic sphere, and so forth, its domestic applicability cannot but be denied."⁷⁰

The court concluded that Articles 66 and 68 of the Geneva Convention, as well as the customary rule allegedly represented by them, did not meet these requirements, and therefore were not domestically applicable.⁷¹

3.3. Indirect Application

Because international law overrides statutes in Japan, Japanese courts are generally wary of recognizing the direct applicability of international law. As seen in the previous section, Japanese courts have denied the direct applicability of the ICESCR, the GATT and the alleged customary rule of compensation to its own nationals who were prisoners of war. The doctrine of direct applicability was apparently used by the court in these cases as a device to avoid application of international law. Japanese courts seem to prefer dealing with the Constitution to dealing with international law.

⁷⁰ Judgment of 5 March 1993, Tokyo High Court, 811 *Hanrei Taimuzu* 76, 87, affirming Judgment of 18 April 1989, Tokyo District Court, 1329 *Hanrei Jiho* 36, 32 JAIL (1989) 125, 29 ILM (1990) 391.

⁷¹ Ibid.

Japanese courts are not very receptive to arguments relying directly on international law.⁷² In the past decade the International Covenants on Human Rights have been invoked before the courts on numerous occasions. Even though the courts assume that the International Covenant on Civil and Political Rights (ICCPR) is generally directly applicable, in no case has a court found Japanese law to be inconsistent with the ICCPR.⁷³ It should be noted, however, that such passivity of the courts is not peculiar to international law. Japanese courts are highly restrained in judicial review and generally reluctant to invalidate legislation even on constitutional grounds.⁷⁴

Reliance on international law has proved effective more as a political means to give legitimacy to a political movement to change laws, rather than as a legal weapon to win cases before the courts. In some instances, the challenged laws were eventually amended, although direct invocation of international law was without success before the courts. For example, the fingerprinting of Koreans was challenged as contrary to the ICCPR in numerous cases in the 1980s. The courts consistently held that it was not a violation of the ICCPR.⁷⁵ In 1991, however, the Japanese Government decided to abolish the practice of fingerprinting permanent residents.

⁷² For further discussion on the reluctance of Japanese courts to deal with international law, see YUJI IWASAWA, 'The Enforcement of International Human Rights by Domestic Courts: The Japanese Experience', in BENEDETTO CONFORTI and FRANCESCO FRACIONI (eds.), *The Role of Domestic Courts in the Enforcement of International Human Rights* (forthcoming).

⁷³ Japanese courts have interpreted many articles of the ICCPR, such as Articles 2(1), 7, 9, 12, 13, 14(3), 17, 18, 19, 23, 25 and 26 and have concluded that they have not been violated, arguably assuming their direct applicability. E.g. Judgment of 8 March 1989, Supreme Court Grand Bench, 43 *Minshu* 89, 22 *L. Japan* (1989) 39 (on Art. 19(3)); Judgment of 22 October 1981, Supreme Court, 35 *Keishu* 696 (on Arts. 18, 19, and 25); Judgment of 13 May 1994, Fukuoka High Court, 855 *Hanrei Taimuzu* 150 (on Art. 12(4)); Judgment of 1 October 1992, Tokyo High Court, 791 *Hanrei Taimuzu* 267 (on Art. 14(3)(a) and (f)); Judgment of 27 November 1990, Osaka High Court, 1368 *Hanrei Jiho* 46, 35 *JAIL* (1992) 145 (on Art. 12); Judgment of 19 June 1990, Osaka High Court, 1385 *Hanrei Jiho* 134, 35 *JAIL* (1992) 136 (on Arts. 7 and 26); Judgment of 17 May 1989, Osaka High Court, 1333 *Hanrei Jiho* 158, 33 *JAIL* (1990) 158 (on Art. 9(3)).

⁷⁴ See generally HIROSHI ITOH, *The Japanese Supreme Court: Constitutional Policies* (1989); HERBERT F. BOLZ, 'Judicial Review in Japan: The Strategy of Restraint', 4 *ICLR* (1980) 88; Y. OKUDAIRA, 'The Japanese Supreme Court and Judicial Review', 3 *Lawasia* (1972) 67.

⁷⁵ E.g. Judgment of 19 June 1990, Osaka High Court, 1385 *Hanrei Jiho* 134, 35 *JAIL* (1992) 136; Judgment of 28 April 1989, Tokyo District Court, 1316 *Hanrei Jiho* 62, 33 *JAIL* (1990) 166; Judgment of 29 January 1988, Tokyo District Court, 1287 *Hanrei Jiho* 158, 32 *JAIL* (1989) 118; Judgment of 29 August 1984, Tokyo District Court, 1125 *Hanrei Jiho* 101, 29 *JAIL* (1986) 238; Judgment of 14 June 1984, Yokohama District Court, 1125 *Hanrei Jiho* 97, 29 *JAIL* (1986) 228.

Direct application is only one effect international law can have in domestic law. Another important effect of international law is to aid in the interpretation of domestic law. Such indirect application of international law can be very effective; in fact, while reluctant to endorse the direct application of international law, courts may be more willing to use international law in this manner.⁷⁶ The term 'indirect effect' has sometimes been used in European Community law to refer to this effect, to contrast it with 'direct effect' (a concept equivalent to 'direct applicability' in this article).⁷⁷

The legal character of the international instrument is not so important in indirect application. Not only ratified treaties and customary international law, but also unratified treaties, treaties which cannot be acceded to (e.g. regional conventions in other regions) and non-binding instruments can all be used as aids in the interpretation of domestic law. Japanese courts have rejected arguments based directly on the Universal Declaration of Human Rights, stating that the Declaration was not legally binding. In one case, however, the Japanese Supreme Court used the Declaration as an aid in the interpretation of the Constitution, significantly broadening the human rights protection under the Constitution. Article 14 of the Constitution, the basic non-discrimination clause, provides that "[a]ll *kokumin* [nationals] are equal under the law." The phrase 'all natural persons' had been proposed by the Supreme Commander for the Allied Powers in an earlier draft of the Constitution, but the Japanese Government changed it to 'all nationals.'⁷⁸ With this restrictive wording, the view was put forward in the past that the human rights provisions in the Constitution were applicable only to Japanese nationals and not to aliens.⁷⁹ In 1964 the Supreme Court concluded:

[A]lthough Article 14 [. . .] is targeted directly to Japanese nationals, its tenor must also be applied, by analogy, to aliens as well, in view of the fact that Article 7 of the Universal Declaration of Human Rights provides that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law [. . .]"⁸⁰

⁷⁶ On the distinction between direct and indirect application of international law, see generally IWASAWA, *op. cit.* n. 14 at 325-37; IWASAWA, *loc.cit.* n. 42 at 689-91.

⁷⁷ E.g. JOSEPHINE SHAW, *European Community Law* (1993) 166-69; JOSEPHINE STEINER, *Textbook on EC Law* (4th ed. 1994) 37-40; STEPHEN WEATHERILL, *Cases and Materials on EEC Law* (2d ed. 1994) 83-99.

⁷⁸ See e.g. SHOICHI KOSEKI, 'Japanizing the Constitution', 35 *Japan Quarterly* (1988) 234, 235-36.

⁷⁹ See IWASAWA, *loc.cit.* n. 39 at 138-39, n. 38.

⁸⁰ Judgment of 18 November 1964, Supreme Court, 18 *Keishu* 579, 582.

In 1993, the Tokyo High Court rendered a epoch-making decision with respect to children born out of wedlock. A child born out of wedlock challenged Article 900 of the Civil Code, which provides that an illegitimate child's share of inheritance is half that of a legitimate child. The plaintiff argued that the provision violated not only Article 14 of the Japanese Constitution but also various human rights treaties, including Article 24(1) of the ICCPR, General Comment 17 of the Human Rights Committee, Article 16 of the Convention on the Elimination of Discrimination against Women, Articles 2 and 3 of the Convention on the Rights of the Child, Article 25(2) of the Universal Declaration of Human Rights, Article 1 of the 1959 Declaration on the Rights of the Child and the 1972 ECOSOC Resolution on the Status of the Unmarried Mother. While the Tokyo High Court invalidated Article 900 of the Civil Code solely on the constitutional ground, it stated:

"[I]n view of the spirit of Article 24(1) of the [ICCPR] and the spirit of Article 2(2) of the Convention on the Rights of the Child [. . .] this court believes that the problem must be solved in a manner in which the objective of the protection of family relations based on legal marriage and the objective of the respect of human rights of illegitimate children are reconciled."⁸¹

It is obvious that the court used international human rights law as an aid in the interpretation of the Constitution.

International law can be a useful guide to the interpretation of general concepts found in domestic law, such as 'public policy' stipulated in Article 90 of the Civil Code. According to this article, any private contract which is contrary to 'public policy' is null and void. The Convention on the Elimination of All Forms of Discrimination against Women has raised the question of applicability of a human rights treaty to relations between private individuals.⁸² In Japan, applicability of human rights provisions to relations between individuals is discussed under the strong influence of the German doctrine of *Drittwirkung* (third-party effect) and, in much the same way as the theory of 'indirect' third-party effect predominates in Germany.⁸³ According to the 'indirect' effect theory, the human rights provisions of the Constitution can only be implemented between private individuals 'indirectly' through the

⁸¹ Judgment of 23 June 1993, Tokyo High Court, 46 *Kominshu* 43, 48.

⁸² See generally JOST DELBRÜCK, 'Third-Party Effects of Fundamental Rights through Obligations under International Law', 12 *Law & State* (1975) 61.

⁸³ See e.g. 1 *Kenpō II: Jinken* [Constitutional Law II: Human Rights] (Nobuyoshi Ashibe ed.), (1978) 39-106. This theory also appears to have found favor with the courts. Judgment of 24 March 1981, Supreme Court, 998 *Hanrei Jiho* 3.

‘public policy’ concept found in Article 90 of the Civil Code. It is likely that this theory will be extended to the Convention on Discrimination against Women as well. Attempts have already been made by Japanese women to invoke the Convention indirectly to enrich the concept of ‘public policy’ and to nullify, for instance, an office regulation which set a lower retirement age for women. The courts, however, have not been very receptive to such arguments.⁸⁴

3.4. Rank

3.4.1. Relationship with statutes

Article 98(2) of the Japanese Constitution provides only that treaties and established laws of nations “shall be faithfully observed.” It does not specify the rank which international law holds in the Japanese legal order. As for the relationship between treaties and statutes, treaties are generally regarded as ranked higher. A treaty prevails even when an inconsistent statute is enacted later. Scholars have reached this conclusion for the following reasons: (1) the Constitution makes internationalism one of its basic tenets; (2) Article 73(3) requires approval of treaties by the Diet; and (3) the phrase that treaties “shall be faithfully observed” implies that they are higher than ordinary statutes.⁸⁵ The government adopted this view during the drafting stage of the Constitution and has maintained it ever since. The view has been accepted by the courts as well. In numerous instances in which human rights treaties were invoked to challenge the legality of statutes, the courts, including the Supreme Court, assumed the superior force of treaties.⁸⁶ In one case the Tokyo District Court held that an article in the Public Corporation and National Enterprises Labour Relations Law was null and void because it conflicted with the 1949 International Labour Organization Convention on the Right to Organize and Collective Bargaining (No. 98).⁸⁷

⁸⁴ E.g. Judgment of 4 July 1990, Tokyo District Court, 1358 *Hanrei Jiho* 28, 32; Judgment of 4 December 1986, Tokyo District Court, 1215 *Hanrei Jiho* 3, 13. For details, see YUJI IWASAWA, ‘The Impact of International Human Rights Law on Japanese Law: The Third Reformation for Japanese Women’, 34 *JAIL* (1992) 21, 33-35.

⁸⁵ E.g., SHIRO KIYOMIYA, *Kenpō I* [Constitutional Law I] (3d ed. 1979) 449; MIYAZAWA, *op. cit.* n. 14 at 814; TAKANO, *op. cit.* n. 49 at 209-13.

⁸⁶ E.g. Judgment of 8 March 1989, Supreme Court Grand Bench, 43 *Minshu* 89, 22 L. Japan (1989). 39.

⁸⁷ Judgment of 10 September 1966, Tokyo District Court, 17 *Rominshu* 1042.

The rank of executive agreements is rarely discussed. Some commentators seem to presume that they have the same rank as treaties.⁸⁸ However, one of the grounds for giving superiority to treaties over statutes – that treaties are approved by the Diet – is lacking as far as executive agreements are concerned. An executive agreement which is concluded by the government alone on the basis of existing domestic laws and regulations, or within the scope of budgetary appropriations, probably should not be given a rank higher than statutes enacted by the Diet; their rank should be equal to orders and regulations issued by the government. Only executive agreements concluded on the basis of a treaty may be given the same rank as a treaty.⁸⁹

While treaties may be entered into by two states alone, general customary international law must be accepted by most states in the world. Since treaties prevail over statutes, Japanese scholars and courts take it for granted that customary international law also prevails over statutes. For example, in the *Yoon Soo Kil* case, the Tokyo District Court assumed that customary international law had stronger force than statutes, when, based upon the customary international rule of non-extradition of political offenders, it annulled a deportation order made in accordance with municipal law.⁹⁰

3.4.2. Relationship with the Constitution

As for the relationship between treaties and the Constitution, scholarly opinions are sharply divided into those who regard treaties as higher than the Constitution (hereinafter referred to as the ‘treaty supremacy theory’) and those who regard the Constitution as higher than treaties (the ‘constitutional supremacy theory’).

The advocates of the treaty supremacy theory give the following reasons for taking such a view. First, Article 98 paragraph 1 stipulates the superiority of the Constitution over any “law, ordinance, imperial prescript or other acts of government.” ‘Treaties’ are not listed; instead paragraph 2 of the same article orders their faithful observance. Secondly, Article 81 empowers the Supreme Court to review the constitutionality of any “law, order, regulation

⁸⁸ E.g. NOBUYOSHI ASHIBE, *Kenpō Kōgi Notes I* [Lecture Notes on Constitutional Law, I] (1986) 37; HIGUCHI et al., op. cit. n. 24 at 1493, 1500; MIYAZAWA, op. cit. n. 14 at 808, 814.

⁸⁹ See TERUYA ABE, *Kenpō* [Constitutional Law] (1983) 279; HAYASHI, loc.cit. n. 12 at 39. YACHI seems to believe that all executive agreements should be ranked lower than statutes. YACHI, loc.cit. n. 52 at 113.

⁹⁰ Judgment of 25 January 1969, Tokyo District Court, 20 *Gyoshu* 28, 14 *JAIL* (1970) 146.

or official act.” Again, ‘treaties’ are not listed. Thirdly, internationalism is one of the basic tenets of the Constitution.⁹¹

The proponents of the constitutional supremacy theory refute these arguments as follows. First, since Article 98(1) relates to the superiority of the Constitution in the domestic order, it is natural that treaties are not listed. Secondly, treaties are not listed in Article 81 because some treaties are not suitable for judicial review. Thirdly, internationalism is such a vague principle that it cannot be a ground for justifying supremacy of treaties over the Constitution. Moreover, the proponents of this view point to the simplified treaty-making procedure under the Constitution. A rigid procedure is prescribed for revision of the Constitution, whereas the treaty-making procedure is quite simple. It is easier to conclude a treaty than to enact an ordinary statute, not to speak of revising the Constitution. Therefore, the view giving superiority to treaties would, in effect, make a revision of the Constitution easy and infringe the principle of the sovereignty of the people, another important principle of the Constitution.⁹²

The treaty supremacy theory was advocated by some of the most influential scholars immediately after the Second World War. Starting from the late 1950s, however, when the constitutionality of the Japan-US Security Treaty became an intense political issue, the validity of this theory came into serious doubt, and support for it dwindled. Today, most scholars support the constitutional supremacy theory. The government also supports the constitutional supremacy theory, at least with respect to ‘bilateral political or economic treaties.’⁹³

In 1959 the Supreme Court, too, endorsed the constitutional supremacy theory in the *Sunagawa* case. In this case, a group of demonstrators who had trespassed on *Tachikawa* Air Base while protesting against the extension of a

⁹¹ E.g. MIYAZAWA, op. cit. n. 14 at 814-18; JIRO TANAKA, ‘Shin Kenpō ni okeru Jōyaku to Kenpō no Kankei’ [The Relationship between Treaties and the Constitution under the New Constitution], in JIRO TANAKA, *Hōritsu ni yoru Gyōsei no Genri* [The Principle of Administration by Law] (1954) 99, 115-21; YOKOTA, loc.cit. n. 14 at 32-33.

⁹² E.g. KIMINOBU HASHIMOTO, *Nihonkoku Kenpō* [The Constitution of Japan] (Rev. ed. 1988) 680-01; HIGUCHI (et al.), op. cit. n. 24 at 1500-01; KIKUYOMIYA, op. cit. n. 85 at 450-52; SATO, op. cit. n. 24 at 1290-93; TAKANO, op. cit. n. 49 at 207-09.

⁹³ The government seems to distinguish between three kinds of treaties and takes the position that some treaties prevail over the Constitution while others do not: treaties which represent “established laws of nations” prevail over the Constitution; treaties which concern “matters of vital importance to the destiny of a nation such as a surrender document or a peace treaty” prevail over the Constitution; while the Constitution prevails over “bilateral political or economic treaties.” See KAZUO YAMANOUCHI, *Seifu no Kenpō Kaishaku* [Interpretations of the Constitution by the Government] (1965) 247-48.

runway were indicted on the basis of a law implementing the Administrative Agreement concluded between Japan and the United States under Article III of the Security Treaty. The accused in this case argued that the Security Treaty, which allowed US forces to be stationed in Japan, was contrary to Article 9 of the Japanese Constitution, which provides that “the Japanese people forever renounce war” and that “[i]n order to accomplish [that] aim [. . .] land, sea, and air forces [. . .] will never be maintained.” The Supreme Court declined to engage in a constitutional review, stating:

The Security Treaty [. . .] must be regarded as having a highly political nature [. . .] Consequently, the legal decision concerning its constitutionality has a character unsuitable in principle for review by a judicial court [. . .] , and accordingly falls outside the power of judicial review by the court, unless its unconstitutionality or invalidity is obvious.⁹⁴

Although the Supreme Court refused judicial review in this case, it suggested that it would exercise a review power if a treaty’s substantive “unconstitutionality or invalidity is obvious.” Thus, the Supreme Court acknowledges in principle that the Constitution is ranked higher than treaties and that treaties are subject to judicial review. In reality, however, one could hardly think of a situation in which the ‘unconstitutionality or invalidity’ of a treaty is ‘obvious’.

Even though treaties are ranked lower than the Constitution, appeals to the Supreme Court based on treaties should not be dismissed summarily. In Japan, appeals to the Supreme Court in criminal matters are admissible only when they find support either in ‘the Constitution’ or in ‘case law’ (Arts. 405 and 433 of the Criminal Procedure Law). As for civil matters, appeals to the Supreme Court as the fourth instance and special appeals to the Supreme Court in cases where appeals are not normally allowed are admissible only when they find support in ‘the Constitution’ (Arts. 409*bis* and 419*bis* of the Civil Procedure Law). The Supreme Court tends to summarily dismiss appeals based on ‘treaties’ as inadmissible, regarding them as appeals based merely on ordinary ‘laws.’ As treaties have higher authority than ‘statutes,’ appeals based on treaties should not be equated with appeals based on ‘statutes.’ Moreover, human rights treaties, especially the International Covenants on Human Rights,

⁹⁴ Judgment of 16 December 1959, Supreme Court Grand Bench, 13 *Keishu* 3225, 4 JAIL (1960) 103; 32 ILR 43. For commentaries on this case, see ALFRED C. OPPLER, ‘The Sunakawa Case: Its Legal and Political Implications’, 76 *Political Science Quarterly* (1961) 241; SENJIN TSURUOKA, ‘La Décision de la cour suprême du Japon dans l’affaire de Sunakawa’, 70 *Revue Général de Droit International Public* (1966) 431.

have provisions similar to the human rights provisions in the Constitution. Appeals to the Supreme Court based on such treaties should be considered as equivalent to appeals based on 'the Constitution.'⁹⁵

As for customary international law, many scholars take the view that it is ranked even higher than the Constitution. The proponents of the treaty supremacy theory tend not to distinguish customary international law from treaties, apparently advocating supremacy of customary international law over the Constitution as well.⁹⁶ On the side of the constitutional supremacy theory camp, many scholars maintain that customary international law must be distinguished from treaties and that it should be given a rank higher than the Constitution.⁹⁷ The government also seems to take the view that 'established laws of nations' prevail over the Constitution.⁹⁸ It certainly would be possible to give peremptory norms of international law (*jus cogens*) privileged status not only under international law but also under domestic law. It is doubtful, however, whether one should give such special status to all rules of customary international law, when, on the international level states can deviate from customary international law by entering into treaties – the principle of *lex specialis derogat legi generali*.⁹⁹

4. CONCLUSION

In Japan, treaties and customary international law have domestic legal force and have a rank higher than statutes but lower than the Constitution. Japan's defeat in the Second World War was the main driving force for the elevation of international law to such a high status in Japan. Repentance for the war is deeply imbedded in the Constitution¹⁰⁰ and has brought about many epoch-making provisions in the Constitution. Because treaties have the force

⁹⁵ MASAMI ITO, 'Kokusai Jinken Hō to Saibansho' [International Human Rights Law and the Courts], 1 *Human Rights International* (1990) 7, 11.

⁹⁶ *Chūshaku Kenpō*, op. cit. n. 25 at 1482-84.

⁹⁷ E.g., HASHIMOTO, op. cit. n. 92 at 682-83.

⁹⁸ *Supra* n.93. See also HIGUCHI (et al.), op. cit. n. 24 at 1501-02; KOJI SATO, *Kenpō* [Constitutional Law] (New ed. 1990) 31.

⁹⁹ See ASHIBE, op. cit. n. 88 at 39; TAKANO, op. cit. n. 49 at 194-95 n. 95.

¹⁰⁰ See the following excerpt from the Preamble of the Constitution: "We, the Japanese people [. . .] resolved that never again shall we be visited with the horrors of war [. . .] do firmly establish this Constitution. We [. . .] desire peace for all time [. . .] and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace [. . .]."

of law and override statutes, however, Japan has been wary of ratifying treaties and is extraordinarily cautious in examining compatibility of domestic laws with a treaty before it proceeds with ratification.¹⁰¹ Nevertheless, once Japan has decided to ratify a treaty, it has been scrupulous in bringing domestic laws into conformity with the treaty. By virtue of amendments made before ratification of treaties, and, to a lesser extent, of their judicial application, the impact of international law on Japanese law has been substantial, especially in the fields of human rights.¹⁰²

¹⁰¹ YACHI, loc.cit. n. 52 at 115.

¹⁰² See IWASAWA, loc.cit. n. 39; IWASAWA, loc.cit. n. 84; IWASAWA, loc.cit. n. 72. One non-Japanese scholar has observed that a "revolution" has been brought to Japan by international human rights law. KENNETH L. PORT, 'The Japanese International Law "Revolution": International Human Rights Law and Its Impact in Japan, 28 *Stanford Journal of International Law* (1991) 139.