Applicability and Interpretation of the International Covenant on Economic, Social and Cultural Rights, focusing on Articles 2 and 9:

－Comparison among the Japanese Courts, the European Court of Human Rights, and the Committee on Economic, Social and Cultural Rights－

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Abstract

When the International Covenants on Human Rights were concluded, the rights stipulated in the Universal Declaration of Human Rights (hereafter, the UDHR) were divided into two Covenants: the International Covenant on Civil and Political Rights (hereafter, the ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereafter, the ICESCR), reflecting the conflict between the East and the West during the Cold War. Consequently, the difference in the nature of those rights was emphasized more than necessary, and the ICESCR was neglected compared to the ICCPR. Its "progressive realization" language has been misunderstood as not requiring any efforts by States Parties. However, as the Committee on Economic, Social and Cultural Rights (hereafter, the CESCR) was established, and the General Comments were issued, the understanding of obligations regarding the economic, social and cultural (hereafter, ESC) rights has been developed.

Nevertheless, the courts in Japan have been persistent on the framework that was established before the ratification of the ICESCR and does not reflect the development of the Covenant's interpretation. Thus, this thesis focuses on the application and interpretation of Articles 2 and 9 of the ICESCR to compare the judgements regarding the discrimination based on nationality in applying the social security system in Japan with similar judgements in the European Court of Human Rights (hereafter the ECHR) and the interpretation shown by the CESCR. It aims to clarify their different understandings of the obligations under the ICESCR and their stance on different treatment based on nationality regarding ESC rights. Ultimately, it leads to the discussion about to what extent the idea of the ICESCR – to grant ESC rights without discrimination and not to retreat the standard of living – is feasible. Therefore, at the end of this thesis, we try to seek the best interpretation which allows realizing the idea of the ICESCR in the real world, which has only a limited amount of resources.

This thesis is structured as follows. Chapter One introduces the theme and structure of the thesis. Chapter Two retraces how the ICESCR was adopted and how the dichotomy between ESC rights and civil and political (hereafter, CP) rights arose. Chapter Three examines how the understanding of obligations has been developed by referring to the General Comments, the Limburg Principles, and the Maastricht Guidelines. Apart from a simple clarification based on the requirement of national interference between the ESC rights and the CP rights, the CESCR introduced three categories of obligations: the obligation to respect, the obligation to protect, and the obligation to fulfill. The Committee also created a concept of "minimum core obligation," which is the *"raison d'être"* of the rights. Although Article 2.1 prescribes the "progressive realization," States Parties are obliged to start taking steps to the realization immediately.

Moreover, the minimum core obligation and the obligation to eliminate discrimination are considered to give immediate effect. Chapter Four introduces some judgements by the ECHR regarding the discrimination based on nationality in the social security system to see how different treatment based on nationality regarding ESC rights is treated in other entities. It shows that the Court adopts strict examination in cases of different treatments between persons in a similar situation. The ECHR examines the compatibility of the provision of domestic law with the aim of the Convention for the Protection of Human Rights and Fundamental Freedoms and the proportionality and rationality of the means and aims. Although the judgements by the ECHR are not directly applicable in the courts of Japan, they are worth referring to in order to better understand the meaning of the ESC rights and the standard to judge the discrimination. Chapter Five introduces some judgements by the courts in Japan regarding the differential treatment based on nationality in the social security system. First, it confirms, as a premise to explain the stance of Japan, that the right of aliens has been judged based on the theory on the nature of rights and the Court has admitted the wide discretion of the legislature regarding the social and economic policies. In terms of the interpretation of the ICESCR, it has been regarded as only requiring progressive realization of the relevant rights. Article 9 is considered as merely declaring political responsibility to actively promote the social security policy within the States and not granting concrete rights to individuals. Based on those interpretations by the CESCR and the judgements by the ECHR and the courts in Japan, Chapter Six discusses some issues regarding the application and interpretation of the ICESCR. First, it examines the domestic legal force of international law by reconfirming the concept of "direct applicability," "self-executing" treaties, and judicial normativity. It also discusses the justiciability of ESC rights and judicial normativity. Then, it moves on to the issue regarding the Japanese legal order. It also confirms the legal significance of "General Comments," "Concluding observations," and "Views" to measure to what extent the courts in Japan should take the interpretation by the Committee into account. Finally, it points out that the limitation on appeal to the Supreme Court in Japan and the principle of exhausting domestic remedies when submitting the individual communication procedure might limit possibility of realizing the ESC rights of individuals even if Japan decides to participate in the individual communication procedure by ratifying the Optional Protocol of the ICESCR. In Chapter Seven, the thesis will be concluded by summarizing the points raised in each Chapter and clarifying the remaining issues.

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1. Introduction

"Economic, social and cultural rights are the rights."[1] Shin, H (2009, p.127) emanated this phrase to emphasize that although it is more than clear that the International Covenant on Economic, Social and Cultural Rights (hereafter, the ICESCR) is one of the "International Covenants on Human Rights," international and domestic implementation efforts for realizing the Covenant had been extremely insufficient compared to those for the International Covenant on Civil and Political Rights (hereafter, the ICCPR), another International Covenant on Human Rights. Its "progressive realization" language has drawn a misunderstanding that the Covenant only imposes an obligation to make an effort.[2] The reporting system, an international implementation measure, had been ignored for a long time, and the government report had never been submitted until the end of 1998.[3] Prescribing the civil and political (hereafter, CP) rights and the economic, social and cultural (hereafter, ESC) rights in separate human rights documents created a hierarchy with CP rights at the top. This has affected the activities of human rights NGOs, with little attention being paid to ESC rights compared to CP rights.[4] Under those circumstances, the CESCR showed its concern toward the disrespect for ESC rights in the speech at the World Conference on Human Rights in 1993 as follows: "The shocking reality, against the background of which this challenge must be seen, is that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights."[5]

However, after many years have passed since the Covenant was issued in 1976, some significant developments in the international implementation started to be observed. Since 1999, the Committee has once again begun adopting "General Comments" on the respective rights of the Covenant.[6] In 2008, based on the word by the Committee, the Optional Protocol of the ICESCR (hereafter, the OP-ICESCR)[7], which stipulates the establishment of an individual

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[1] Shin, H. (2009). *Jinkenjyōyaku no gendaitekitenkai [Modern development of human rights treaties]*. Tokyo: Shinzansha, p.127.
[2] Shin, H. (2009). p.129.
[3] Shin, H. (2009). p.127.
[4] Symonides, J., & Yokota, Y. (2004). *Kokusaijinkenhō manyuaru, sekaitekishiya kara mita jinken no rinen to gainen [International human rights law manual, human rights philosophy and practice from a global perspective]*. Tokyo: Akashishoten, p.155
[5] UN Committee on Economic, Social and Cultural Rights (CESCR), *Report on the Seventh Session*, 23 November – 11 December 1992, Doc. E/1993/22, p.83, para 5. Available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2F1993%2F22(SUPP)&Lang=en [accessed 20 March 2022]
[6] A. Chapman and S. Russell. (2002). Introduction, A. Chapman and S. Russell (eds), *Core obligations: Building a Framework for Economic, Social and Cultural Rights*. Antwerp: Intersentia, pp.3-4.
[7] OHCHR. Optional Protocol to the International Covenants on Economic, Social and Cultural

communication procedure, an examination system, and an optional national reporting system, was adopted by the UN Human Rights Council and the UN General Assembly. Wider agreement on the core elements of ESC rights, development of international standards, and some guides to monitoring and evaluating them now exist.[8] These developments are noteworthy.

Nevertheless, turning to the situation in Japan, there have been no significant legislative and administrative measures for consciously implementing the Covenant, other than the slight amendment of the law[9] at the time of ratification. Moreover, there have been few judgements that used the rights under the ICESCR in their decisions. The Supreme Court dismissed the allegation that the National Pension Act (before amendment) violated the ICESCR in the *Shiomi* case on 2 March 1989 by stating that the ICESCR imposes an obligation to "progressively achieve." It continues that Article 9 of the Covenant declares "the political responsibility to actively promote social security policies toward the realization of rights; thus, it does not stipulate that concrete rights should be granted to individuals immediately."[10] Since then, the judgements of the lower courts have repeated the same view. In other words, the courts have continued to stubbornly state that the rights under the ICESCR are not rights that individuals can assert in a court. It needs to be acknowledged that there are reasons why the phrase by Shin introduced at the beginning still needs to be reiterated, more than 40 years after Japan ratified the ICESCR.[11]

The interpretation surrounding the non-discrimination principle is also at stake. The international human rights law, which was established after the horrors of World War II and the persecution based on political, racial, and religious background during the war, is a legal system that recognizes "human rights" as the right of everyone and regards non-discrimination and equity that derives from the universality of human rights as the most precious principle.[12] Any human rights law, including the Charter of the United Nations, holds up human rights protection for "everyone" without discrimination based on race, sex, language, and religions, and so on. The peculiarity of human rights protection under human rights treaties is the comprehensiveness of *ratione personae* of protection of rights, which is derived from the universality of the "human

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Rights. Available at: https://www.ohchr.org/en/professionalinterest/pages/opcescr.aspx [accessed 20 March 2022]

[8] A. Chapman and S. Russell. (2002). p.3.

[9] Elimination of nationality requirements for housing-related laws by changing the legal interpretation. Cf. With the participation in the 1951Convention relating to the Status of Refugees and its 1967 Protocol, the Immigration Control and Refugee Recognition Act was enacted and amended, and the nationality clauses were abolished from the National Pension Act and three child-related laws such as the Child Allowance Law. See Shin, H. (2016). *Kokusaijinkenhou ― kokusaikijun no dainamizumu to kokunaihō tono kyōchō ― [International human rights law ― coordination between international standard dynamism and domestic law ―]*. Tokyo: Shinzansha, p.460.

[10] Judgt of 2 Mar. 1989, Sup. Ct, 1363 HANREI JIHŌ, p.68.

[11] Japan ratified the ICESCR in 1979. See Ministry of Foreign Affairs of Japan. (2020). Kokusaijinkenkiyaku [International Covenants on Human Rights] available at: https://www.mofa.go.jp/mofaj/gaiko/kiyaku/index.html [accessed 20 March 2022]

[12] Shin, H. (2011). Kokusajinkenhō kara mita gaikokujin no jinken [Human rights of foreigners as seen from international human rights law]. *Jiyū to seigi*, 62.6, p.11.

rights" concept.[13] Japan has ratified most human rights treaties, including the ICESCR, and owes a responsibility to fulfill its duty under the treaties. However, the theoretical framework under the Constitution of Japan to judge whether an "alien" can be a subject to enjoy the rights depends on the nature of the right. It must be pointed out that in relation to residence status, there are situations in which human rights protection is greatly impaired. In that sense, Article 2.2 of the ICESCR can be expected to be a useful and indispensable legal tool to protect the rights of aliens who tend to fall out from the framework of human rights protection under the Constitution.

Developing and strengthening the debate on all aspects of human rights, including ESC rights and the non-discrimination principle, is an urgent task. The Covenant must be implemented not only at the international level but also at the domestic level. Therefore, this thesis focuses on the interpretation of Articles 2 and 9 of the ICESCR, which were already taken up in some cases in Japan, to discuss the nature of the obligations that the Covenant imposes, the interpretation regarding the non-discrimination principle, especially in relation to the discrimination based on nationality, and the right to social security. It examines the divergence regarding their interpretation among the courts in Japan, the CESCR, and the European Court of Human Rights (hereafter, the ECHR), and indicates the remaining issues to realize the relevant rights at the domestic level. This thesis is structured as follows. The second chapter describes how the "progressive realization" language led to the depreciation of the ICESCR, in contrast to the ICCPR, which has been considered to have an "immediate" effect. The third chapter details how the understanding of the State's obligations to realize the rights under the ICESCR has been developed by examining the General Comments by the CESCR, the Limburg Principles, and the Maastricht Guidelines. The fourth chapter takes a look at the judgements by the ECHR and observes what kind of framework is adopted to judge discrimination based on nationality regarding the right to social security. The fifth chapter examines some judgements by the courts in Japan for a more detailed look at what kind of theoretical framework do the Japanese courts use to interpret Articles 2 and 9 of the ICESCR. The sixth chapter points out the divergence between the interpretation regarding the applicability of the ICESCR and Articles 2 and 9 in the international society and that in the Japanese courts. Finally, the seventh chapter runs over the main points of this thesis, reconsiders to what extent the idea of the ICESCR– to grant ESC rights for everyone without discrimination and not to conduct regressive measures – is feasible, and points out the remaining issues.

2. Dichotomy between CP rights and ESC rights

The Universal Declaration of Human Rights (hereafter the UDHR) was enacted in 1948 in order

[13] Shin, H. (2011). *Jiyū to seigi*, 62.6, p.12.

not to repeat the disastrous human rights violation that occurred during World War II.[14] The UDHR is a legally non-binding document, which is very comprehensive and covers both CP rights and ESC rights. The ICCPR and the ICESCR were established in 1966 to give legally binding power to the essences contained in the UDHR. The contents included in the UDHR were split into two categories, reflecting the conflict structure between the West and East during the Cold War.[15] On the one hand, the socialist states sought to justify their regime by claiming that ESC rights should be prioritized, despite their insufficient protection of these rights. On the other hand, western societies and governments emphasized that CP rights are of great importance as if they almost rejected ESC rights as part of the human rights system. There were fierce fights over the requirement of States Parties' involvement to realize the enjoyment of each right.[16] CP rights were interpreted as not requiring States Parties' involvement and, instead, were considered as rights to demand that the State Parties should suppress their exercise of power. Therefore, the Covenant was considered to impose the immediate realization of those rights, and the rights under the Covenant can be executed in a court. Meanwhile, ESC rights were construed as the rights to ask States Parties to take positive measures, requiring financial burden. Hence, the Covenant was considered as a "promotional convention," which merely imposes the obligation to "progressively realize," and those rights were seemed unable to be asserted in a court.[17]

This interpretation should be questioned. As will be mentioned in detail, some CP rights require the States Parties' involvement and mobilization of resources[18], while ESC rights do ask States Parties not to interfere.[19] Moreover, it must be bizarre if we interpret the right to live, stipulated in Article 6 of the ICCPR, as a right to be realized immediately, while reading the right to be free from hunger, prescribed in Article 11 (2) of the ICESCR, as a right to be realized progressively because those provisions seem to require almost the same amount of effort by the State Parties.[20] In addition, while the ICESCR prescribes progressive realization, recognizing the constraints that come from the limits of available resources, it also imposes various obligations with an immediate effect.[21]

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[14] United Nations. History of the Declaration. Available at: https://www.un.org/en/about-us/udhr/history-of-the-declaration [accessed 20 March 2022]
[15] Symonides, J., & Yokota, Y. (2004). p.155.
[16] Shin, H. (2009). p.129.
[17] Shin, H. (2009). p.130.
[18] Shin, H. (2009). p.132.
[19] For example, in order to realize the "right not to be tortured", it is insufficient to require the omission, "the obligation not to torture". For effectively guaranteeing this right, various commissions are required such as prevention or elimination of the torture, punishment of practitioners, relief for victims, and taking measures to prevent recurrence. See Shin, H. (2016). pp.156-157.
[20] Shin, H. (2009). pp.130-131.
[21] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1 of the Covenant)*, 14 December 1990, E/1991/23, para.1. Available at: https://www.refworld.org/docid/4538838e10.html [accessed 20 March 2022]

Another questionable allegation is that the ESC rights cannot be a "right" because they cannot be executed in a court. This is a one-track way of thinking. The concept of "right" not only signifies the execution in a court but also includes allocating as much social and financial resources as possible to take appropriate measures to meet the requirements.[22] In addition, it should be recognized that avoiding the violation of rights from States and third parties by judging their behaviors as illegal in the judiciary in a case of infringement is also the consequence of constituting a "right."[23] The rights prescribed in the ICESCR provide legal constraints on acts of infringement or denial of rights while creating a correlative obligation to take various positive steps to realize the rights.[24]

Acknowledging the basic idea that the ICESCR aims for realizing the ESC "rights," the interpretation regarding the rights and obligations enumerated in the Covenant has been developed through General Comments, the Limburg Principles, and the Maastricht Guidelines. These issues regarding the nature of the States Parties' obligations under the ICESCR and the judicial normativity of the Covenant will be looked at in detail in the following chapters.

3. Contents of the ICESCR

Article 2 is a key provision to fully understand the ICESCR. It describes the nature of the general legal obligations undertaken by States Parties to the Covenant and must be seen as having a dynamic relationship with all the other provisions of the Covenant.[25] At the time of ratification, the nature of the ICESCR obligation was simply understood with its "progressive realization" language, but over time, the understanding toward its obligations and rights has been developed more precisely and concretely as will be seen below.

3.1. Article 2.1

3.1.1. "to take steps" with a view to "achieving progressively"

Article 2.1 of the ICESCR prescribes that each State Party is "to take steps" with a view to "achieving progressively" the full realization of the rights enumerated in the Covenant. While States Parties are not obliged to achieve the full realization of rights in Article 2.1 immediately, they are obliged to continue taking positive measures for realizing the same.[26] In other words, the omission to "take steps" itself consists of the negligence of the obligation stipulated in Article 2.1.[27] States Parties are required to formulate and implement domestic policies towards the

[22] Shin, H. (2009). p.132.
[23] Shin, H. (2009). p.133.
[24] Shin, H. (2016). p.259.
[25] CESCR, *General Comment No. 3*, para.1.
[26] Shin, H. (2016). p.296.
[27] Shin, H. (2016). p.296.

realization of the Covenant rights and appropriately evaluate how much progress has been made from such implementation.[28] Philip G. Alston (1987, pp.357-358) argues that States Parties are required to monitor the realization of ESC rights, devise appropriate strategies, and clearly define programs for their implementation in order to comply with the obligation to achieve the realization of ESC rights "progressively."[29] General Comment 14 embodies this idea in paragraphs 57-58.[30] Those steps must be taken within a reasonably short time after the Covenant's entry into force for the States concerned.[31] The CESCR has explained that Article 2 "imposes an obligation to move as expeditiously and effectively as possible" towards the goal of full realization of the substantive rights under the Covenant.[32] The Limburg Principles also state that "All States parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant."[33] The Committee adds that "such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."[34]

It must be noted that the concept of progressive realization recognizes the fact that full realization of all ESC rights cannot be achieved in a short period due to resource constraints. In this sense, the obligation differs significantly from that contained in Article 2 of the ICCPR, which embodies an immediate obligation to respect and ensure all relevant rights. Nevertheless, the ICESCR should neither be misinterpreted as not imposing any obligations on States Parties nor considered that the Covenant does not demand immediate implementation.[35] Indeed, some rights under the ICESCR, such as freedom from discrimination in enjoying all ESC rights and core obligations, give rise to obligations of immediate effect.[36] Thus, a State cannot argue, for example, that it is providing primary education or primary healthcare to boys immediately but would extend

[28] Shin, H. (2016). p.296.
[29] P. Alston. (1987). Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights. 9 *Human Rights Quarterly.* Maastricht Guidelines, pp.357-358.
[30] CESCR, *General Comment No. 14*, paras.57-8.
[31] CESCR, *General Comment No. 3,* para.2.
[32] See e.g., CESCR, *General Comment No. 3*, para. 9; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, para.44. Available at: https://www.refworld.org/pdfid/4538838c22.pdf [accessed 20 March 2022]; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 May 2000, E/C.12/2000/4, para.31. Available at: https://www.refworld.org/pdfid/4538838d0.pdf [accessed 20 March 2022]; and UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, para.18. Available at: https://www.refworld.org/docid/4538838d11.html [accessed 20 March 2022]; UN Commission on Human Rights, *Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, 8 January 1987, E/CN.4/1987/17, para.21. Available at: https://www.refworld.org/docid/48abd5790.html [accessed 20 March 2022]
[33] UN Commission on Human Rights, *Limburg Principles*, para.16.
[34] CESCR, *General Comment No. 3*, para.2.
[35] Shin, H. (2016). p.296.
[36] M. Ssenyonjo. (2009). *Economic, Social and Cultural Rights in International Law*. London: Hart Publishing. p.60

it to girls progressively.

It is evident that the words used in Article 2.1 — "achieving progressively"— ask for States Parties to continue taking positive measures for the full realization of rights, and some obligations with immediate effect are included in the intention of the provision.

3.1.2. "the maximum of its available resources"

Article 2.1 obligates each State Party to take the necessary steps "to the maximum of its available resources." The availability of resources refers not only to those controlled by the State or other public entities but also to resources available within the society as a whole, "from the private sector as well as the public."[37] It is the State's responsibility to mobilize these resources.

One of the issues deriving from the obligation to mobilize the maximum of its available resources was the evaluation, as pointed out by Audrey R. Chapman (1996, p.31). He noted that evaluating progressive realization within the context of resource availability "considerably complicates the methodological requirements" for monitoring.[38] There were two practical difficulties in applying this requirement to measure state compliance with the full use of maximum available resources. The first difficulty was determining what resources are "available" to a particular State to give effect to the substantive rights under the Covenant. It has been indicated that the word "available" leaves too much "wiggle room for the State,"[39] making it difficult to define the breach of the progressive obligation.[40] The second difficulty was to determine whether a State has used such available resources to the "maximum". R Robertson (1994, p.694) points out that "maximum" is the sword of human rights rhetoric, standing for idealism.

To solve these concerns, the CESCR has developed some useful indicators in its "Concluding Observations" to determine state compliance with the obligation to utilize the "maximum available resources."[41]

The implication from the obligation to take steps to the maximum of "available resources" is that an assessment must be made to check whether the steps taken were "adequate" or "reasonable" by taking into account the following considerations:

(a) The extent to which the measures taken were deliberate, concrete and targeted towards the

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[37] A. Chapman and S. Russell. (2002). p.11.
[38] A. Chapman. (1996). A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights. 18 H*uman Rights Quarterly*, p.31.
[39] R. Robertson. (1994). Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realising Economic, Social and Cultural Rights. 16 *Human Rights Quarterly,* p.694.
[40] S. Joseph *et al*. (2000). *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary.* Oxford University Press, p.7.
[41] UN Committee on Economic, Social and Cultural Rights (CESCR), *Statement: An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant*, 21 September 2007, UN Doc E/C.12/2007/1, para.8. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2F2007%2F1&Lang=en [accessed 20 March 2022]

fulfilment of economic, social and cultural rights;

(b) Whether the State party exercised is discretion in a non-discriminatory and non-arbitrary manner;

(c) Whether the State party's decision (not) to allocate available resources is in accordance with international human rights standards;

(d) Where several policy options are available, whether the State party adopts the option that least restricts Covenant rights;

(e) The time frame in which the steps were taken;

(f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations or risk.[42]

If communication is submitted against a State Party to the ICESCR and its Optional Protocol, and the State Party uses "resource constraints" as an explanation for any retrogressive steps taken, the Committee indicates that it will consider such information on a country-by-country basis in the light of objective criteria such as:

(a) The country's level of development;

(b) The severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;

(c) The country's current economic situation, in particular whether the country was undergoing a period of economic recession;

(d) The existence of other serious claims on the State party's limited resources; for examples, resulting from a recent natural disaster or from recent internal or international armed conflict;

(e) Whether the State party had sought to identify low-cost options; and

(f) Whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.[43]

The Committee emphasizes that even where the available resources are demonstrably inadequate, the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.[44] Moreover, the obligations to monitor the extent of and envisage strategies and programs of the realization of ESC rights, are not eliminated as a result of resource constraints.[45] Furthermore, the Committee underlines the fact that even in times of severe resources constraints, whether induced by economic recession or

[42] CESCR, *Statement: An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant*, para.8.
[43] CESCR, *Statement: An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant*, para.9.
[44] CESCR, *General Comment No. 3*, para.11.
[45] CESCR, *General Comment No. 3*, para.11; CESCR, *General Comment No. 1*, para.4.

by other factors, the vulnerable members of society[46] can and must be protected by the adoption of relatively low-cost targeted programs.[47] The Limburg Principles states, "the obligation of progressive achievement exists independently from the increase in resources; it requires effective use of resources available."[48]

From these criteria and elements, it can be said that the Committee expects a strict examination to judge whether States Parties mobilize "the maximum of available resources" and seek to ensure the widest possible enjoyment of the relevant rights. Particular attention needs to be paid to protect the most vulnerable people in society.

3.1.3. Minimum core obligations

The CESCR introduces the idea of "minimum core obligation," which is the duty of all States Parties to meet the minimum essential parts of rights, even if the "full" realization of the right can be progressive. A minimum core obligation exists to satisfy the minimum essential level of each right. The Limburg Principles insist that "States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all."[49] The "minimum core content" has been described as "the non-negotiable foundation of a right to which all individuals, in all contexts, and under all circumstances are entitled."[50] If, for example, in a State Party, any significant number of individuals is deprived of essential foodstuffs, primary health care, basic shelter and housing, or the most basic forms of education, it is failing to discharge its obligations under the Covenant.

Although General Comment no.3, which introduces the idea of the minimum core obligations, does not provide a methodology for determining minimum state obligations, General Comment no.19 on the right to social security describes the minimum core obligations for the right to social security in details. States Parties are required:

(a) To ensure access to social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. If a State party cannot provide this minimum level for all risks and contingencies within its maximum available resources,

[46] The elements to be considered when defining the vulnerability and vulnerable groups under international human rights law are as follows: the extent of lack of legal protection and deprivation of rights affecting certain groups of persons, whether this lack of protection and denial of rights arises because of discrimination based on internationally prohibited grounds, what specific role the State must play to deal with the situation of those groups, and those groups' empowerment in terms of their participation in preparing laws and policies affecting their rights, and access to justice to seek redress where their rights have been violated. See Nifosi-Sutton, I. (2019). *The Protection of Vulnerable Groups under International Human Rights Law.* London: Routledge, p.16.
[47] CESCR, *General Comment No. 3*, para.12.
[48] UN Commission on Human Rights, *Limburg Principles.*
[49] UN Commission on Human Rights, *Limburg Principles*
[50] The International Human Rights Internship Program (IHRIP), *Ripple in Still Water: Reflections by Activists on Local- and National- Level Work on Economic, Social and Cultural Rights*, chapter 2. Available at: http://hrlibrary.umn.edu/edumat/IHRIP/ripple/toc.html [accessed 20 March 2022]

the Committee recommends that the State party, after a wide process of consultation, select a core group of social risks and contingencies;

(b) To ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups;

(c) To respect existing social security schemes and protect them from unreasonable interference;

(d) To adopt and implement a national social security strategy and plan of action;

(e) To take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalized individuals and groups;

(f) To monitor the extent of the realization of the right to social security.[51]

If the Covenant were to be read in a way not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.[52] The lack of sufficient resources does not exonerate States Parties, including developing states, from a threshold or the "minimum core obligation" to ensure "minimum essential levels" of each of the rights guaranteed under the Covenant.[53] In the same way, because core obligations are non-derogable, they continue to exist in situations of conflict, emergency, and natural disaster.[54] The ICESCR contains no derogation clause, and the CESCR has confirmed that the Covenant applies even in terms of conflict or general emergency.[55] It contrasts with the ICCPR, which acknowledge the derogation in time of public emergency[56], for a State Party to attribute its failure to meet its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposal to satisfy such obligations.[57]

Whether the minimum core in a least-developed state with limited available resources is the same as that in a more-developed state with more available resources can be questioned. While there are different views on this issue,[58] there would be no point in having a minimum core of state responsibility if it were state-specific and not universal.[59] The minimum core can be seen

[51] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19, para.59. Available at: https://www.refworld.org/docid/47b17b5b39c.html [accessed 20 March 2022]
[52] CESCR, *General Comment No. 3*, para.10.
[53] CESCR, *General Comment No. 3*, para.10.
[54] UN General Assembly. Report of the United Nations High Commissioner for Human Rights. 2015 session. para 15.
[55] UN General Assembly. Report of the United Nations High Commissioner for Human Rights. 2015 session. para 15.
[56] Article 4 of the ICCPR.
[57] CESCR, *General Comment No. 19*, para.60.
[58] K.G. Young. (2008). The Minimum Core of Economic and Social Rights: A Concept in Search of Content. 33 *Yale Journal of International Law,* pp.113-175.
[59] G. van Buren. (2002). Of Floors and Ceilings: Minimum Core Obligations and Children. D. Brand and S. Russeld (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives*. South Africa: Protea Boekhuis, p.184.

as a "base-line",[60] below which all States must not fall, and should endeavor to rise above.[61]

3.1.4. "by all appropriate means"

3.1.4.1. Legislative measures

The means that are expected to be used for satisfying the obligation to take steps under the ICESCR are "all appropriate means, including particularly the adoption of legislative measures."[62] The Committee declares that legislation is highly desirable in many instances and may even be indispensable in some cases.[63] Legislation is particularly essential to combat *de jure* discrimination, such as that against women, minorities, children, and persons with disabilities.[64]

The Committee strongly recommends the incorporation of the Covenant into domestic law, including the amending of existing laws,[65] to be directly invoked in the domestic courts.[66] The failure to do so in a case, where such adoption is "indispensable" (e.g., to eliminate *de jure*

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[60] D. Bilchitz. (2003). Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for the Future Socio-economic Rights Jurisprudence. 18 (1) *South African Journal on Human Rights* p.12.

[61] F. Coomans. (2002) In Search of the Core Content of the Right to Education. A Chapman and S Russel (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*. Antwerp: Intersentia, p.228.

[62] Article 2.1 of the ICESCR.

[63] CESCR, *General Comment No. 3*, para.3.

[64] See e.g., UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: Iraq*, 12 December 1997, UN Doc E/C.12/1/Add.17, paras 13-14. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.17&Lang=en [accessed 20 March 2022]; UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: Morocco*, 1 December 2000, UN Doc E/C.12/1/Add.55, paras 34, 45 and 47. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.55&Lang=en [accessed 20 March 2022]; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 5: Persons with Disabilities*, 9 December 1994, E/1995/22, para 16. Available at: https://www.refworld.org/docid/4538838f0.html [accessed 20 March 2022]

[65] UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: Yemen*, 28 November 2021, UN Doc E/C.12/1/Add.92 available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.92&Lang=en [accessed 20 March 2022]. The Committee found that "there are still persisting patterns of discrimination [against women], particularly in family and personal status law, as well as inheritance law" (para 9) and "strongly recommend[ed]that the State party amend existing legislation in accordance with the provisions of article 3 of the Covenant" (para 28).

[66] UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: UK of Great Britain and Northern Ireland*, 5 June 2002, UN Doc E/C.12/1/Add.79, para 24. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.79&Lang=en [accessed 20 March 2022]; UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: Ireland*, 17 May 2002, UN Doc E/C.12/1/Add.77, para 23. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.77&Lang=en [accessed 20 March 2022]; UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: Czech Republic*, 5 June 2002, UN Doc E/C.12/1/Add.76, para 25. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.76&Lang=en [accessed 20 March 2022]; UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding Observations: Trinidad and Tobago*, 17 May 2002, UN Doc E/C.12/1/Add.80, para.32. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1%2fAdd.80&Lang=en [accessed 20 March 2022]

discrimination), is considered to be a clear "violation" of the Covenant.[67]

The importance of incorporating the Covenant to realize the right to social security is recognized in General Comment no.19 as well. The incorporation in the domestic legal order of international instruments recognizing the right to social security is considered to significantly enhance the scope and effectiveness of remedial measures because it enables the courts to adjudicate violations of the right to social security by directly referring to the Covenant.[68] Existing legislation, strategies, and policies should be reviewed to ensure that they are compatible with obligations arising from the right to social security and should be repealed, amended or changed if they are inconsistent with the Covenant requirements.[69]

3.1.4.2. Judicial remedies

Judicial remedies are also considered appropriate, especially for justiciable rights.[70] There are several provisions in the ICESCR, including Articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4), and 15 (3), which can be immediately applied by judicial and other organs in domestic legal systems. Based on these provisions, the Committee denies the claim that the provisions under the ICESCR are inherently non-self-executing.

In relation to the right to social security, the Committee states that any person or group that has experienced violations of their rights should have access to effective judicial or other appropriate remedies at both national and international levels.[71] All victims of violations of the right to social security should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition.[72] Legal assistance for obtaining remedies should be provided within the maximum available resources.[73] Judges, adjudicators, and members of the legal profession should be encouraged by States Parties to pay greater attention to violations of the right to social security in the exercise of their functions.[74]

3.1.4.3. Other measures

Transformation of ESC rights into positive law would not be enough to realize such rights. Other measures that are also considered "appropriate" for Article 2.1 include, but are not limited to, administrative, financial, educational, and social measures.[75] Any administrative remedies such

[67] CESCR, *General Comment 13,* para.59; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 14: The Rights to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, para.48. Available at: https://www.refworld.org/pdfid/4538838d0.pdf [accessed 20 March 2022]
[68] CESCR, *General Comment No. 19*, para.79.
[69] CESCR, *General Comment No. 19*, para.67.
[70] CESCR, *General Comment No. 3*, para.5.
[71] CESCR, *General Comment No. 19*, para.77.
[72] CESCR, *General Comment No. 19*, para.77.
[73] CESCR, *General Comment No. 19*, para.77.
[74] CESCR, *General Comment No. 19*, para.80.
[75] CESCR, *General Comment No. 3*, para.7.

as those provided by the national human rights commission and ombudsperson institution[76] should be practically "accessible, affordable, timely, and effective."[77] With regard to Article 9, the Covenant imposes a duty on each State Party to take whatever steps are necessary to ensure that everyone enjoys the right to social security, as soon as possible.[78]

3.1.4.4. Appropriateness

Regarding the word "appropriate" in Article 2.1, the Committee clarifies that each State Party must decide for itself which means are the most appropriate under the circumstances for each of the rights.[79] General Comment no.19 also admits that every State Party has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances regarding the right to social security.[80] However, as the "appropriateness" of the means chosen will not always be self-evident, the Committee states that the States Parties' reports should indicate not only the measures that have been taken but also the basis on which those measures are considered to be the most "appropriate" under the circumstances. In addition, General Comment no.3 mentions that the Committee ultimately determines whether all appropriate measures have been taken.[81]

Regarding the right to social security, before any action is carried out by the State Party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and include: (a) an opportunity for genuine consultation with those affected, (b) timely and full disclosure of information on the proposed measures, (c) reasonable notice of proposed actions, (d) legal recourse and remedies for those affected, and (e) legal assistance for obtaining legal remedies. Such actions are based on the ability of a person to contribute to a social security scheme, and their capacity to pay must be considered.[82]

3.1.5. Retrogressive measures

States should avoid taking regressive steps that worsen access to ESC rights, such as cutting back investment in essential services, even under pressure from international lenders such as the International Monetary Fund (IMF) and the World Bank.[83] Unless justified "after the most careful

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[76] See UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights*, 10 December 1998, E/C.12/1998/25. Available at: https://www.refworld.org/docid/47a7079c0.html [accessed 20 March 2022]
[77] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para 9. Available at: https://www.refworld.org/docid/47a7079d6.html [accessed 20 March 2022]
[78] CESCR, *General Comment No. 19*, para.66.
[79] CESCR, *General Comment No. 3*, para.4.
[80] CESCR, *General Comment No. 19*, para.66.
[81] CESCR, *General Comment No. 3*, para.4.
[82] CESCR, *General Comment No. 19*, para.78.
[83] M. Ssenyonjo. (2009). pp.67-68.

consideration of all alternatives" and "by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources",[84] the adoption of measures that cause a clear deterioration in the protection of rights afforded violates the Covenant.[85]

3.2. Article 2.2

3.2.1. States' obligations to eliminate discrimination

The CESCR admits that non-discrimination and equality principles are fundamental components of international human rights law and essential to the enjoyment of ESC rights.[86] Article 2.2 obliges States Parties "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The Covenant recognizes the rights of "everyone" to the various Covenant rights, including the right to social security.[87] Non-discrimination is an immediate and cross-cutting obligation in the Covenant.[88] The use of the term "guarantee" implies an immediate obligation to eliminate discrimination on the prohibited grounds.[89]

General Comment no.20 notes that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination, and it has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.[90] Direct discrimination occurs when an individual is treated less favorably than another person in a similar situation for a reason related to a prohibited ground, while indirect discrimination refers to laws, policies or practices that appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination.[91] For reference, in some cases, the ECHR states that policies and measures that have disproportionately prejudicial effects on a particular group can be considered as discrimination, even if they are not

[84] CESCR, *General Comment No. 3*, para 9.
[85] M. Ssenyonjo. (2009). p.61.
[86] UN Committee on Economic, Social and Cultural Rights (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)*, 2 July 2009, E/C.12/GC/20, para.2. Available at: https://www.refworld.org/docid/4a60961f2.html [accessed 20 March 2022]
[87] CESCR, *General Comment No. 20*, para.3.
[88] CESCR, *General Comment No. 20*, para.7.
[89] CESCR, *General Comment No. 3*, para.1; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, 10 May 1999, E/1992/23, para 10. Available at: https://www.refworld.org/docid/4538838c0.html [accessed 20 March 2022]; CESCR, *General Comment 13*, paras. 31 and 43; CESCR, *General Comment No. 14*, para.30; CESCR, *General Comment No. 15*, para.17.
[90] CESCR, *General Comment No. 20*, para.7.
[91] CESCR, *General Comment No. 20*, para.10.

specifically directed to that group.[92]

Discrimination must be eliminated both formally and substantively: eliminating formal (or *de jure*) discrimination requires ensuring that a State's constitution, laws, and policy documents do not discriminate on prohibited grounds while eliminating substantive (or *de facto*) discrimination requires paying sufficient attention to groups of individuals that suffer historical or persistent prejudice.[93] The Committee insists that States Parties must immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes that cause or perpetuate substantive or *de facto* discrimination.[94] States are also obliged to adopt measures to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.[95]

3.2.2. Permissible scope of differential treatment

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective.[96] Differential treatment will be assessed:

i) if the aim and effects of the measures or omissions are legitimate
ii) if the aim and effects of the measures or omissions are compatible with the nature of the Covenant rights
iii) if the aim and effects of the measures or omissions promote general welfare in a democratic society.

The requirement on legality demands not only that the basis of limitation is prescribed in the law but should also be indicated in a way that ensures accessibility and predictability.[97] The requirement on compatibility with the nature of the Covenant rights means that limitations imposed on rights should not be interpreted or applied in a manner that prejudices the essence of the rights.[98] Certain rights on the ICESCR are not subject to any limitations by their nature.[99] In addition, the Committee stipulates that there must be a clear and reasonable relationship of

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[92] Shin, H. (2016). p.391.
Cf. *D.H. and Others v. The Czech Republic,* Appl. No. 57425/00, Council of Europe: European Court of Human Rights, 13 November 2007. Available at: http://hudoc.echr.coe.int/eng?i=001-83256 [accessed 20 March 2022]
189. An applicant alleging indirect discrimination, thus, establishes a rebuttable presumption that the effect of a measure or practice is discriminatory: the burden, then, shifts to the respondent State, which must show that the difference in treatment is not discriminatory.
[93] CESCR, *General Comment No. 20*, para.8.
[94] CESCR, *General Comment No. 20*, para.8.
[95] CESCR, *General Comment No. 20*, para.11.
[96] CESCR, *General Comment No. 20*, para.13.
[97] Shin, H. (2016). p.195.
[98] Shin, H. (2016). p.192.
See UN Commission on Human Rights, *Limburg Principles*, para.56.
[99] For example, the right to freedom from hunger is not subject to any restrictions.
See P. Alston and G. Quinn. (1987). The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights. 9 *Human Rights Quarterly*, p.201.

proportionality between the aim sought to be realized and the measures or omissions and their effects. To put limits on the rights, States Parties are required to justify such limitation by explicitly referring to the purpose recognized by the provisions of the Convention in the case.[100]

A failure to remove differential treatment based on a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State Party's disposition.[101]

3.2.3. Prohibited grounds of discrimination

Article 2.2 lists the prohibited grounds of discrimination as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The inclusion of "other status" indicates that this list is not exhaustive and other grounds may be incorporated in this category.[102]

"National origin" refers to a person's State, nation, or place of origin.[103] "Nationality" is included in "other status."[104] The Committee insists that the ground of nationality should not bar access to Covenant rights, without prejudice to the application of Article 2.3 of the Covenant.[105] The Covenant rights apply to everyone, including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers, and victims of international trafficking, regardless of legal status and documentation.[106] For reference, this provides greater protection than the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families[107], which grants irregular migrants more restrictive rights.

The strict stance against different treatment based on nationality can also be found in the ECHR case law. Since the 1990s, the ECHR has deemed discrimination based on nationality to be suspected under Article 14, alongside gender-based discrimination and different status as an out-of-marriage child. The jurisprudence has been developing in a direction to require a nationality-based distinction consistent with the Covenant.[108]

3.2.4. Non-discrimination principle and the right to social security

The Covenant prohibits any discrimination, whether in law or, whether direct or indirect, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right

[100] Shin, H. (2016). p.202.
[101] CESCR, *General Comment No. 20*, para.13.
[102] CESCR, *General Comment No. 20*, para.15.
[103] CESCR, *General Comment No. 20*, para.24.
[104] CESCR, *General Comment No. 20*, para.30.
[105] CESCR, *General Comment No. 20*, para.30.
[106] CESCR, *General Comment No. 20*, para.30.
[107] OHCHR. International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families. Available at: https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx [accessed 20 March 2022]
[108] Shin, H. (2016). p.365.

to social security.[109] Article 2.2 prohibits discrimination on the grounds of nationality, and the Committee notes that the Covenant contains no express jurisdictional limitation. Where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country.[110] 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.[111]

3.2.5. Article 26 of the ICCPR and Article 2.2 of the ICESCR

Article 26 of the ICCPR, on the one hand, is an autonomous norm, which guarantees equality to all people as long as there are national laws and regulations in the State. Therefore, the provision can be insisted with rights that are not guaranteed in the ICCPR. On the other hand, Article 2.2 is a subordinate norm, which can only be applied in conjunction with the ESC rights enshrined in the ICESCR.[112]

3.3. Article 9

The right to social security was established in international law in Article 9 of the ICESCR as a legally binding provision but had not attracted attention for a long period.[113] In 1987, the CESCR was established as an expert body of the UN Economic and Social Council and started the operation to improve the reporting procedure of the States Parties to the ICESCR.[114] In 1993, the Office of the High Commissioner for Human Rights (hereafter, the OHCHR) started promoting and coordinating the human rights endeavors of the UN.[115] However, there remained the need to elucidate the right to social security and the investigation of the normative content of Article 9 was considered indispensable.[116] General Comment no. 19 on the right to social security was issued to meet that demand.

With regard to the obligations arising from Article 9, General Comment no.19 states that "States parties must take effective measures […] within their maximum available resources, to fully realize the right of all persons without any discrimination to social security." Furthermore, "the measures that are to be used provide social security benefits cannot be defined narrowly and,

[109] CESCR, *General Comment No. 19*, para.29.
[110] CESCR, *General Comment No. 19*, para.36.
[111] CESCR, *General Comment No. 19*, para.37.
[112] CESCR, *General Comment No. 20*, para.7.
[113] S. Francesco. (2010). The Rights to Social Security under Article 9 of the International Covenant on Economic, Social and Cultural Rights. *28 Chinese (Taiwan) Y.B. Int'l L. & Aff*. p.192.
[114] S. Francesco. (2010). p.192.
[115] S. Francesco. (2010). p.192.
[116] S. Francesco. (2010). p.192.

in any event, must guarantee all peoples a minimum enjoyment of this human right." These measures include both contributory or insurance-based schemes and non-contributory schemes. The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies.[117] States Parties have immediate obligations in relation to the right to social security, such as the guarantee that the right will be exercised without discrimination of any kind (Article 2.2), ensuring the equal rights of men and women (Article 3), and the obligation to take steps (Article 2.1) towards the full realization of Articles 11.1 and 12. Such steps must be deliberate, concrete, and targeted towards the full realization of the right to social security.[118]

3.4. Obligations

In contrast to the dichotomy between the right to be free as a negative obligation and the social right as a positive obligation, international human rights law raises a multi-layered obligation of States Parties, such as the obligation to "respect," obligation to "protect," and obligation to "fulfill." The right to social security, like any human right, gives rise to three types of obligations.[119]

3.4.1. Obligation to "respect"

To "respect" the human rights stipulated in the Covenant, that is, not to infringe the rights in exercising States Parties' power, is the most fundamental obligation that arises from the State's recognition of human rights under the Covenant.[120]

The obligation to respect requires that States Parties refrain from interfering directly or indirectly with enjoying the right to social security. The obligation includes, inter alia, refraining from engaging in any practice or activity that, for example, denies or limits equal access to adequate social security, arbitrarily or unreasonably interferes with self-help or customary or traditional arrangements for social security, and arbitrarily or unreasonably interferes with institutions that have been established by individuals or corporate bodies to provide social security.[121]

3.4.2. Obligation to "protect"

To effectively guarantee human rights, an obligation should take appropriate measures to protect individuals' rights from being infringed not only by state institutions but also by third parties such

[117] CESCR, *General Comment No. 19*, para.9.
[118] CESCR, *General Comment No. 19*, para.40.
[119] CESCR, *General Comment No. 19*, para.43.
[120] Shin, H. (2016). p.181.
[121] CESCR, *General Comment No. 19*, para.44.

as private individuals and private companies. Such obligation is called the obligation to "protect." The obligation to "protect" can be divided into (1) taking necessary legislative and administrative measures to prevent infringement of rights, and (2) giving judicial remedies and other appropriate remedies, including investigating the facts and imposing appropriate legal sanctions on the practitioner for infringing rights.[122]

In regard to Article 9, the obligation to protect requires that State Parties prevent third parties from interfering in any way with enjoying the right to social security. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures, for example, to restrain third parties from denying equal access to social security schemes operated by them or by others and imposing unreasonable eligibility conditions; arbitrarily or unreasonably interfering with self-help or customary or traditional arrangements social security that is consistent with the right to social security, and failing to pay legally required contributions for employees or other beneficiaries into the social security system.[123]

3.4.3. Obligation to "fulfill"

The important implication arising from the obligation to fulfill human rights is the necessity of consciously formulating and implementing policies for improving the realization of human rights; that is, "progress," the original meaning of "progressive" used in "progressive realization." From this perspective, the Committee often mentions the importance of developing a national strategy to realize the rights under the Covenant and recommends States Parties to develop a framework law and action plan. In addition, to achieve the "progressive" realization of human rights, it is essential to evaluate how much progress has been made in the realization of rights by implementing those policies through appropriate methods. Indicators and benchmarks are indispensable tools for conducting such evaluations.[124] For instance, the Committee mentions indicators and benchmarks in its General Comment no.14 as below.

57. National health strategies should identify appropriate right to health indicators and benchmarks. The indicators should be designed to monitor, at the national and international levels, the State party's obligations under article 12. (…)

58. Having identified appropriate right to health indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator.

The OHCHR published a guideline[125] and a report[126] in 2006 to introduce indicators for

[122] Shin, H. (2016). p.218.
[123] CESCR, *General Comment No. 19*, para.45.
[124] Shin, H. (2016). p.298.
[125] United Nations. Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents. Available at: https://undocs.org/HRI/MC/2006/3 [accessed 20 March 2022]
[126] United Nations. Report on Indicators for Monitoring Compliance with International Human Rights Instruments, 11 May 2006. Available at: https://undocs.org/en/HRI/MC/2006/7 [accessed 20 March

assessing the implementation of human rights. The report categorizes human rights indicators into three types: structural indicators, process indicators, and outcome indicators. Structural indicators concern the organizational and legal framework, such as whether the State has ratified the relevant human rights treaty, whether the State legally endorses its rights, or whether the State has a national human rights institution. Process indicators concern the implementation of the legal system, such as how much budget is allocated to policies aimed at realizing rights and how many appeals to courts regarding human rights violations and complaints against national human rights institutions exist. Outcome indicators concern the outcome of the realization of rights, such as the number of businesses identified as committing to human rights abuses and the number of children in school.

In response to this, the Committee on Economic, Social and Cultural Rights adopted a new guideline in 2008[127]. Also, the OHCHR published a compilation of guidelines in 2009[128], stating that States should provide accurate information about the demographic and ethnic characteristics of the country and its population, the standard of living of the different segments of the population, taking into account the indicators contained in the guidelines.

With regard to Article 9, the obligation to fulfill requires States Parties to adopt the necessary measures, including the implementation of a social security scheme, directed towards the full realization of the right to social security. The obligation to fulfill can be subdivided into the obligations to facilitate, promote, and provide.[129]

The obligation to facilitate requires States Parties to take positive measures to assist individuals and communities to enjoy the right to social security. The obligation includes, inter alia, according to sufficient recognition of this right within the national political and legal systems preferably by way of legislative implementation, adopting a national social security strategy and plan of action to realize this right, ensuring that the social security system will be adequate, accessible for everyone, and will cover social risks and contingencies.[130]

The obligation to promote obliges States Parties to take steps to ensure that there is appropriate education and public awareness concerning access to social security schemes, particularly in rural and deprived urban areas, or amongst linguistic and other minorities.[131]

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[127] CESCR, *Guidelines on treaty-specific documents to be submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights,* Doc E/c.12/2008/224 March 2009. Available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1NkPsgUedPlF1vfPMK1p8f5MH%2BK5Dm7kafREVrGYDSsU%2B30JiSECW6s7w7dseAXKyOEeAAGMNK6ox2Vjjc7cCrgJcrHAhFBR%2BOObR%2Bx [accessed 20 March 2022]

[128] United Nations. Compilation of guidelines on the form and content of reports to be submitted by states parties to the international human rights treaties. Available at: https://undocs.org/HRI/GEN/2/Rev.6 [accessed 20 March 2022]

[129] CESCR, *General Comment No. 19*, para.47.

[130] CESCR, *General Comment No. 19*, para.48.

[131] CESCR, *General Comment No. 19*, para.49.

States Parties are also obliged to provide the right to social security when individuals or a group are unable, on grounds reasonably considered to be beyond their control, to realize that right themselves, within the existing social security system with the means at their disposal. States Parties will need to establish non-contributory schemes or other social assistance measures to provide support to those individuals and groups who are unable to make sufficient contributions for their own protection. Special attention should be given to ensuring that the social security system can respond in times of emergency, for example, during and after natural disasters, armed conflict, and crop failure.[132]

3.5. Violations of ESC rights

As have been seen, ESC rights impose three different types of obligations on States. A failure to perform any one of these three obligations constitutes a violation of such rights.

3.5.1. The Limburg Principles

The meaning of the obligations stipulated in the ICESCR was examined by a group of experts who have adopted the Limburg Principles on the Implementation of the ICESCR[133]. The principle itself is not legally binding but provides the best guidance on understanding the obligations resulting from the ratification of the Covenant.[134] The Limburg Principles enumerates what constitutes a breach of obligations under the Covenant:

72. A State party will be in violation of the Covenant, inter alia, if:

- it fails to take a step which it is required to take by the Covenant;

- it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right;

- it fails to implement without delay a right which it is required by the Covenant to provide immediately;

- it willfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;

- it applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;

- it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;

- it fails to submit reports as required under the Covenant.

3.5.2. The Maastricht Guidelines

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights[135], published

[132] CESCR, *General Comment No. 19*, para.50.
[133] UN Commission on Human Rights, *"Limburg Principles"*.
[134] Symonides, J., & Yokota, Y. (2004). p.172.
[135] University of Minnesota Human Rights Library. Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. 22-26 January 1997. Available at:

after the establishment of the CESCR, develops the concept of recognition of violation of the ICESCR contained in the Limburg Principles.

8. […] the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question.

9. Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights […]. Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.

11. A violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result. Furthermore, any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

13. In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations. A State claiming that it is unable to carry out its obligation for reasons beyond its control has the burden of proving that this is the case.

14. Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violation include:

(a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;

(b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;

(c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;

(d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;

(e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;

(f) The calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;

(g) The reduction or diversion of specific expenditure, when such reduction or diversion results in the

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http://hrlibrary.umn.edu/instree/Maastrichtguidelines_.html [accessed 20 March 2022]

non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

15. Violations of economic, social and cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Example of such violations include:

(a) The failure to take appropriate steps as required under the Covenant;

(b) The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;

(c) The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;

(d) The failure to regulate activities of individuals or groups so as to prevent them from violating economic social and cultural rights;

(e) The failure to utilize the maximum of available resources towards the full realization of the Covenant;

(f) The failure to monitor the realization of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;

(g) The failure to remove promptly obstacles with it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;

(h) The failure to implement without delay a right which it is required by the Covenant to provide immediately;

(i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;

(j) The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.

3.5.3. Violations of Article 9

With regard to Article 9, States Parties must show that they have taken the necessary steps towards the realization of the right to social security within their maximum available resources and have guaranteed that the right is enjoyed without discrimination to demonstrate compliance with their general and specific obligations. Under international law, a failure to act in good faith to take such steps amounts to a violation of the Covenant.[136]

In assessing whether States Parties have complied with obligations to take action, the Committee looks at whether the implementation is reasonable or proportionate for attaining the relevant rights, complies with human rights and democratic principles, and is subject to an

[136] CESCR, *General Comment No. 19*, para.62.

adequate framework of monitoring and accountability.[137]

Violations of the right to social security can occur through acts of commission, that is, the direct actions of States Parties or other entities insufficiently regulated by States. Violations include, for example, the adoption of deliberately retrogressive measures incompatible with the core obligations, the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to social security, active support for measures adopted by third parties that are inconsistent with the right to social security, the establishment of different eligibility conditions for social assistance benefits for disadvantaged and marginalized individuals depending on the place of residence, active denial of the rights of women or particular individuals or groups, and so on.[138]

Violations through acts of omission can occur when the State Party fails to take sufficient and appropriate action to realize the right to social security. In the context of social security, examples of such violations include the failure to take appropriate steps towards the full realization of everyone's right to social security, the failure to enforce relevant laws or put into effect policies designed to implement the right to social security, the failure to ensure the financial sustainability of State pension schemes, the failure to reform or repeal legislation which is manifestly inconsistent with the right to social security, the failure to regulate the activities of individuals or groups so as to prevent them from violating the right to social security, the failure to promptly remove obstacles that the State Party is dutybound to remove in order to permit the immediate fulfillment of a right guaranteed by the Covenant, the failure to meet the core obligations, the failure of a State Party to consider its Covenant obligations when entering into bilateral or multilateral agreements with other States, and so on.[139]

3.6. Remedies

"Remedies" can be broadly divided into two aspects: procedural aspect and substantive aspect. The former signifies remedies that an individual, whose right is violated, can obtain by being examined and judged by a competent authority of the State, including a judiciary. The latter refers to remedies that the petitioner, whose allegation has been admitted as a result of such procedures, can obtain to recover from the damage.[140]

Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination.[141] These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged

[137] CESCR, *General Comment No. 19*, para.63.
[138] CESCR, *General Comment No. 19*, para.64.
[139] CESCR, *General Comment No. 19*, para.65.
[140] Shin, H. (2016). p.266.
[141] CESCR, *General Comment No. 20*, para.40.

violations relating to Article 2.2, including actions or omissions by private actors.[142] These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, and guarantees of non-repetition and public apologies; States Parties should ensure that these measures are effectively implemented.[143] Domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions in ways that facilitate and promote the full protection of ESC rights.[144]

4. Judgements of the ECHR

The regional human rights commissions and courts play a role in protecting ESC rights. The regional human rights bodies that may address ESC rights violations include the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights. Among them, the ECHR has accumulated case law which is related to discrimination regarding the enjoyment of the right to social rights. Thus, this thesis focuses on the judgements by the ECHR.

4.1. Legal sources

After World War II, it was an urgent task for the Western countries to protect their traditional regimes from the threat of communism; thus, "the maintenance and further realization of Human Rights and Fundamental Freedoms"[145] was strongly insisted. The Convention for the Protection of Human rights and Fundamental Freedoms focuses on CP rights, with a little mention of ESC rights. The Convention is characterized by not only recognizing individual rights but also making those rights legal and establishing a system to guarantee individual rights for the first time in international law.[146]

The European Social Charter[147] stipulates economic and social rights. Part I stipulates rights and principles, Part II stipulates specific obligations, Part III stipulates "undertakings" regarding the method of accepting the obligations, Part IV stipulates implementation measures, and Part V stipulates derogations in emergencies. Article 12 in Part I prescribes the right to social

[142] CESCR, *General Comment No. 20*, para.40.
[143] CESCR, *General Comment No. 20*, para.40.
[144] CESCR, *General Comment No. 20*, para.40.
[145] European Court of Human Rights, & Council of Europe. The Convention for the Protection of Human rights and Fundamental Freedoms. p.5. Available at: https://www.echr.coe.int/documents/convention_eng.pdf [accessed 20 March 2022]
[146] Sudre, F. (1997). *Yōroppa jinken jyōyaku [European Convention on Human Rights] (Tateishi, H. Trans)*. Tokyo: Yūshindō, pp.6-7.
[147] Council of Europe. European Social Charter. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048b059 [accessed 20 March 2022]

security, and Article 14 prescribes the non-discrimination principle. Notably, the European Social Charter allows selective application in accepting the obligations stipulated in it, taking into consideration the circumstances of each State.[148]

The judgements of the ECHR constitute a case law because the Court has repeated interpretation of the Covenant and the Charter. The case law by the ECHR is increasingly being used in the Japanese courts[149]; thus, it is worth referring to. Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms stipulates the rights to respect private and family life, and Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms stipulates the protection of property, and cases related to social security are connoted in these provisions; by acknowledging them, Article 14 of the Convention, which prohibits discrimination in the realization of the rights outlined in it, can be applied.

4.2. Judgements

4.2.1. Gaygusuz vs. Austria (1996)[150]

In this case, an application for emergency assistance was refused due to nationality. Emergency assistance is a part of the contribution system and is provided in case of unemployment when there are no other means to rely on. According to the Court's case law, a difference of treatment is discriminatory for Article 14 of the Convention if it does not have "objective and reasonable justification."[151] In other words, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized," it is considered discriminatory. The Court judged for this case that the difference in treatment between Austrians and non-Austrians under the 1977 Unemployment Insurance Act regarding entitlement to emergency assistance was not based on any objective and reasonable justification.[152] The ECHR admitted the infringement of Article 14 of the Convention and Article 1 of the Protocol by pointing out that requirements other than nationality were met.[153]

4.2.2. Koua Poirrez vs. France (2003)[154]

In this case, the award of allowance for disabled adults, a part of the non-contribution system,

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148 Tabata, S. (1988). *Kokusaikajidai no jinken mondai [Human rights issues in the age of internationalization]* (p.153). Tokyo: Iwanamishoten.
149 Serita, K. (2018). *Kokusaijinkenhō [International human rights law]* (p.110). Tokyo: Shinzansha.
150 *Gaygusuz v. Austria*, 39/1995/545/631, Council of Europe: European Court of Human Rights, 23 May 1996. Available at: https://www.refworld.org/cases,ECHR,3ae6b6f12c.html [accessed 20 March 2022]
151 *Gaygusuz v. Austria*. para.42.
152 *Gaygusuz v. Austria*. para.43.
153 *Gaygusuz v. Austria*. para.52.
154 *Koua Poirrez v. France*, Appl. No. 40892/98, Council of Europe: European Court of Human Rights, 30 September 2003. Available at: https://www.legislationline.org/download/id/7076/file/ECHR_Case%20of%20Koua%20Poirrez%20v.%20France_2003_en.pdf [accessed 20 March 2022]

was denied due to nationality. The Court points out Article 1 of the Protocol is applicable regardless of contribution to the system.[155] Although the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment, very weighty reasons would have to be put forward before the Court to regard the difference as compatible with the Covenant.[156] The Court found that the difference in treatment regarding entitlement to social benefits between French nationals or nationals of a country having signed a reciprocity agreement and other foreign nationals was not based on any "objective and reasonable justification,"[157] The ECHR admitted the discrimination based on nationality and the infringement of Article 14 of the European Convention of Human Rights and Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

4.2.3. Okpisz vs. Germany (2006)[158]

In this case, the distribution of child benefits was rejected because a foreigner was only entitled to the benefits if in possession of a residence permit or a provisional residence permit. The Court judged that, with regard to child benefits, it did not discern sufficient reasons justifying the different treatment of aliens who did and did not own, respectively, a stable residence permit. It admitted a violation of Article 8 in conjunction with Article 14 of the European Convention of Human Rights.[159]

4.2.4. Andrejeva vs. Latvia (2009)[160]

In this case, an applicant argued that making a distinction based on nationality between those in receipt of retirement pensions constituted discrimination. Foreign nationals and stateless persons received only a scant amount of retirement pension because the law stipulated that if they had labor relations outside Latvia, that period could not be included in the pension enrollment period even if they were working in Latvia. The Court reiterated that discrimination means treating persons in similar situations differently, without an objective and reasonable justification. "No objective and reasonable justification" means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized."[161] The Contracting States enjoy a certain

[155] *Koua Poirrez v. France*. para.37.
[156] *Koua Poirrez v. France*. para.46.
[157] *Koua Poirrez v. France*. para.49.
[158] *Okpisz v. Germany*, Appl. No. 59140/00, Council of Europe: European Court of Human Rights, 25 October 2005. Available at: http://hudoc.echr.coe.int/fre?i=001-70767 [accessed 20 March 2022]
[159] *Okpisz v. Germany*. para.34.
[160] *Andrejeva v. Latvia*, Appl. No. 55707/00, Council of Europe: European Court of Human Rights, 18 February 2009. Available at: https://www.refworld.org/cases,ECHR,49a654aa2.html [accessed 20 March 2022]
[161] *Andrejeva v. Latvia*. para.81.

margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.[162] A wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy.[163] The ECHR accepted the protection of the country's economic system as a legitimate aim that is compatible with the general objectives of the Convention[164] and was mindful of the broad margin of appreciation enjoyed by the State in the field of social security[165]. However, nationality was the sole criterion for the distinction; thus, the Court has held that very weighty reasons would have to be put forward to be compatible with the Convention.[166] The ECHR judged that the Government of Latvia did not give sufficient explanation on the reasonable relationship of proportionality between the means and the aim.[167] Therefore, the Court admitted a violation of Article 14 of the European Convention of Human Rights.[168]

4.2.5. Dhahbi vs. Italy (2014)[169]

The agreement between the European Union and Tunisia prescribes that "workers of Tunisian nationality and any members of their families […] shall enjoy, in the field of social security, treatment free from any discrimination based on nationality."[170] However, the distribution of family allowance was denied due to a lack of Italian nationality. The Court admitted that the applicant was treated less favorably than others in a relevantly similar situation, on account of a personal characteristic.[171] Based on that, the Court asserted that, notwithstanding the wide margin of appreciation left to the national authorities in the field of social security, the arguments submitted by the Government were not sufficient to satisfy the Court that there was a reasonable relationship of proportionality.[172] It concluded there was a violation of Article 14 in conjunction with Article 8 of the Convention.[173]

4.3. Discussion based on judgements

From the above judgements, it can be inferred that when there is a difference in treatment between persons in similar situations regarding the economic and social rights, the ECHR examines whether the provision meets the aims of the Convention and whether the means and aims have

[162] *Andrejeva v. Latvia*. para.82.
[163] *Andrejeva v. Latvia*. para.83.
[164] *Andrejeva v. Latvia*. para.86.
[165] *Andrejeva v. Latvia*. para.89.
[166] *Andrejeva v. Latvia*. para.87.
[167] *Andrejeva v. Latvia*. para.89.
[168] *Andrejeva v. Latvia*. para.92.
[169] *Dhahbi v. Italy*, Appl. No. 17120/09, Council of Europe: European Court of Human Rights, 8 April 2014. Available at: http://hudoc.echr.coe.int/eng?i=001-142504 [accessed 20 March 2022]
[170] Article 65 of the Euro-Mediterranean Agreement
[171] *Dhahbi v. Italy*. para.49.
[172] *Dhahbi v. Italy*. para.53.
[173] *Dhahbi v. Italy*. para.54.

proportionality. Contracting States are required to explain rationality and proportionality, indicating a reversed onus of proof. If reasonable circumstances cannot be found, the Court concludes the violation of Article 14 of the Convention in conjunction with Article 8 of the Convention or Article 1 of the Protocol in regard to the right to social security. Moreover, the ECHR does not distinguish between the contribution and non-contribution system to judge the discrimination based on nationality.

Although the judgements by the ECHR cannot be directly applied to Japanese courts, the European Convention shares the same visions with the ICESCR. Its interpretation by the ECHR is worthy of being considered; in other words, it could be indirectly applied in the Japanese courts.

5. Judgements of the Japanese courts

This section takes up several judgements regarding the rights of aliens and discrimination on the right to social security based on nationality to see how the courts in Japan interpret Articles 2 and 9 of the ICESCR and whether they utilize them when making a judgement.

5.1. Basic stance of the Supreme Court regarding the discrimination based on nationality

Before introducing the Japanese case law regarding the discrimination on granting the right to social security based on nationality, this section shows a landmark case that clarifies the stance of the Japanese courts about the right of aliens. Although this case is about CP rights, it clearly explains what kind of criteria the Japanese courts utilize to determine to what extent the fundamental rights should be guaranteed to non-nationals.

5.1.1. McLean vs. Minister of Justice (1978)[174]

Summary of the case

McLean, a citizen of the United States, made a plea to the Tokyo District Court to nullify the Minister of Justice's refusal to renew his period of stay in Japan. The Immigration Bureau refused to extend his visa, partly because he had changed his occupation without receiving the bureau's approval, which was required by law, and partly because he had been participating in anti-Vietnam War activities. The Supreme Court dismissed McLean's appeal and ordered him to pay litigation costs.

Judgement regarding the right of aliens

It is a leading case in Japanese courts regarding the right of aliens. It introduced the theory on the

[174] Judgt of 4 Oct. 1978, Sup Ct. 32 MINSHŪ 7, p.1223.

nature of right – the so-called "McLean standard" - which is a theory interpreting the right of aliens not by the wording of the Constitution but the nature of rights.

The Supreme Court states, "It should be understood that the guarantee of fundamental rights under the Chapter Three of the Japanese Constitution extends to aliens staying in Japan except for the rights which seem to address Japanese nationals exclusively by nature. Aliens can engage in political activities, except for the activities that influence the political decision making and its implementation in Japan."[175]

Discussion

Before making individual judgements and introducing the McLean standard, the Court introduced a legal theory: "under customary international law, States parties do not owe a duty to accept aliens in their states. States parties can freely determine whether to accept them in their States and what kind of condition can be set when accepting them, unless there is a special treaty."[176] This theory has been criticized for being too abstract, using an uncertain concept, and giving the Minister of Justice too much discretionary power to dismiss any individual theory.[177] Izumi, T (2011, p.20) insists that the McLean standard does not necessarily have to be changed, but the purpose of the Constitution and international law should be considered when using the standard, and "whether the evaluation of the fact is clearly unreasonable" and "whether it clearly lacks validity in light of social norms" should be carefully examined. It should be kept in mind that many treaties, such as the ICESCR and the 1951 Convention on the Status of Refugees and the International Covenants on Human Rights, came into force after the McLean standard was established. Those treaties cannot be disregarded when adopting the McLean standard, as Izumi asserts.

5.2. Interpretation of the ICESCR by the courts in Japan

This section enumerates some judgements regarding the discrimination on the right to social security based on nationality.

5.2.1. Judgt 22 Sept. 1982 / Judgt 20 Oct. 1983[178]

Summary of the case

[175] Judgt of 4 Oct. 1978, Sup Ct. 32 MINSHŪ 7, p.1223.
[176] Judgt of 4 Oct. 1978, Sup Ct. 32 MINSHŪ 7, p.1223.
[177] Izumi, T. (2011). Makurīn jiken saikōsaihanketsu no wakugumi no saikō [Rethinking the framework of the Supreme Court decision in the McLean case]. *Jiyū to seigi*, p.20.
[178] Courts in Japan. *Kokuminhenkin hihokenjya shikaku torikeshi syobun torikeshi tō seikyū kōso jiken [Appeal case of requesting the disposition which canceled national pension insured qualification]*. Available at: https://www.courts.go.jp/app/hanrei_jp/detail5?id=16930 [accessed 20 March 2022]
See also Iwasawa, Y. (1998) *International law, human rights, and Japanese law －the impact of international law on Japanese law －*. Oxford: Clarendon Press. pp.171-172.

In 1979, before the National Pension Act was revised, a Korean person brought a lawsuit claiming that the Social Insurance Agency should pay an old-age pension to him. A canvasser had persuaded him to join the national pension plan, knowing that he was Korean. All premiums were paid. Nevertheless, the Agency refused to pay his pension, realizing that he was ineligible. In the Court, the plaintiff argued that the refusal to give his pension violated Articles 14 and 25 of the Constitution of Japan, citing Article 9 of the ICESCR to support his claim.

Judgement regarding the ICESCR

The Tokyo District Court rejected the claim, implying that Article 9 of the ICESCR was not directly applicable. The Court held:

Social rights are rights which by their nature should be guaranteed by the State to which the holder of the rights belongs, and do not purport to be rights which *ipso facto* should also be guaranteed by foreign States. Accordingly, one should conclude that even if social rights are not guaranteed to aliens in the same way as to nationals, it does not violate Article 14 of the Constitution… Although aliens are included in "everyone" in [Article 9 of the ICESCR], this clause only obligates the States Parties to actively promote the social security policy. One cannot take it that concrete rights are accorded to aliens thereby. Consequently, even if aliens are not made eligible for the national pensions system, it does not violate the Covenant.[179]

The Tokyo High Court reversed this judgement, using human rights treaties as aids to interpretation. The Court held as follows:

In accordance with the principle of good faith and equity, one should conclude that the administrative authorities can undermine the … fiduciary relation which was created between the appellant and the administrative authorities only when there exists an unavoidable need of public nature… It is not an unavoidable need of public nature to maintain and stick to the nationality requirement in all cases, for one should conclude that the nationality requirement is not an element of the national pension system so basic as to allow no exception, judging from the fact that … our country has been obligated since 1979 by Article 9 of the [ICESCR] to promote social security policy also for aliens, and that on 1982… the nationality requirement was eliminated through the revision of the Adjustment Law in connection with Japan's accession to the Convention Relating to the Status of Refugees.[180]

Discussion

The Tokyo District Court stated that social rights do not purport to be rights that foreign States should guarantee, but it should be pointed out that the National Pension Act has a residence requirement and does not apply to Japanese nationals living abroad.[181] In other words, Japan

[179] Judgt of 22 Sept. 1982, Tokyo Dist. Ct, 1055 HANREI JIHO 9, p.18.
[180] Judgt of 20 Oct. 1983, Tokyo High Ct, 1092 HANREI JIHO 32, p.33.
[181] Article 7 of Kokuminnenkinhō [National Pension Act]. Available at: https://elaws.e-gov.go.jp/document?lawid=334AC0000000141 [accessed 20 March 2022]

entrusts the pensions of the Japanese to the country of residence. It should also be remembered that social security is a mutual aid mechanism based on solidarity "as a member of society"[182] rather than nationality.

Regarding the interpretation of Article 9, the Tokyo District Court denied its direct applicability, but it is worth noting that the Tokyo High Court stated that Japan had been obliged since 1979 by its provision to promote social security policy for aliens as well.

5.2.2. Shiomi vs. Osaka (1989)[183]

Summary of the case

X (plaintiff, appellant) was born on 25 June 1934 (Showa 9) in Osaka City and lost her eyesight in her childhood due to measles. She was certified with first-grade state of disability on 1 November 1959 (Showa 34), the date of disability certification of the transitional disability welfare pension. X held Korean nationality on 1 November 1959 (Showa 34), but later married a Japanese husband and acquired Japanese nationality by the naturalization process on 16 December 1970 (Showa 45).

X claimed to be the recipient of the disability welfare pension under Article 81.1 of the National Pension Act before the amendment and requested the entitlement to Y (Governor of Osaka Prefecture – defendant, appellee). Y dismissed the request on 21 August 1971 (Showa 47), reasoning that X did not have a right to receive the disability welfare pension under Article 81.1 of the National Pension Act because she was not a Japanese national on the date of recognition of disability. X was dissatisfied with the disposition and sent a request for examination to the Osaka Prefecture Social Insurance Examiner, but the request was rejected on 30 November 1972 (Showa 47). In addition, X filed a reexamination request to the Social Insurance Examination Division, but it was also rejected on 31 July 1973 (Showa 48). Therefore, X filed a lawsuit to the Osaka District Court, requesting cancellation of the disposition. X argued that the defendant's rejection of her application was invalid because it contravened Article 2.2 of the ICESCR. She asserted that "nationality" was included in "national origin" and that Article 2.2 was directly applicable.

Judgement regarding the ICESCR

The Supreme Court stated that "Article 9 of the Covenant prescribes that 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.' It confirms that the right to social security in the State Party deserves protection by the national social policy and declares the political responsibility to actively promote social security policy

[182] Article 22 of the Universal Declaration of Human Rights. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights [accessed 20 March 2022]

[183] Judgt of 2 Mar. 1989, Sup. Ct, 1363 HANREI JIHŌ, p.68. Available at: https://www.courts.go.jp/app/hanrei_jp/detail2?id=62351 [accessed 20 March 2022]
See also Iwasawa, Y. (1998). p.173.

toward the realization of the right. However, it does not stipulate that an individual should be granted concrete rights immediately. It is obvious from Article 2.1 as well, which requires States Parties to achieve 'the full realization of the rights recognized in the present Covenant progressively by all appropriate means, including the adoption of legislative measures.' Therefore, it cannot be said that the Covenant is intended to exclude the nationality clause immediately."[184]

Discussion

It is the leading case in which the Supreme Court judged the right to social security of aliens. It mainly disputed whether it was constitutional to require Japanese nationality to be eligible for the payment of the transitional disability welfare pension on the date of disability certification.

Regarding the ICESCR, the Supreme Court referred to Article 9, which stipulates the right to social security, and Article 2.1, which is the general obligation of the Covenant, and declared the political responsibility of the States Parties. The Court did not mention the equality provision of Article 2.2. In response to this judgement, some criticize that Article 2.2 states that "the rights enunciated in the present Covenant will be exercised without discrimination" and the provision should have been read together with Article 9 in this case.[185] It should have been examined whether the previous Act and the disposition based on it, which excluded the plaintiff from the subject due to lack of the Japanese nationality on the date of recognition of disability, violate Article 9, which recognizes the social security right of "everyone."[186] It is also pointed out that, when making a judgement, the Court should have considered the fact that the provision of nationality requirement was abolished due to the revision.[187] In addition, considering that the OP-ICESCR stipulates the individual communication procedure, there is room for interpreting that Article 9 not only declares the political responsibility of States Parties but also stipulates concrete rights to individuals. Furthermore, General Comment no.18 of the CCPR regarding Article 26 of the ICCPR states, "when legislation is adopted by a State Party, it must comply with the requirement of Article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant."[188] This provision could have been applied in this case.[189]

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[184] Judgt of 2 Mar. 1989, Sup Ct, 1363 HANREI JIHŌ, p.68.
[185] Shin, H. (2011). Shakaihoshō to byōdōken ― shiomi jiken [Social security and equality―the Shiomi case―]. *Kokusaihō hanrei hyakusen [100 selections of international law precedents]* (2nd ed.). p.103.
[186] Shin, H. (2011). *Jiyū to seigi,* 62.6, p.17.
[187] Shin, H. (2011). *Jiyū to seigi*, 62.6, p.17.
[188] UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, para.12. Available at: https://www.refworld.org/docid/453883fa8.html [accessed 20 March 2022]
[189] Although nationality is not enumerated as a reason for non-discrimination in Article 26, it is considered to be included in "other status". There is a case in individual reporting that made clear that nationality was contained in "other status". *Ibrahima Gueye et al. v France*. Report of the Human

5.2.3. Nakanoso case (1996, 1997, 2001)[190]

Summary of the case

X (plaintiff, appellant), who has the nationality of the People's Republic of China, entered Japan on 26 August 1988 (Showa 63) with the status of "a person whose residence is specifically approved by the Minister of Justice" (status of residence 4-1-16-3) under the Immigration Control and Refugee Recognition Act before the 1989 amendment (Heisei 1). Subsequently, he returned to China temporarily and, then, re-entered Japan. He continued to stay in Japan without applying to renew the period of stay, which had expired on 26 August 1990 (Heisei 2), and was in a state of illegal immigration. X was hospitalized on 16 April 1994 (Heisei 6) due to a skull fracture caused by a traffic accident and was discharged from the hospital on 22 June 1994. On 1 August, the same year, X submitted an application for receiving public assistance to Y (Welfare Office Director – defendant, appellee), and Y accepted it. However, Y rejected the application because X was an illegal foreign resident. X sent a request to examine the disposition to the Governor of Tokyo on 27 September, the same year, but it was rejected on 20 February 1995 (Heisei 7) for being ineligible for appeal. Therefore, X filed a suit to request the cancellation of the disposition by insisting that it violated Articles 25 and 14 of the Japanese Constitution, the UDHR, and the ICESCR, and it was illegal to disapprove the *mutatis mutandis* of public assistance that has been permitted for many years in practice.

Judgement regarding the ICESCR

The Supreme Court founds that the ICESCR did not provide a basis for understanding that illegal immigrants were included in the protection under the Public Assistance Act.

Discussion

It is the first case in which the Supreme Court judged the applicability of the Public Assistance Act to illegal foreign residents.

It deserves the recognition that the Tokyo High Court mentioned Article 2.2 of the ICESCR and tried the application. The Court states, "It is necessary to consider whether the Public Assistance Act, which limits its recipients to Japanese nationals, violates the relevant provision." However, the Court includes that "It is clear that it cannot be understood that the scope of

Rights Committee, UN Doc. A/44/40, 1989. Available at: https://www.equalrightstrust.org/ertdocumentbank/Ibrahima%20Gueye%20et%20al.%20v.%20France.pdf [accessed 20 March 2022]
See also Shin, H. (2011). *Jiyū to seigi*, 62.6, p.17.

[190] Judgt of 29 May.1996, Tokyo Dict. Ct, 47 GYŌSEI JIGEN SAIBANREISYŪ 4-5, 421; Judgt of 24 Apr. 1997, Tokyo High Ct, 48 GYŌSEI JIGEN SAIBANREISYŪ 4, p.272; Judgt of 24 Sep. 2001, Sup. Ct, 1768 HANREI JIHŌ, p.47. Available at: https://www.courts.go.jp/app/hanrei_jp/detail2?id=62831 [accessed 20 March 2022]

application of the Act has been changed to include aliens as a matter of course (that is, without amending the law) due to the legally binding force of the Covenant." This stance can be seen as abandoning the practice of the non-discrimination of the Covenant, despite Japan's ratification of the ICESCR. It is required to read Articles 2.2 and 9 together and work toward the realization of the purpose of the articles.

5.2.4. Judgt 25 May. 2005 / Judgt 15 Nov. 2006

Summary of the case

Korean residents in Japan without pension benefit due to the Japanese national requirement provision of the previous National Pension Act and its transitional measure after the law amendment raised a lawsuit for redressal by the State. The plaintiffs argued that the Japanese nationality requirement provision in the previous National Pension Act, which enacted the provision of Article 9, violates the equity principle between nationals and aliens, thus illegal.

Judgement regarding the ICESCR

The Osaka District Court dismissed the claim but made a judgement as follows regarding Article 2.2. of the ICESCR in 2005. The Court declined the defendant (Japan)'s allegation that stated that neither Article 2 nor Article 9 grants concrete rights to each individual. Instead, the Court stated that "the right to social security derives from the State's duty of progressive realization so the right itself cannot be immediately admitted as a concrete right. However, when the right is already enacted in law, Article 2.2 that prohibits the discrimination in enjoying the right to social security should be acknowledged its judicial normativity, as having the same significance as Article 26 of the ICCPR."[191]

In the appellate court as well, the Osaka High Court dismissed the claim but followed the judgement of the lower court with regard to the direct applicability of Article 2.2. of the ICESCR.[192]

Discussion

Notably, there were judgements that affirmed the direct applicability of Article 2.2. of the ICESCR.

Both judgements by the Osaka District Court and the Osaka High Court alleged that the Japanese nationality requirement provision was not compatible with Article 2.2. of the ICESCR and Article 26 of the ICCPR and could be deemed illegal if the Act was not amended. However, those judgements are still problematic in the sense that they decided that there was no violation of provisions because the requirement had been abolished two years after the Covenant was

[191] Judgt of 25 May. 2005, Osaka Dist. Ct, 1188 HANREI TIMES, p.254.
[192] Judgt of 15 Nov. 2006, Osaka High Ct. not listed in a casebook
See also Shin, H. (2011). *Jiyū to seigi*, 62.6, p.18.

enacted and admitted the wide legislation discretion regarding not relieving the plaintiffs by developing the Act.[193] The Courts stated that the legislature has wide discretion in deciding whether to take transitional and supplemental measures because the responsibility to provide non-contributory pension and the life security should be primarily owned by the State that the person belongs to. However, Shin (2011, p.18) questions whether it is appropriate to bring up the argument that the State has wide discretion on the human rights protection for aliens by dividing nationals and non-nationals in the application of the ICESCR, which stipulates non-discrimination in executing the rights.[194] Moreover, the National Pension Act has residential requirement and the life security of the Japanese nationals living abroad is relied on the state of residence; thus, the judgement by these courts lacks persuasiveness even more.[195]

In respect to the discretion of the legislative, the Osaka District Court and the Osaka High Court followed the judgement in the *Shiomi* case, which justified the discretion on the basis that the Disability Pension Welfare was a non-contributory pension paid entirely by the national treasury. Regarding this point, it is noteworthy that many States nowadays do not distinguish between contributory and non-contributory systems in a case of interpretation and application of the right to social security because the fiscal resource of social security is compounded.[196] As previously mentioned in chapter 4, the ECHR makes clear that when a person has an assertable right related to social security in domestic law, whether the system is contributory or non-contributory is not taken into account because the boundary between them is unclear, and the social security system is becoming increasingly compounded.[197]

5.2.5. Proceeding by Koreans living in Japan for pension (Judgt 17 Oct. 2011) [198]

Summary of the case

The so-called Korean pension lawsuits in Japan are based on the premise that exempting Koreans living in Japan from receiving the national pension by establishing a nationality clause in the former National Pension Act violates the International Covenants on Human Rights and Article 14 of the Constitution. The plaintiff claims damages by arguing that the failure of taking transitional measures or remedies, when the nationality clause was deleted due to the law amendment, violates the above Covenants and the provision of the Constitution.

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193 Shin, H. (2011). *Jiyū to seigi,* 62.6, p.17.
194 Shin, H. (2011). *Jiyū to seigi*, 62.6, p.18.
195 Niwa, M. (2007). Zainichi Korean kōreisha munenkin mondai [Elderly Korean residents in Japan with no pension problem]. *Kokusaijinken* ,18, p.97.
196 Shin, H. (2011). *Jiyū to seigi*, 62.6, p.18.
197 See also *Stec and others v. the United Kingdom*, Admissibility Decision, ECHR 2005-X, paras. 50-51; Shin, H. (2011). *Jiyū to seigi*, 62.6, p.18.
198 Judgt of 17 Oct. 2011, Fukuoka High Ct. not listed in a casebook.
See also Kasai, M. (2012). Kokusaijinkenkiyaku to kenpō 25 jyō [International Covenants on Human Rights and Article 25 of the Constitution of Japan]. *Hōritsujihō*, 84.5, p.63.

Judgement regarding the ICESCR

The Fukuoka High Court issued the following judgement regarding the International Covenants of Human Rights. Article 9 of the ICESCR "confirms that the right to social security deserves to be protected by the national social policy of States Parties and declares that States Parties owe the responsibility to actively promote the social security policy toward the realization of the right. However, it does not stipulate that concrete rights should be granted to individuals immediately. […] Article 2.2. of the ICESCR must be understood as declaring that States Parties have political responsibility to actively promote the equal realization of the above right (the right of Article 9 under the ICESCR)". Even if Article 26 of the ICCPR has judicial normativity in Japan, "when judging whether the provision of the social rights, which is stipulated in the ICESCR as well, in the domestic law, violates Article 26 of the ICCPR, the judgement should find a consistency between the purpose of the ICESCR to promote the social security by legislation and the request." "From this point of view, as for Article 26 of the ICCPR, it is reasonable to acknowledge that at least, regulations that the legislature sets when making legislation or amendments for the purpose of promoting social security policies in line with the aims of the ICESCR presuppose, to some extent, the discretion of the legislature, taking into account the budgetary constraints of the State and economic, social, and international circumstances, etc. This relationship is similar to the one between Article 25.2 and Article 14 of the Constitution of Japan. The distinction under the provisions of the relevant social security laws should be judged from the viewpoint of whether it is a reasonable discriminatory treatment with a rational reason. Thus, it cannot be understood that the legislature does not have any discretion in relation with Article 26 of the ICCPR." After making such a judgement, the Fukuoka High Court rejected all the plaintiff's allegations based on the human rights treaties.

Discussion

This judgement follows the conventional judgements from the *Shiomi* lawsuit, which recognize the self-executing function for the ICCPR but not for the ICESCR, and like other judgements, do not recognize the justiciability of Article 9 of the ICESCR.

Interestingly, this ruling directly acknowledges that the non-discrimination framework does not (or should not) apply in the area of social security.[199] Moreover, by stating that the relationship between Article 9 of the ICESCR and Article 26 of the ICCPR is "similar to the relationship between Article 25.2 and Article 14 of the Constitution," it shows that the claims under the human rights treaties do not lead to any stricter standards compared to the claims under the Constitution. In this respect, it is a contrast to the following judgements that made a positive judgement regarding "equality" of Article 2.2 of the ICESCR and Article 26 of the ICCPR.

[199] Kasai, M. (2012). p.64.

For example, the Osaka District Court in 2005[200] affirmed the judicial normativity of the human rights treaties on "equality". While acknowledging the self-executing function and judicial normativity of the ICCPR, the Court stated, "regarding the right to social security, […] as long as it is admitted by law, it is possible to be protected by the provision (Article 26 of the ICCPR). When there is a state of discrimination prohibited by Article 26 regarding the right to social security recognized by law, a State Party is obliged to take measures to resolve the situation." The Court continued that "when taking measures to eliminate the state of discrimination regarding the right of social security, it takes a reasonable period of time, as in the case of creating the right of social security by legislation. Therefore, if the necessary measures have not been taken after such a reasonable period of time, the violation of the above obligation will be admitted."

In addition, the Kyoto District Court in 2007[201] ruled that "in regard to the social security legislation of a State Party, when determining whether distinguishing aliens residing in the State from nationals violates Articles 2.2 and 26 of the ICCPR, […] on the premise that the legislature has the discretion over social security legislation, it is necessary to examine from the viewpoint of whether it is a deviation of the legislative discretion to make such a distinction and whether it is unreasonable." It can be said that the Court used a slightly stricter examination standard.

Although the judgments on Articles 2.1 and 9 of the ICESCR have been lenient,[202] a more positive interpretation, at least for "equality," can be expected.

6. Discussion based on judgements

The Supreme Court's judgement on McLean vs. Ministry of Justice in 1978 became the leading case on how to interpret the right of non-nationals. It introduced the McLean standard, which, based on the national authority's discretion on whether to accept aliens within the State and under what kind of condition, interprets the right of aliens not by the wording of the Constitution of Japan but the nature of rights. The judgement by the Tokyo District Court in 1982 took up the nationality requirement of the National Pension Act. On the one hand, the Court asserted that social rights do not purport to be rights guaranteed by foreign States and denied the direct applicability of Article 9 of the ICESCR. On the other hand, the Tokyo High Court judgement in 1983 stated that Japan had been obliged since 1979 by Article 9 to promote social security policy for aliens. The Supreme Court's judgement on *Shiomi vs. Osaka* in 1989 became the leading case in which the Court judged the right to social security of aliens. The Court referred to Articles 2.1 and 9, concluding that from the requirement of progressive realization in Article 2.1, it was apparent that Article 9 merely declared the political responsibility to actively promote social

[200] Judgt of 25 May. 2005, Osaka Dist. Ct, 1188 HANREI TIMES, p.254.
[201] Judgt of 23 Feb. 2007, Kyoto Dist. Ct, 1993 HANREI JIHŌ, p.104.
[202] Kasai, M. (2012). pp.64-65.

security policy toward the realization of the right and did not grant the concrete right to individuals. The judgement by the Tokyo High Court in the *Nakanoso* case of 1997 mentioned Article 2.2 but concluded that the scope of application of the Public Assistance Act could not be understood as having been changed to include aliens as a matter of course due to the legally binding force of the Covenant. The judgements by the Osaka District Court in 2005 and the Osaka High Court in 2006 stated that the right to social security cannot be immediately admitted as concrete; however, when the right is enacted in law, the judicial normativity of Article 2.2, which prohibits the discrimination in enjoying the right to social security, should be acknowledged. Although it is worthwhile that the Courts admitted the direct applicability of Article 2.2, the decision to acknowledge a wide legislative discretion on a non-contributory pension should be reconsidered. The judgement by the Fukuoka High Court in 2011 followed the judgement in the *Shiomi* case regarding the interpretation of Article 9. As for Article 2.2, the Court stated that the provision must be understood as declaring that States Parties have political responsibility to actively promote the equal realization of the relevant rights. After denying the judicial normativity of the ICESCR, the Court admitted that of Article 26 of the ICCPR. However, it stated that considering the budgetary constraints and economic, social, and international circumstances, it was reasonable to acknowledge that regulations to promote social security policies in line with the aims of the ICESCR presuppose the discretion of the legislature. The Court concluded that the relationship between Article 26 of the ICCPR and Article 9 of the ICESCR is similar to the one between Article 25.2 and Article 14 of the Constitution of Japan.

From these judgements, issues to be considered when applying the ICESCR to a case where there is a different treatment based on nationality regarding the right to social security can be summarized as the justiciability of the ESC rights and the judicial normativity of the ICESCR. Before examining those issues in detail in section 2, section 1 confirms the legal effect of treaties in domestic legal orders by exploring the concept of "direct applicability," "self-executing," and "judicial normativity." In addition, the order of treaties in Japanese domestic legal order and the relation between international human rights treaties and the Constitution of Japan will be looked into. Furthermore, the legal significance of "General Comments," "Concluding observations," and "Views" will be examined in section 4 to clarify to what extent they should be considered when interpreting the ICESCR and making judgements. Finally, section 5 discusses limitations on appeal to the Supreme Court and the rule of exhaustion of local remedies to point out one of the issues that arise when Japan ratifies the OP-ICESCR. This chapter considers these five topics one by one.

6.1. Domestic legal force of treaties

6.1.1. "Direct applicability", "self-executing" treaties, and "judicial normativity"

Article 98.2 of the Constitution of Japan prescribes that "Treaties concluded by Japan and established laws of nations shall be faithfully observed." Although there are different views on the status of treaties in Japan due to the ambiguity of its language,[203] the majority of scholars and case law admit that treaties have legal force in Japan and are incorporated into Japan's legal order.[204] Among the three ways of incorporating treaties into the domestic statutes —the system of automatic incorporation, the system of incorporation by a law of approval, and the system of individual incorporation[205]—, the common view and the government stance is that Japan adopts the system of automatic incorporation, which gives domestic legal force to a ratified treaty after the promulgation.[206]

Even if Japan adopts the system of automatic incorporation, whether a treaty is directly applicable or self-executing is a different issue. The terms "direct applicability" and "self-executing" have been used in a different context with different definitions, and have induced confusion.[207] Therefore, their definitions will be organized and reconfirmed here based on the study by Matsuda (2020)[208] as follows.

Takano's *Constitution and treaties [Kenpō to jyōyaku]*[209] is considered particularly important as a pioneering study of international law and the constitutional legal systems of Japan. The study focuses on the significance of the constitutional participation and involvement of the Diet in the conclusion of treaties and their domestic effect.[210] He argues that the domestic effect of treaties and the procedure for parliamentary approval are not directly linked, and even though the procedure of parliamentary approval is simpler than that of law and similar to the budget procedure, Article 98.2 of the Constitution of Japan recognizes the domestic effect of treaties.[211] Matsuda analyzes that Takano adopts a stance[212] that the issue of domestic effect only matters for

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[203] Iwasawa, Y. (1985). *Jōyaku no kokunai tekiyō kanōsei: iwayuru 'self-executing' na jōyaku n ikansuru ichi kōsatsu [Domestic applicability of treaties: what are self-executing treaties?].* Tokyo: Yūhikaku. pp.27-32.

[204] E.g., Judgt of 28 June 1977, Sup Ct, 31 MINSHŪ 511, 23 JAPANESE ANN. INTL'L. p.174 (1979-80) (interpreting and applying the Warsaw Convention on International Transportation by Air); Judgt of 5 Apr. 1961, Sup. Ct Grand Bench, 15 MINSHŪ p.657, 8 JAPANESE ANN. INTL'L. p.153 (1964), 32 I.L.R. p.170 (recognizing the change of nationality of Koreans effected by the Peace Treaty).

[205] Iwasawa, Y. (1998). pp.32-33.

[206] Shin, H. (2011). *Jiyū to seigi*, 62.6, p.13.

[207] Matsuda, S. (2010). *Nihon no saibansho ni okeru kokusaijinkenhō – kokunaitekiyōron no saikōsei - [International human rights law in Japanese courts – reconstitution of domestic application theory]*. Tokyo: Tokyodaigaku hōkadaigakuin law review. p.149

[208] Matsuda, S. (2020). *Kokusaihō to kenpōtitsujo : kokusaikihan no jisshikengen [International law and Constitutional Legal System : The Competence to Implement International Norms].* Tokyo: Tokyodaigakusyuppankai. pp. 8-21.

[209] Takano, Y. (1960). *Kenpō to jyōyaku [Constitution and treaties].* Tokyo: Tokyodaigakusyuppankai.

[210] Takano, Y. (1960). p.2.

[211] Takano, Y. (1960). pp.153-56. He enumerates the words of Article 98.2 of the Constitution of Japan, the requirement of Diet approval to conclude a treaty, which is stipulated in Article 61, and the practice under the previous Constitution that approved domestic effect to treaties, as grounds.

[212] Takano, Y. (1960). p.100. "In regard to the domestic effect, in original meaning of directly regulating the legal relations of the people, problems arise only with self-executing treaties": p.163 "When admitting the domestic effect of a treaty, it is important as a premise to judge whether or not

self-executing treaties, in other words, the issue of self-executing is regarded as a prerequisite for domestic effect.

On the contrary, Yuji Iwasawa's Domestic Applicability of the Treaty [Jyōyaku no kokunaitekiyōkanōsei][213] argues that the domestic effect is a prerequisite for being self-executing. After studying the concept of the self-executing treaty in the United States and the direct applicability in the European Community Law up to the 1980s, he explains that the terms "self-executing" and "direct applicability" mean "the possibility of being applied without the need for further action," and insists the necessity of distinguishing these concepts from the issue of domestic effect, which is "whether international law is recognized as a legal norm in the country and whether it exists as a law in the country." In response to this argument, the mainstream international law study of Japan considers the direct applicability separately from the domestic effect and conducts an analysis by using the framework of "direct application" and "indirect application" when discussing the legal effect of international norms in the constitutional legal systems.[214]

According to this theory, in a country that generally accepts international law, such as Japan, "all international law has a domestic effect."[215] International law is presumed to be directly applicable in principle based on its domestic effect, and standards that exclude direct applicability should be examined rather than those that justify direct applicability.[216] Whether a treaty has "direct applicability" must be determined in light of the context in which the treaty is to be applied,[217] and its judgement criteria are organized as follows. (1) As a subjective standard, no parties or legislators have an intention to exclude direct applicability. (2) As an objective standard, (a) the provisions are not unclear or incomplete, and (b) the content of the treaty is not a matter required by the Constitution to be regulated by the Constitution or laws. Although the judgement of direct applicability is a matter of domestic law,[218] "in reality, the decision-making criteria are almost the same in each country."[219] Furthermore, there are two application methods of international law: "direct application" and "indirect application." Treaties that satisfy "direct applicability" can directly be applied to the facts of the case and bring legal effect. Treaties that are not "directly applicable" have "other effects," and can be "indirectly applied," for example, by being referred to as interpretation standards, guidelines, or reinforcements for domestic law.

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the treaty is self-executing in relation to the treaty itself and the domestic legal system of the country at that time."

213 Iwasawa, Y. (1985). *Jōyaku no kokunai tekiyō kanōsei: iwayuru 'self-executing' na jōyaku n ikansuru ichi kōsatsu [Domestic applicability of treaties: what are self-executing treaties?].* Tokyo: Yūhikaku.

214 Matsuda, S. (2020). p.10.

215 Matsuda, S. (2020). p.11.

216 Iwasawa, Y. (2020). *Kokusaihō [International Law].* Tokyo: Tokyodaigakusyuppankai. p.527.

217 Iwasawa, Y. (1985). p.330.

218 Iwasawa, Y. (1985). pp.321-325.

219 Kotera, A (Ed.). (2010). *Kōgikokusaihō 2 [Lecture of international law 2].* Tokyo: Yūhikaku. p.115.

The legal binding effect does not matter for "being applied indirectly."[220] When using international norms in Japan, it is widely explained to adopt the procedure, which firstly considers "direct applicability" based on the requirement theory consisting of subjective and objective criteria, and if not "directly applicable," considers "indirect application."[221]

However, the requirement theory of direct applicability, which consists of subjective and objective criteria, stays in an academic discussion and is not used in Japanese administrative and court practices in reality. There are only a few judgements in lower courts that discussed subjective and objective criteria by using the concepts of "direct applicability" and "domestic applicability" in a sense that is clearly distinguished from domestic effect and judicial normativity. No examples of the Supreme Court that elaborated on subjective and objective criteria are confirmed yet.[222]

In addition, the concept of "direct applicability" is vague and has caused confusion in both practice and theory. Although the concept of "direct applicability" has been proposed as an alternative to a confusing concept of self-executing,[223] the terms "direct," "applicability," and "possibility," which are included in the concept of "direct applicability," are all obscure. Thus, it can be said that the confusion has not been resolved yet.[224] Matsuda, S (2020) arranges different views on the terms "direct applicability" and "self-executing" as follows. (1) Both direct applicability and self-executing are considered to mean "applicable without the need for further measures.[225] The issue of judicial normativity in Article 25 of the Constitution of Japan is same as that of direct applicability.[226] (2) Self-executing should be strictly distinguished from direct applicability, which means what is obligated by international law to be applied as it is in the domestic courts of each country.[227] (3) The term "direct applicability" is understood as the basis of the proceeding. In most cases, the basic rights provisions of the Constitution are not directly applicable.[228] (4) Self-executing has two meanings: first, a treaty that does not require implementation legislation, and second, a treaty that can be used by courts as an independent judicial standard. Based on that understanding, the requirement of "integrity" should be added to "clarity."[229] "The concept of 'direct applicability' is originated under the European Community

[220] Kotera, A (Ed.). (2010). p.117.
[221] Matsuda, S. (2020). p.13.
[222] Matsuda, S. (2020). p.14.
[223] Iwasawa, Y. (1985). p.284.
[224] Matsuda, S. (2010). pp.150-151.
[225] Iwasawa, Y. (1985). p.281.
[226] Iwasawa, Y. (1985). pp.325-30.
[227] Abe, H. (2001) Kokusaijinkenhō to nihon no kokunaihōsei [International human rights law and domestic legislation systems in Japan]. Kokusaihōgakkai. *Nihon to Kokusaihō no hyakunen 4 jinken.* Tokyo: Sanshōdō. p.276.
[228] Obata, K. (2006). Kokusaijinkenkiyaku – nihonkokukenpōtaikei no moto deno jinkenjyōyakuno tekiyō [International human rights law – application of human rights treaties under the Constitution of Japan]. *Jurist 1321*, p.13.
[229] Kotera, A. (2004). *Paradaimu kokusaihō – kokusaihō no kihon kōsei [Paradigm International Law – Basic Constitution of International Law].* Tokyo: Yuhikaku. pp.65-66.

(EC) Law and differs from 'self-executing' in the second sense, both in terms of effectiveness and standards." (5) It basically supports the argument by Iwasawa, but insists that the requirement of "integrity" is a demand of an element that is almost impossible to be executed.[230] (6) From the perspective of whether legislative implementation is necessary or not, the Convention for the Unification of Certain Rules for International Carriage by Air, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the Convention on the Privileges and Immunities of the United Nations, the Act on Special Measures Incidental to Enforcement of the "Agreement between the United Nations and Japan regarding the Headquarters of the United Nations University," the Universal Postal Convention, the Model Tax Convention on Income and on Capital, and the United Nations Convention on Contracts for the International Sale of Goods[231] can be raised as examples of self-executing treaties. Treaties which have a provision to impose a legislative obligation to States Parties, such as most of the international human rights treaties, can be considered as not intending to be applied directly.[232]

From these examples, it can be said that the concept of direct applicability is still polysemous and unclear. Matsuda, S (2020) points out that such confusion remains because the concept of judicial normativity in domestic public law study, especially in the Constitutional study, and that of direct applicability in international law study is not well connected.[233] In the Constitutional study, the concept of judicial normativity has been argued by contrast to program normativity and defined as "legal norms that become the direct rules at the constitutional review by courts."[234] In contrast, the *Iwasawa* theory, one of international law study, positions the occasion when a treaty functions as a conformity examination standard for domestic law to "other effects"[235] that a treaty can have when it is not directly applicable. The decisive inconsistency between the direct applicability of the *Iwasawa* theory and judicial normativity of the Constitutional study is apparent.[236]

6.1.2. Direct applicability and a basis for an individual's claim

The direct applicability of a treaty has also traditionally been defined as the question of whether the prescribed right can be "directly applied as an individual's right."[237] In other words, it has been converted to an issue of whether an individual can directly claim their rights from the treaty's

[230] Shin, H. (2009). p.214.
[231] Nakatani, K. (2013). *Rōsukūru -kokusaihō tokuhon- [Law school -International Law Reader-]*. Tokyo: Shinzansha. p.146.
[232] Nakatani, K. (2013). p.145.
[233] Matsuda, S. (2020). p.18.
[234] Ichikawa, M. (1990). *Saibankihansei no igi [Significance of judicial normativity]*. Hōgakukyōshitsu 116. p.55.
[235] Iwasawa, Y. (1985). p.331.
[236] Matsuda, S. (2020). p.20.
[237] R. Abraham. (1991) L'applicabilité directe de la Convention devant la juridiction administrative. *Revue universelle des droits de l'homme*. p.275.

provisions. However, Iwasawa, Y (2004, p.107) and Shin (2016, pp. 507-508) provide a counter-argument to it by insisting that the case where international law is applied directly within a State is not limited to the case where individual rights and obligations are set.[238]

Iwasawa (1985, p.391) emphasizes the necessity of distinguishing the following two cases when considering the applicability of treaties.[239] The first case, which consists of the narrowest meaning of the "application" of treaties, is when the treaty is used as the basis for an individual's claim against the State. When "application" is argued in this sense, the requirements for affirming the applicability of treaties can be the strictest. It often requires a high degree of clarity in which the content of an individual's claim to the State is defined. The second case is when the treaty is used as the basis for recognizing the act of the State as illegal. When "application" is argued in this sense, the requirements for the application are not as strict as in the first case. It is often regarded acceptable if there is sufficient clarity to recognize the illegality of a State's conduct. In other words, the direct applicability of human rights treaties should not be regarded as the same issue as to whether a right is "directly applicable as an individual right." Depending on the form of the lawsuit, it is sufficient for the accuser to insist that domestic laws and administrative acts violate the treaty provisions.[240] Courts should make a judgement on legality in light of the provisions of the treaty but do not have to recognize individual rights.[241] When a judge recognizes the existence of a treaty norm that binds the State and revokes or dismisses a domestic law or administrative act as illegal, it means that the judge ensures an objective legal order in light of international law (*contrôle objectif*).[242]

Under the Japanese statutes, for example, when the measures taken by a prison officer against a prisoner based on the former Prison Act and Regulations for Applying the Prison Act and the application of the former Alien Registration Act are contrary to the provisions of human rights treaties and subject to the state redress proceedings under the State Redress Act, the Court had to determine whether the civil servant caused the damage "illegally" ―including violating the treaty norms incorporated in the domestic legal order of Japan― to an individual.[243] The judges did not need to consider whether such individual could claim their concrete rights in a Court. In addition, in revocation lawsuits such as those seeking revocation of refugee disapproval dispositions and cancellation of deportation order issuance due to violations of the 1951 Convention relating to the Status of Refugees and the Convention against Torture and Other Cruel,

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238 Kotera, A (Ed.). (2004). *Kōgikokusaihō [Lecture of international law]*. Tokyo: Yūhikaku. p.107; Shin, H. (2016). *Kokusaijinkenhou – kokusaikijun no dainamizumu to kokunaihō tono kyōchō - [International Human Rights Law – Dynamism of International Standards and Coordination with Domestic Law -]*. Tokyo: Shinzansha, pp.507-508.
239 Iwasawa, Y. (1985). p.391.
240 Shin, H. (2016). p.508.
241 Shin, H. (2016). p.508.
242 M. Waelbroeck. (1972). Effets intermes des obligations imposées à l'Etat. *Miscellanea W. J. Ganshof van der Meersch*. Bruxelles/Paris: Bruylant/LGJ, t.2, p.576.
243 Shin, H. (2016). p.508.

Inhuman or Degrading Treatment or Punishment, it did not matter whether the incorporated treaty explicitly guaranteed individual rights.[244] It was because the possibility of determining whether the disposition taken by the administrative agency was "illegal" in light of the treaty provisions was the only thing required to make a judgement. In States Parties where treaties have domestic legal effect, the provisions of the treaties always constitute valid legal norms that have legally binding effects on the States, and it does not necessarily mean that individual rights can be directly derived from the provisions.[245]

6.1.3. Roles expected to judicial institutions

In a country where a treaty has domestic legal force, such as Japan, human rights treaties are considered to constitute effective legal norms for judicial institutions. Thus, judicial institutions are required to give effective remedies for human rights violations of the treaty, following its norms. In other words, courts owe an obligation to examine arguments when human rights violation on the treaty is insisted and to give appropriate remedies in case the human rights violation is found.[246]

If passively interpreting the direct applicability of treaties by domestic courts in principle and allowing direct applicability only in an exceptional case where the strict conditions of subjective and objective requirements are met, it overlooks the fact that treaties are effective sources of law with domestic legal effect in Japan.[247] In addition, taking such a stance is undesirable because it narrows the applicability of the treaties by setting unnecessarily strict requirements.[248] Setting high barriers and limiting the direct applicability of the treaties will ultimately result in circumventing the obligations under the human rights treaties.[249] The human rights treaties are initially intended and aimed at protecting the human rights of individuals under the jurisdiction of the State Party and are primarily expected to be implemented within it. Therefore, if the courts admit direct applicability only in an exceptional case where the strict conditions of subjective and objective requirements are satisfied, it will be extremely difficult to realize the object and the purpose of the human rights treaties, and the treaties' obligations will never be fulfilled.

In States where the domestic legal effect of a treaty is recognized, judges can derive a

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[244] Shin, H. (2016). p.508.
[245] Shin, H. (2016). p.508.
[246] Shin, H. (2016). pp.55-57.
[247] Shin, H. (2016). p.511.
[248] Kitamura, T. (2008). Kokusaijinkenhō no kaishaku, tekiyō ni okeru kokunaisaibansho no yakuwari ― sekkenji bideo shichō fukyokajiken wo daizai toshite ― [Role of domestic courts in interpreting and applying international human rights rights law ― based on the case of disaaproval of video viewing at interviews―]. Gotō kokubaisoshō bengodanhen (Ed.), *Bideo saisei to himitsu kōtsūken (jyōkokuhen) [Video playback and secret traffic rights (appeal)]*. Tokyo: Gendaijinbunsha. p.56.
[249] Shin, H. (2007). Jinkenjyoyaku no chokusetsutekiyōkanōsei [Direct applicability of international human rights law]. *Aoyamahōgakuronshū 49.1*, p.238.

substantive legal effect from applicable treaties within their jurisdiction unless there are rules in domestic law that specifically restrict the judge's right to interpret the treaty.[250] If the judgement regarding the direct applicability of a treaty is under the authority of judges who are required to interpret and apply the provisions in each case, there is no reason to negatively interpret the direct applicability.[251] It can be said that affirming the direct applicability of a treaty is inherent in the legally binding force of the treaty norms that are required to be effective in the domestic legal order of each State.[252] This is especially true for treaties such as human rights treaties, which aim to ensure the human rights of individuals rather than securing mutual rights and obligations of between States and set the effective implementation within the States Parties as the primary object.[253] The ICESCR is no exception.

6.2. Justiciability of ESC Rights and Judicial Normativity of the ICESCR

Since the *Shiomi* case, courts have stubbornly continued to state that the rights under the ICESCR are not the rights that individuals can invoke in courts. It is questionable whether a "right" can never be claimed in a court while being called a "right".[254] Thus, this section examines whether ESC rights are justiciable and whether the ICESCR has judicial normativity.

"Justiciability" means the capability of being evaluated or enforced under the law. In order for a right to be "justiciable," States must incorporate the content of the right into domestic law and the law must provide an effective remedy to individuals for addressing alleged violations.[255] The effective remedy does not have to be judicial, and in certain circumstances, administrative remedy may be appropriate.[256] In General Comment no.9, the CESCR states that "justiciability" and norms that are "self-executing" should be distinguished.[257] "Justiciability" refers to matters that are appropriately resolved by the courts, whereas "self-executing" refers to applicability by courts without further elaboration. "Judicial normativity" is the condition to be met in order to consist of a base for judicial judgement.[258] In Japan, it has been considered that the treaty provisions must be self-executing to have judicial normativity.[259]

ESC rights have often mistakenly been considered non-justiciable[260]. Some argue that courts should not determine how the resources need to be allocated because political authorities

[250] Shin, H. (2016). p.511.
[251] Shin, H. (2016). p.511.
[252] Shin, H. (2016). p.511.
[253] Shin, H. (2016). pp.511-512.
[254] Shin, H. (2009). pp.127-128.
[255] K. Walter & K. Jorg. (2009). *The Law of International Human Rights Protection.* Oxford: Oxford University Press. pp.117-118.
[256] CESCR, *General Comment No. 9.* para 9.
[257] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24. para.10. Available at: https://www.refworld.org/docid/47a7079d6.html [accessed 20 March 2022]
[258] Matsuda, S. (2010). p.153.
[259] Yakushiji, K. (2009). p.52.
[260] CESCR, *General Comment No.9.* para.10.

are better equipped to address such matters[261]. The CESCR has rejected this argument, stating that courts are already involved with decision-making about resource allocation[262]. Some domestic and international cases demonstrate that ESC rights are justiciable[263], as detailed by S. Verma (2005).

The CESCR has identified two aspects of ESC rights that are always justiciable, that is, minimum core obligations and retrogressive measures, which have already been touched upon in chapter 3. First, States should always meet the minimum core obligation of the right. For example, States must ensure the general availability of essential food, primary health care, basic shelter, and basic education. Otherwise, the State will be considered to be failing to meet its obligations under the ICESCR unless it demonstrates it has taken every effort to use all its resources to satisfy the minimum obligations.[264] The "minimum core" is considered as the baseline of the obligation to progressively realize rights.[265] Second, States may not take deliberately retrogressive measures, which are actions that hinder the realization of ESC rights. Since States are obligated to progressively realize ESC rights, they must fully justify any government action that impedes or reduces enjoyment of these rights.[266]

Symonides, J., & Yokota, Y. (2004) also insist that Some of the ESC rights do meet judicial decisions.[267] First, the right to be free from state interference, including the right to own private property and the right to be free from forced labor, is the easiest right to be executed legally. Second, the application of the non-discrimination principle is particularly important. Although States Parties have discretion regarding the extent they develop social security system, once they establish a law to guarantee the right to social security for people, for instance, the right becomes a legal right, and States Parties ought to respect the non-discrimination principle. Consequently, even though the social security system can be limited due to resource constraints, once the legal foundation is structured, every person should be guaranteed the right to enjoy it and insist it in a court if the equality is not secured. Third, there are specific economic and social rights that are deemed minimum rights to be applied for everyone, such as the right to receive education for free.

Those rights should be absorbed in domestic legal, administrative, and judicial systems, first, by being recognized as an achievable goal, and second, by being executed in domestic law or administration through proper political and social reforms.[268]

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[261] CESCR, *General Comment No.9.* para.10.
[262] CESCR, *General Comment No.9.* para.10.
[263] S. Verma. (2005). *Justiciability of Economic Social and Cultural Rights Relevant Case Law.* The International Council on Human Rights Policy Review Meeting: Rights and Responsibilities of Human Rights Organisations.
[264] CESCR, *General Comment No. 3.* para 10.
[265] A. Sisay. (2013). *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theory, Practice and Prospect.* Cambridge: Intersentia. p.280.
[266] CESCR, *General Comment No.3.* para 9.
[267] Symonides, J., & Yokota, Y. (2004). p.168.
[268] Symonides, J., & Yokota, Y. (2004). p.170.

Whether the ESC rights are subject to a judicial decision also depends on the circumstances in which the right constitutes an issue, the legal system of the country, the accumulation of judicial precedent, and the stance of the judiciary.[269] Regarding the obligation to fulfill and promote, the legislature and the government play significant roles. On the one hand, even though the role of the judiciary is inherently limited, it is still possible to confirm the default of the State's obligations by illegally confirming the inaction of the legislature and the government. On the other hand, the judiciary can play a major role in relieving the violation of rights committed by the State or third parties in terms of obligations to respect and protect. In particular, the enjoyment of rights without discrimination is a matter that the ICESCR requires to "guarantee" and "secure". Complaints regarding discrimination are critical domains in which individuals can receive immediate relief in courts through injunctions, compensation, and complaints.[270]

Shin (2009, p.140) points out that Japan's conventional theories and judicial precedents may have overlooked "justiciability" due to persistence on whether the norms are "self-executing."[271] For the treaty provisions to have judicial normativity in Japan, the provisions must be self-executing by stipulating the contents, such as the rights and obligations of the parties, clearly and in detail without constitutional restrictions that prevent direct application.[272] The government of Japan explained in a state report to the CCPR that, in general terms, "whether or not to apply provisions of treaties directly is determined in each specific situation, taking into consideration the purpose, meaning and wording of the provisions concerned."[273]

As can be seen in chapter 5, there has been an argument that denies the self-executing effect of the ICESCR because of the progressive achievement obligation and the discretionary power of the legislative.[274] However, not all the rights under the ICESCR claim benefits, and such rights can have a self-executing effect in the context of asking to exclude the obstruction by the State.[275] General Comments no. 3 and 9 of the CESCR find that a series of articles such as Articles 2.2, 8, and 10.3, are directly applicable by domestic courts. The Comments criticize that a rigid classification of ESC rights, which puts them beyond the reach of the courts, would be arbitrary.[276] General Comment no. 9 states that "while the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, […], be considered to possess at least some significant justiciable dimensions."[277]

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[269] Shin, H. (2009). p.138.
[270] Shin, H. (2009). p.139.
[271] Shin, H. (2009). p.140.
[272] Yakushiji, K. (2009). p.52.
[273] UN Human Rights Committee (HRC), *CCPR Fourth periodic report of States parties due in 1996*, 1 October 1997, CCPR/C/115/Add.3, para.9. Available at: http://www.bayefsky.com/reports/japan_ccpr_c_115_add_3_1997.pdf [accessed 20 March 2022]
[274] See also Judgt of 15 Oct. 1999, Osaka High Ct, 1718 HANREI JIHŌ, 42.
[275] Yakushiji, K. (2009). p.52.
[276] CESCR, *General Comment No. 3*, para.5; CESCR, *General Comment No. 9*, para.10; UN Doc. HRI/GEN/1/Rev. 5 (2001), p.19, 60.
[277] CESCR, *General Comment No. 9*, para.10.

There are some judgements by the PCIF and the ICJ that argued whether international treaties, including the ICESCR, only prescribe rights and obligations between States or generate individual rights as well. The PCIF judgement in Danzig[278] and the ICJ judgement in LaGrand[279] confirmed that the treaty could stipulate individual rights. Regarding social rights, the ICJ Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territory[280] admitted infringement of social rights by wall construction on the premise of granting individual rights under the ICESCR.[281] From these judgements, it is reasonable to assume that some ESC rights have justiciability, and the ICESCR can grant individual rights.

In recent years, there have been some judgements from the lower courts that affirmed the judicial normativity of the ICESCR in Japan. In a lawsuit by Korean resident regarding the discrimination on a pension, the Osaka High Court judged in 2006 as follows: "Both Articles 2 and 9 [of the ICESCR] are ratified without reservation. Although the right to social security cannot be recognized immediately as a concrete right because the right itself derives from the State's duty to realize the right progressively, once it is legislated, Article 2.2 should be recognized as having the same significance as Article 26 of the ICCPR and its normativity should be affirmed."[282] Although the judicial precedent by the Supreme Court regarding the self-executing effect has not been established yet, the fact that the provisions of the human rights treaty have been directly interpreted and applied in lower courts in some cases of human rights violations cannot be ignored.[283]

6.3. Rank of treaties in the Japanese legal order

6.3.1. Relationship between treaties and laws

Having affirmed the domestic legal force and examined the requirements for acknowledging the direct applicability of treaties, the next issue to be considered is the rank of treaties in the Japanese legal order. The common view and the government's stance regard treaties at least are superior to law.[284]

Affirmatives regarding the preponderance of treaties over laws insist that if a court judges that a provision or application of a Japanese law goes against the provision of a treaty, the treaty will be prioritized, and the application of the law should be rejected. From this stance, it is clear

[278] Murakami, M. (2006). Danzig saibansho no kankatsuken jiken [A case regarding the jurisdiction of the Courts of Danzig]. Matsui, Y (Ed.), *Hanreikokusaihō (2nd ed.)*. Tokyo: Tōshindō, pp.122-124.
[279] Yamagata, H. (2006). LaGrand jiken [LaGrand case]. Matsui, Y (Ed.), *Hanreikokusaihō (2nd ed.)*. Tokyo: Tōshindō, pp. 562-566.
[280] ICJ. Legal consequences of the construction of a wall in the occupied Palestinian territory. Available at: https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf [accessed 20 March 2022]
[281] Yakushiji, K. (2009). Nihon ni okeru jinkenjyōyaku no kaishakutekiyō [Interpretation and application of human rights treaties in Japan]. *Jurist 1387*, p.52.
[282] Judgt of 25 May. 2005, Osaka Dist. Ct, 1188 HANREI TIMES, 254.
[283] Yakushiji, K. (2009). p.53.
[284] Shin, H. (2011). *Jiyū to seigi [Freedom and justice]*, 62.6, p.13.

that the norms of human rights treaties are superior to laws, including the Immigration Control and Refugee Recognition Act, in the Japanese domestic legal order. Whereas, since the Supreme Court ruling of the McLean case, which is regarded as the leading case for the protection of human rights of aliens in Japan, a misunderstanding that the protection of human rights of aliens is premised on having a residential status under the Immigration Control and Refugee Recognition Act has been generalized.[285] In this case, the Supreme Court applied the theory on the nature of right by declaring that "the guarantee of basic human rights in relevant provisions of the third chapter of the Constitution should be considered to be equally applicable to the aliens who reside in Japan, except the rights which seem to target only Japanese nationals due to the nature of the rights." At the same time, the Court stated that "the guarantee of basic human rights in Constitution for aliens should be understood as being given only within the framework of the residential system for aliens" because it is the discretion of the State Party to decide whether aliens can reside in Japan, and they are not guaranteed the right to continue residing in Japan under the Constitution. From the perspective of international human rights law, it should not be overlooked that Japan ratified the International Covenants of Human Rights in the next year, 1979. The judgement of the McLean case has been repeated to justify including the guarantee of human rights for aliens into the framework of the residence system. Shin (2011, pp.13-14) argues that such a stance needs to be fundamentally reviewed from the viewpoint of the human rights treaty. Even if the right of aliens to enter and stay is not yet recognized by customary international law, the treatment of persons under the jurisdiction of Japan is constrained and bound by the norms of human rights treaties that have domestic legal force. In other words, domestic laws, including the Immigration Control and Refugee Recognition Act, are demanded to be developed and executed in conjunction with the norms of human rights treaties.[286]

6.3.2. Theories on the relationship between treaties and the Constitution

Theories on the relationship between treaties and the Constitution can be divided into three categories: the treaty dominance theory,[287] the constitutional dominance theory,[288] and the so-

[285] Shin, H. (2011). *Jiyū to seigi* 62.6, p.13.
[286] Shin, H. (2011). *Jiyū to seigi*, 62.6, pp.13-14.
[287] There are three grounds for the treaty dominance theory. First, Article 98.1 of the Constitution lists the forms of domestic law that are invalid if it violates the Constitution, "the supreme law of the nation," but treaties are not listed there. Moreover, Article 81 of the Constitution does not mention treaties as subject for examining constitutionality. These provisions at least show that the treaty is not inferior to the Constitution. Second, Article 98.2 stipulates the obligation to comply with the treaty in good faith, so the treaty is considered to be superior to the Constitution. Third, the Constitution raises internationalism and pacifism as basic principles, but it presupposes the compliance with treaties concluded by Japan, that is, the restriction on national sovereignty. In order for those principles to be effective, the treaties should be granted a formal effect superior to the Constitution. See Serizawa, H. (1995). Kenpō to jyōyaku [Constitution and treaties]. *Hōgakukyōshitsu 173*, p.77.
[288] The constitutional dominance theory develops its argument as follows. First, Article 98.1 is a provision that declares the supreme legality of the Constitution in domestic legal order, and it is a matter of course that the provision does not mention treaties. The lack of treaties in the subjects of

called conditional theory, which approves the superiority of treaties over the Constitution in case the treaties meet certain requirements[289].

Serizawa, H (1995, p.78) points out that we must be cautious about determining the superiority of treaties or the Constitution uniformly because there is a difference between bilateral treaties and treaties signed among few countries and multilateral treaties such as the Charter of the United Nations and the International Covenants of Human Rights.[290] However, the conclusion he draws regarding the relationship between international human rights law and the Constitution is quite simple: in the case of international human rights treaties, there can be no conflict between the Constitution and the treaty regarding the idea of respecting human rights. Therefore, when the provisions, which guarantee human rights in a more detailed and broader manner, are prioritized, problems are unlikely to occur.[291] In contrast to legal precedents of Japanese courts, which stated that the Constitution of Japan covers the content of international human rights treaties, the human rights treaties seem to stipulate the provisions in more details and in a more concrete way. If the content of a human rights treaty has the same purpose as the Constitution and stipulates the rights

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examining constitutionality stipulated in Article 81 shows merely the consideration of the fact that some treaties, which are agreements between states, are not suitable for judicial review, and does not necessarily hamper the examination of the constitutionality towards treaties. Second, Article 98.2 stipulates the obligation to comply with the treaty in good faith, not to repeat the neglect and violation of international law that happened during the war. It emphasizes compliance with officially established international law to not to be criticized by the international society again and admits the domestic legal effect without requiring any special transformation procedure. The intent is not to tolerate the existence of unconstitutional treaties. Third, although the Constitution is based on internationalism and pacifism, as long as presupposing the current state of the international community in which the legal order that the monism of international law dominance is thoroughly valid has not yet been established, the general abstract principles of corporatism and pacifism cannot immediately derive the dominance of any treaty. Fourth, in addition to the above points, state institutions authorized by the Constitution are obliged to respect and uphold it; therefore, they are not allowed to conclude unconstitutional treaties. Fifth, the treaty dominance theory results in allowing the constitutional amendment to be achieved by an unconstitutional treaty established by a laxer procedure than ordinary legislation, stipulated in Article 61. This is an unacceptable argument that violates the constitutional amendment done by the will of the people, which is a manifestation of national sovereignty, with internationalism. See Serizawa, H. (1995). p.77.

[289] There are multiple positions in the third theory: the conditional theory. The first standpoint states that "the fundamental normative part of the Constitution" is superior to treaties. If the order in the domestic legal system is schematized from this position, the order will be as follows: the fundamental normative part of the Constitution > Treaty >/= other parts of the Constitution > Law > Order. One argument against this stance is that it disregards the people's right to amend the Constitution, which is an expression of national sovereignty because some parts of the Constitution other than the fundamental normative part will be able to be amended by unconstitutional treaties. The second stance insists that only treaties which form the basis of the existence of the state are "superior to the Constitution". This type of treaties includes treaties on surrender, peace treaties, and territorial treaties. One criticism is that the criterion for distinguishing whether it is a treaty superior to the Constitution is unclear, when considering, for example, the Potsdam Declaration and the Treaty of Mutual Cooperation and Security between Japan and the United States of America. The third position distinguishes between "treaties" and "established international law" and interprets the latter as superior to the Constitution. See Serizawa, H. (1995). p.77.

[290] Serizawa explains that in the former treaties, the will of a single government plays a huge role in the process of concluding a treaty, while in the latter, the influence of a single government is limited because many states participate in the legislative process. Therefore, it is difficult for the government to amend the Constitution arbitrarily. Moreover, the content of the treaty is accepted by many states and, thus, should be less likely to violate the Constitution. See Serizawa, H. (1995). Kenpō to jyōyaku [Constitution and treaties]. *Hōgakukyōshitsu 173*, p.78.

[291] Serizawa, H. (1995). p.79.

broadly or in more depth, the content of the Constitution should be considered to have been enriched or reinforced by the treaty's provisions. Obata, K (2006, p.14) argues that the provision of the treaty should be regarded as a guideline for interpretating the Constitution.[292]

6.3.3. Effectiveness of laws violating treaties while not violating the Constitution

One of the controversial practical issues surrounding the domestic implementation of human rights treaties is the domestic effectiveness of laws and administrative sanctions that violate the provisions of the treaties while not violating the constitutional provisions.[293] Japan adopts the system of automatic incorporation; thus, treaties gain domestic legal force by ratification and promulgation. The human rights treaties that have been ratified or joined after the coordination with domestic statutes, presupposing the protection of human rights based on the Constitution and preexisting domestic laws, the minimum necessary legal revisions should be considered to have already been made to ensure the compatibility with the treaties, and reservations have been made for some provisions whose obligations cannot be fulfilled under the Constitution or national policies. Thus, treaty provisions with clear and detailed norms are considered to be directly applicable in Japan unless there are constitutional restrictions.[294] If the guarantee by the treaty exceeds that by the Constitution, even if the domestic law does not violate the human rights clause of the Constitution, it can be considered as violating the treaty. The violation of a treaty, by extension, constitutes a situation that are not permitted by the Constitution through violation of Article 98.2.[295] It should be recognized as the intention of the government and the legislature who approved the treaty to presuppose the protection of human rights by law and the Constitution, and in rare cases where those rights cannot be fully covered by them, human rights violation will be relieved through the direct application of the treaty, and necessary amendments to the law will be made after that.[296]

However, in reality, there have been few cases in which domestic laws and administrative sanctions are judged to be illegal or invalid due to violating the treaty provisions.[297] The majority opinion of the Supreme Court in 2008[298] mentioned the ICCPR and the Convention on the Rights of the Child when making the judgement regarding the constitutionality of the Nationality Law. Various reflections have been shown toward it: (a) “Although the judgement did not take up the

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[292] Obata, K. (2006). p.14.
[293] Saito, M. (2011). Kokusaijinkenhō to saikōsai no sutansu [International human rights law and the stance of the Supreme Court]. *Hōgakuseminar 674*, p.6.
[294] Iwasawa, Y. (1985). pp.49-50, 310-315.
[295] Sato, K. (2006). Kenpōchitsujyo to “kokusaijinken” ni taisuru oboegaki [Memorandum of constitutional order and “international human rights”] *Kōzakokusaijinkenhō I*, p.39.
[296] Yakushiji, K. (2012). pp.22-23.
[297] Yokota, K. (1994). “Kokusaijinken” to nihonkokukenpō – kokusaijinkenhōgaku to kenpōgaku no kakyō [“International human rights” and the Constitution of Japan – a bridge between the study of international human rights law and the Constitution]. *Kokusaijinken 5*, pp.9-10.
[298] Judgt of 4 Jun. 2008, Sup. Ct. 62 MINSHŪ 6, p. 1367.

application of specific provisions as an issue and merely cited them as a source of information to show the change of the international society environment, it is noteworthy that international human rights law is referred to even indirectly."[299] (b) "violations of the treaty cannot be grounds for appeal, and the Supreme Court' decision in this case did not directly consider the issues surrounding the treaty. However, the majority opinion […] took into account the provisions of the human rights treaties and concluded that Article 14 of the Constitution was violated by pointing out that the rational link between the distinction and the object of the law cannot be found in light of changes in the domestic and international social environment surrounding Japan. This is noteworthy."[300] (c) "even though plaintiffs did not make claims based on international human rights law, the Supreme Court referred to those treaties to reinforce their judgement. […] It can be said that the situation where even the Supreme Court must take into consideration the international human rights treaties depending on cases is steadily being formed."[301] At the same time, the view (c) criticized that "since the ratified treaty is part of the legal order of Japan, […] it is not just a matter of 'international trends.' The equation with foreign legislative trends gives a slightly strange impression, at least from the position of the treaty, which is superior to the law in the domestic legal system." Saito, M (2011, p.6) also condemns that the Court argues foreign legislation and international human rights in parallel without examining the compatibility of the Nationality Law with specific treaty provisions.[302] Izumi's supplementary opinion insisted in the judgment on the remedy method that granting Japanese nationality while regarding part of Article 3.1. of the Nationality Law as unconstitutional is "compatible with the purpose" of Article 24.3 of the ICCPR and Article 7.1 of the Convention on the Rights of the Child.[303] Arguing that it "is compatible with the international human rights treaties" after drawing a conclusion by examining the constitutionality could be considered as platitude or lip service. However, there might be multiple logical interpretations of constitutional provisions. In such a case, Saito (2011, p.7) affirms that choosing a constitutional interpretation that is compatible with the international human rights treaty and declaring the compatibility between the constitutional interpretation and the international human rights treaties could be a good start.[304]

Under the individual communication procedure, domestic laws and administrative sanctions that were judged as not violating the Constitution or human rights treaties in domestic

[299] Hayakawa, S. (2009). Kokusekihōikenhanketsu [Unconstitutional judgement of the Nationality Law]. *Kokusaijinken 20*, p.111.
[300] Takahashi, K. *et al*. (2008). (Kendan) Kokusakihō ikenhanketsu wo megutte [(Dialogue) Concerning the unconstitutional judgement of the Nationality Law] *Jurist 1366,* p.73 (Remarks by Iwasawa, Y).
[301] Imai, T. (2008). Kokusekihōikensoshoōsaikōsaihanketsu to kokusaijinken [Unconstitutional proceedings decision regarding the Nationality Law by the Supreme Court and international human rights]. *Kikankyōikuhō 159*, p.78.
[302] Saito, M. (2011). p.6.
[303] Saito, M. (2011). p.7.
[304] Saito, M. (2011). p.7.

courts can be found to be in violation of human rights treaties by the Committee. It is undesirable to suddenly start the discussion on the interpretation and application of the human rights treaty in front of the Committee; thus, it is crucial to discuss it to some extent in the domestic courts. Therefore, Yakushiji, K (2012, p.21) emphasizes the significance of marshalizing the arguments surrounding certain acts under domestic law that are not unconstitutional but violate the provisions of the Covenant.[305]

6.3.4. Role of the judiciary to acknowledge the unique significance of treaties

International human rights treaties generally obligate States Parties to implement their human rights guarantee within the States but do not limit the way. This is because international human rights law neither presupposes a specific form of politics or governance mechanism nor presupposes a specific idea of human rights. In the case of Japan, measures to realize the right should be taken in line with its governing body, including all national institutions such as parliament, government, courts, and, in some cases, local governments.[306] When incorporating international human rights treaties, there were few legislations or amendments to implement them in Japan. The lack of legislative measures for such implementation does not cause any particular problem in the legal system in Japan, which stands on the monistic theory that recognizes the domestic legal force of international law without incorporation into domestic statutes.

Nevertheless, the absence of such legislative measures creates many conflicts between the government, which does not find any particular contradiction or conflict with the rights already realized in the domestic constitutional system, and citizens, who expect that the rights will be expanded by accepting international human rights treaty.[307] For this reason, the expectation of expanding rights under the international human rights treaties is brought to the judicial proceedings. Whereas, the Supreme Court has been repeating the following judgements: the violations of treaties, like other violations of laws and regulations, are not the grounds for appeal under the procedural law; thus, the conclusion has been drawn without mentioning the international human rights treaty in the reasons[308]; the purpose of the provisions of the International Covenants on Human Rights is not different from that of the Constitution of Japan[309], the judicial normativity of the ICESCR has been denied by concluding that the Covenant is nothing more than a political declaration, and the restriction on freedom of expression has been justified on the ground of "public welfare" without undergoing a distinct examination by judging

[305] Yakushiji, K. (2012). p.21.
[306] Higashizawa, Y. (2012). Kenpō to kokusaijinkenhō – kyōtsū no jinkenkihan no kakuritsu nimukete, kikaku no shushi [Constitution and international human rights law – toward the establishment of the common human rights norm, purpose of this project]. *Hōritsujihō 84.5*, p.5.
[307] Higashizawa, Y. (2012). p.6.
[308] Judgt of 29 Aug. 1997, Sup. Ct, 51 MINSHŪ7, p.2921.
[309] Judgt of 8 Mar. 1989, Sup. Ct, 43 MINSHŪ 2, p.89.

that the content guaranteed by the ICCPR is the same as the Constitution. Regarding the last point, the Committee has repeatedly expressed concern that the Constitution's concept of "public welfare" is vague and unrestricted and may allow restrictions that are beyond those allowed under the Covenant.[310] Even under such circumstances, in the judgements of the lower courts, there are many cases in which international human rights treaties are actively used in relation to aliens, criminal defendants, children born out of wedlock, and racial discrimination.[311]

When incorporating international human rights law in domestic statutes, it is important to recognize which parts overlap and differ from constitutional human rights. In contrast to constitutional human rights, which have been systematized with a constitutional understanding of regulating the state authority, international human rights law, which has been established as a universal consensus worldwide, cannot be explained by the legal concept of domestic law alone. The Tokyo High Court declared in 1998 that "in light of the circumstances in which Japan ratified the ICCPR under the order of the Constitution of Japan and accepted the legal force of the Covenant in domestic legal order, the nature, content, and scope of the rights and freedoms guaranteed by the Covenant are not different from or beyond the scope of those guaranteed under the Constitution."[312] This judgement is equivalent to saying that the treaty interpretation is unnecessary on the premise of the pre-established harmony between the legal order under the Constitution of Japan interpreted by the courts and the contents of the human rights treaty. Such an idea dismisses the significance of ratifying the human rights treaty.

Whereas the constitutional human rights theory considers the dichotomy of the right to be free as a negative obligation and social right as a positive obligation, international human rights law emphasizes the inseparability of human rights and the multi-layered nature of state obligations[313] such as the obligation to respect, obligation to protect, and obligation to fulfill. Even in the ICCPR, which is often equated with the human rights clause of the Constitution, there is a horizontal effect that imposes an obligation on the State to eliminate infringement by individuals.[314] Furthermore, the method for examining the violation of treaties needs to be distinguished from the conventional examination to determine the constitutionality, because, in contrast to the constitutional theory that uses the general restriction clause of "public welfare" when legitimizing the restriction of human rights, the International Covenants on Human Rights adopted a method of listing the justification for restricting each right.[315] The operation of the international human rights law by courts that have applied similar concepts of rights and

[310] Yakushiji, K. (2012). p.20; UN Human Rights Committee (HRC), *CCPR Concluding observations: Japan*, 18 December 2008, CCPR/C/JPN/CO/5, para.10. Available at: https://undocs.org/CCPR/C/JPN/CO/5 [accessed 20 March 2022]
[311] Higashizawa, Y. (2012). p.5.
[312] Judgt of 21 Jan. 1998, Tokyo High Ct, 1645 HANREI JIHŌ, p.67.
[313] Higashizawa, Y. (2012). p.7.
[314] Higashizawa, Y. (2012). p.7.
[315] Higashizawa, Y. (2012). p.7.

examination criteria without distinction from the conventional examination to determine the constitutionality needs to be reconsidered.

6.4. Legal significance of "General Comments," "Concluding observations," and "Views"

This thesis refers to "General Comments," "Concluding observations," and "Views" to show the stance of the CESCR but what kind of legal significance do they have and how are they positioned in the Vienna Convention? This section introduces some different answers to the question.

Each human rights treaty has a treaty body that monitors the domestic implementation of treaties, thus constituting an international implementation system. Treaty bodies were established because, in contrast to other international treaties that consist of the reciprocal relationship between States, human rights treaties need a third party to monitor their implementation. The significance of international human rights treaties will be greatly diminished unless the domestic implementation is evaluated internationally by them. The CESCR has shown its interpretation regarding the provisions of the ICESCR through "General Comments," "Concluding observations," and "Views." "General Comments" are adopted for all States Parties, and "Concluding observations" are adopted for each State in the reporting procedure. In the individual communication procedure, the Committee adopts "Views" that state the fact-finding and legal judgement as to whether there is a violation of the Covenant after receiving and examining the individual communication. In a State Party where a treaty has legally binding power, such as Japan, a concerned party can invoke an international human rights law in a court and refer to the interpretation shown by treaty bodies in "General Comments," "Concluding observations," and "Views" to confirm the meaning of the Covenant. To make clear whether or to what extent the Courts in Japan should consider them when making judgements, their legal significance should be examined.

"General Comments," "Concluding observations," and "Views" do not have legally binding power. However, they consist of treaty interpretations that have been accumulated in treaty bodies' execution of an international implementation system. Based on the assumption that States Parties accepted the duties imposed on treaty bodies in the human rights treaty mechanism when ratifying it, they are expected to show respect for their treaty interpretation.[316]

Although some consider that Article 98.2 of the Constitution of Japan, that is, "Treaties concluded by Japan […] shall be faithfully observed" should be considered to include the respect to the interpretation by treaty bodies,[317] it is often stated that the Courts in Japan do not have to respect them due to the lack of legally binding effect. The Osaka High Court declared in 1998

[316] Shin, H. (2016). pp.96-97.
[317] Saito, M. (2011). p.5.

that "General Comments," "Concluding observations," and "Views" "neither have a power to legally bind the treaty interpretation by domestic institutions of States Parties nor a power to legally bind the interpretation by Japanese courts."[318] Moreover, the Tokyo High Court declared in the same year that "Concluding observations do not immediately affect the legal force of domestic law in states parties."[319] The Tokyo High Court stated in 2002 that, the "General Comments" by the Committee "cannot be considered as having legally binding effect for Japan: therefore, there is no reason to incorporate their contents to interpret Article 14 of the Japanese Constitution."[320] Presumably, the Court apprehended that those comments do not have to be referred to when interpreting the domestic law of Japan; that is, they do not have to be even indirectly applied because those comments do not have legally binding power.

Another viewpoint that denies the necessity of respecting the Committee's interpretation is the perspective of judicial independence.[321] However, as Japan has already accepted the reporting procedure under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention for the Protection of All Persons from Enforced Disappearance, the argument that the reporting procedure by the Committee threatens the independence of jurisdiction is no longer consistent with the national execution that recognizes the jurisdiction of these bodies.[322] In addition, the courts in States Parties do not have to regard the Committee's interpretation as something with legally binding power. Still, they have to interpret and apply the law in conjunction with an international human rights standard by referring to the treaty interpretation shown by a treaty body. States Parties are asked to respect the Committee's interpretation because they owe the responsibility to realize the rights and observe the duty stipulated in treaties.[323] The requirement on courts to consider the Committee's interpretation when interpreting laws and regulations does not go against with independence of judicial authority.[324]

The theory and some judgements have apprehended "General Comments," "Concluding observations," and "Views" as constituting important elements in interpreting treaties: "subsequent practice" in Article 31.3 (b), "supplementary means of interpretation" in Article 32, and "interpreted in good faith" in Article 31.1 of the Vienna Convention on the Law of Treaties.[325] The following introduces some arguments regarding which category "General Comments,"

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[318] Judgt of 25 Sep. 1998, Osaka High Ct, 992 HANREI TIMES, p.103.
[319] Judgt of 29 Sep. 1998, Tokyo High Ct, 1659 HANREI JIHŌ, p.35.
[320] Judgt of 28 Mar. 2002, Tokyo High Ct, 1131 HANREI TIMES, p.139.
[321] Shin, H. (2016). p.104.
[322] Yakushiji, K. (2012). p.17.
[323] Shin, H. (2016). p.104.
[324] Sasada, E. (2012). Sōkatsu komento: kenpōgaku no tachiba kara [Summary comment: from the standpoint of the study of the Constitution]. *Kokusaijinken 23*, p. 63.
[325] United Nations. Vienna Convention of the Law of Treaties. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [accessed 20 March 2022]

"Concluding observations," and "Views" apply.

There is only one judicial precedent that regarded the Committee's interpretation as "subsequent practice" in Article 31.3 (b) of the Vienna Convention.[326] On the one hand, the Osaka District Court stated in 2004 that "General Comments" are "subsequent practice" regarding the application of treaty and should be respected to a considerable extent as something equivalent to a complementary means for interpretation and something that establishes agreement among States Parties.[327] On the other hand, several theories are critical for seeing "General Comments," "Concluding observations," and "Views" as "subsequent practice." For example, Murakami, M (2005, p.9) insists that it is problematic to regard the Committee's interpretation as "subsequent practice" because of two reasons: first, Article 31.1 (b) supposes practice of "parties"; second, the practice has to be "something that establishes the agreement of the parties regarding its interpretations" but the views from treaty bodies "should be always taken into account" regardless of acceptance by the parties.[328] Although the "views of the Human Rights Committee gain their authority from their inner qualities of impartiality, objectiveness and soberness,"[329] Kitamura, T (1996, p.76) also argues that it "cannot make a judgement with legally binding power in regard to treaty interpretation." Thus, "General Comments," "Concluding observations," and "Views" "do not establish a legal interpretation among the parties."[330]

Although a subsequent practice is expected to establish the agreement of the parties, Iwasawa (2010, p.67) argues that it does not mean that every State has to execute that practice. It is considered sufficient if every State Party accepts the practice.[331] Many theories admit that the acceptance of such practice by other States Parties can be implicit and regarded as tacit approval.[332] If a judgement by the implementation-monitoring body establishes the agreement of the parties, it cannot be regarded as a subsequent practice. In other words, even if the judgement by the implementation-monitoring body does not have legal power, it can constitute a subsequent practice.[333]

The second possibility is that "General Comments," "Concluding observations," and "Views" can be regarded as "supplementary means of interpretation" prescribed in Article 32 of the Vienna Convention. Many precedents in Japan apprehend "General Comments," "Concluding

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[326] Iwasawa, Y. (2010). Jiyūkenkiyakuiinnkai no kiyakukaishaku no hōtekiigi [Legal significance of the CCPR's interpretation of the Covenant]. Sekaihōnenpō, p.54.
[327] Judgt of 9 Mar. 2004, Osaka Dist. Ct, 1858 HANREI JIHŌ, p.79.
[328] Murakami, M. (2005). *Jinshusabetuteppaijyōyaku to nihon [International Convention on the All Forms of Racial Discrimination]*. Tokyo: Nihonhyōronsha, p.9.
[329] D. McGoldrick. (1991). *The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights*. Clarendon Press: Oxford. p.152.
[330] Kitamura, T. (1996). *Kokusaijinken to keijikōkin [International human rights and criminal detention]*. Tokyo: Nihonhyōronsha, p.76.
[331] Iwasawa, Y. (2010). p.67.
[332] E.g., R. Gardiner. (2008). *Treaty Interpretation*. Oxford: Oxford University Press.pp.235-41; D. Harris. (2004). *Cases and Materials on International Law*. 6th ed. London: Sweet & Maxwell. pp.37-38.
[333] Iwasawa, Y. (2010). p.67.

observations," and "Views" as "supplementary means." The Osaka High Court declared in 1994 that "General Comments," "Concluding observations," and "Views" of the CCPR should be relied on "as supplementary means of interpretation."[334] Theories in Japan strongly affirm this stance as well. Yakushiji (2006, p.21) argues that the advisory opinion of the Construction of a Wall in the Occupied Palestinian Territory implies that "Views" can function as supplementary means for treaty interpretation, independent of its legally binding force.[335] Obata (2006, p.94) also insists that "at least" there is no reason not to regard the "Views" and "Concluding observations" of the CCPR as supplementary means of interpretation.[336] However, Murakami (2005, pp.9-10) has three reasons to be against to "General Comments" and others by treaty bodies as supplementary means of interpretation.[337] First, examples of supplementary means of interpretation raised in the Vienna Convention relate to the agreement of the parties, but "Views" from the Committee do not have such character. Second, the supplementary means of interpretation can only be used in limited cases, but "Views" by the Committee should always be considered. Third, the supplementary means of interpretation can be used to "determine" the treaty interpretation, but it is questionable if the interpretation by treaty bodies should be given such weight.

The third possibility is to rely on Article 31.1 as a ground to refer to "General Comments," "Concluding observations," and "Views." Article 31.1 prescribes that a treaty "shall be interpreted in good faith". Imai (1989, p.31, 40) affirms that "interpreting and applying a treaty by referring to ['General Comments,' 'Concluding observations,' and 'Views'] constitutes nothing but an attitude to 'interpret in good faith.'"[338] Murakami (2005, p.10) supports this view by arguing that "it is valid to consider that ['General Comments,' 'Concluding observations,' and 'Views'] should be taken into account when interpreting a treaty in good faith."[339] However, Article 31.1 only lays down general principles of treaty interpretation. It is difficult to either admit an independent role in the principle of faithful interpretation or lead a particular way of interpretation from this principle.[340]

Some cases did not mention which way of interpretation that "General Comments," "Concluding observations," and "Views" apply in the Vienna Convention but referred to them when making judgements. The Osaka High Court mentioned in 2005 that General Comment no.19 of the CCPR and the View from individual communication procedure of the S.W.M. Broeks vs.

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334 Judgt of 28 Oct. 1994, Osaka High Ct, 1513 HANREI JIHŌ, p.71.
335 Yakushiji, K et al. (2006). *Hōkadaigakuin kēsubukku kokusaijinkenhō [Law school case book of international human rights law]*. Tokyo: Nihonhyōronsha, p.21.
336 Yakushiji, K et al. (2006). *Hōkadaigakuin kēsubukku kokusaijinkenhō [Law school case book of international human rights law]*. Tokyo: Nihonhyōronsha, p.94. (Obata, K).
337 Murakami, M. (2005). pp.9-10.
338 Imai, T. (1989). Kokusaijinkenhō no kokunaisaiban ni okeru tekiyō to kodomo no kenri jyōyaku [Application of international human rigts law in domestic courts and the Convention of the Rights of the Child]. Nagai, K *et al.*, *Kodomo no kenri to saiban [Rights of the child and trials]*. Tokyo: Hōseidaigakushuppannkyoku, p.40.
339 Murakami, M. (2005). p.10.
340 R. Gardiner. (2008) pp.147-61.

the Netherland and stated that "the equity principle of Article 26, the ICCPR can be applied for the right of social security stipulated in the ICESCR."[341]

"General Comments," "Concluding observations," and "Views" adopted by the Committee themselves are not legally binding. However, the States Parties have given the Committee the authority to monitor the implementation of the Covenant; thus, it is pointless to maintain the reporting procedure and individual communication procedures unless to recognize some legal significance in the treaty interpretation by the Committee.[342] In General Comment no.33, the CCPR regards the "Views" as an "authoritative determination" and emphasizes that "the nature and importance of this view is derived from the inseparable role of the Committee under the Covenant and the Optional Protocol."[343] The same significance should be found in "General Comments," "Concluding observations," and "Views" by the CESCR.

6.5. Limitations on appeal to the Supreme Court and the exhaustion of domestic remedies

The current Code of Criminal Procedure[344] limits the reasons for appealing to the Supreme Court to the violation of the Constitution, the misinterpretation of the Constitution, or being contrary to the Supreme Court's case law in Article 405. Other than that, according to Article 406, the Supreme Court can only accept cases, which seem to contain essential matters concerning the interpretation of laws and regulations, by appeal. Claims of violation of treaty are comprehended to be included in "matters concerning the interpretation of laws and regulations"; thus, such claims, including claims of violation of the human rights treaty, by themselves, will not be examined by the Supreme Court unless the petition for appeal is accepted. If an appeal regarding a treaty violation is considered a mere violation of laws and regulations and is not taken up by the Supreme Court, in that case, problems will arise in relation to the rule of exhaustion of domestic remedies. The rule requires that individuals use all the available remedies in the State before submitting a complaint or communication to an international human rights treaty body. If an appeal cannot be judged in the Supreme Court, people will not be able to use the individual communication procedure even if Japan participates in it in the future.[345] The limitations on appeal to the Supreme Court need to be reviewed before adopting the OP-ICESCR and joining the individual communication procedure.

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[341] Judgt of 27 Oct. 2005, Osaka High Ct. See Iwasawa, Y. (2010). p.55.
[342] Yakushiji, K. (2009). p.49.
[343] UN Human Rights Committee (HRC), *General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, CCPR/C/GC/33, para.13. Available at: https://www.refworld.org/docid/4ed34e0f2.html [accessed 20 March 2022]
[344] The Code of Criminal Procedure. Available at: https://elaws.e-gov.go.jp/document?lawid=323AC0000000131 [accessed 20 March 2022]
[345] Shin, H. (2016). p.95.

7. Conclusions

When drafting the International Covenants on Human Rights, the Commission on Human Rights discussed the difference regarding the nature of human rights. After all, the following opinions submitted by the Western Countries accounted for the majority: in contrast to the CP rights, which require States Parties to restrain the exercise of power and can be executed in the courts, ESC rights demand States Parties to take positive measures and cannot be familiar with the enforcement in the Courts because it requires financial burden.[346] Based on these views, the International Covenants on Human Rights were divided into the ICCPR and the ICESCR. The ICCPR obliges States Parties to "respect and ensure" rights in Article 2.1, whereas the ICESCR only prescribed to "take steps" toward the full realization of rights in Article 2.1.

Such circumstances regarding the dichotomy of the International Covenant on Human Rights have led to theories that tend to emphasize, more than necessary, the difference of obligations between the two Covenants on the ground of "the difference of the nature of the rights."[347] Until the mid-1980s, it was generally explained that the ICCPR imposes an obligation to realize the rights immediately, whereas the ICESCR only imposes an obligation to "realize the rights progressively."[348] In other words, the ICESCR was considered as a "promotional convention." Subsequently, as mentioned above, the understanding of the State Parties' obligations under the ICESCR became much deeper thanks to the activities of the CESCR and the development of theories. The Committee and the theories have developed the obligations into the obligation to respect, the obligation to protect, and the obligation to fulfill, reflecting the multi-layered nature of the rights. Moreover, they developed the idea of "minimum core obligation," which imposes the duty to all States Parties in order to meet the minimum essential parts of rights even if the "full" realization of the right can be progressive. Nevertheless, the superficial understanding of "obligation of progressive realization," "obligation to make an effort," and "promotional obligation," which were introduced at the beginning of the adoption of the Covenant, is still valid in Japan, and the indication by the CESCR to give effect to the provisions has been ignored.

The general principle of international law is that the wording of an international treaty should be interpreted in good faith in light of its object and purpose[349]. Considering that the ICESCR acknowledges the ESC "rights" and was established for realizing them, it is reasonable to choose an interpretation that matches the object and purpose of the treaty rather than focusing

[346] Shin, H. (2009). p.129.
[347] Shin, H. (2009). p.130.
[348] Shin, H. (1999). *Jinkenjyōyakujyō no kokka no gimu [State's obligations under human rights treaties]*. Tokyo: Nihonhyōronsha, pp.11-14.
[349] United Nations. Vienna Convention of the Law of Treaties. Article 31.

on what each State Party was thinking at the time of drafting. Interpreting the ICESCR as only proclaiming the political responsibility and denying its applicability in courts are inconsistent with the purpose of the ICESCR, which aims to realize the "rights." Although the International Covenants on Human Rights have been divided into two covenants for the above reasons, it is far from rational to assume that all rights under the ICESCR should be realized in the future, with the understanding of "progressive" realization.

Thus, in the domestic implementation of the ICESCR, it is of paramount importance for the courts as bulwarks of human rights relief to make a judicial decision that understands the norms of the Covenant and ensure their effectiveness, in addition to the responsibility of the legislature and administrative institutions, which should develop and operate domestic laws to meet the requirements of the human rights treaties. Giving effect to the provisions of the ICESCR in the domestic legal order and considering them in the process of legislation and policy formulation have been demanded in the "Concluding observations" as well.[350] The Committee also requires making references to and having a proper understanding of the ICESCR in judicial decisions to have a direct and applicable effect.

Although the Constitution and the Covenant have the same basic principles of human rights protection, there are differences in the content of rights and the approach to reasons for restrictions. With these differences in mind, a more proactive and treaty-compliant approach should be taken by the judiciary if there are international human rights that cannot be fully covered by the human rights provisions of the Constitution. When several interpretations are admittable to the provision of the Constitution, choosing the one that is most persistent with the aim of the Covenant can be a good start. It is desirable to adopt judicial activism that is on par with the application of international law interpretations, even if there are some restrictions on judicial power from the legislative and administrative departments.

The ECHR has shown an active commitment to judge the violation of social and economic rights together with the non-discrimination principle. When there is a different treatment based on nationality in applying the social security system, regardless of the contribution requirements, the ECHR has been strictly examining its legality. The Court looks into whether the provision of domestic law meets the aims of the Convention for the Protection of Human Rights and Fundamental Freedoms and whether the means and aims have proportionality. The Court asks for the States authority to explain the rationality and proportionality of setting different requirements

[350] UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations: Japan*, 24 September 2001, E/C.12/1/Add.67. Available at: https://www.refworld.org/docid/3cc800a52.html [accessed 20 March 2022]; UN Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the 3rd periodic report of Japan, adopted by the Committee at its 50th session, 29 April-17 May 2013: Committee on Economic, Social and Cultural Rights*, 10 June 2013, E/C.12/JPN/CO/3. Available at: https://www.refworld.org/docid/52d54b6f4.html [accessed 20 March 2022]

for persons in similar situations, which means the reversed onus of proof. When the proportionality cannot be found, the Court judges the violation of Article 14 of the Convention together with Article 8 of the Convention or Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Although the judgements by the ECHR cannot be directly applied to Japanese courts, the European Convention shares the same visions with the ICESCR. Thus, its interpretation by the ECHR is worthy of being considered.

By contrast to the ECHR, which set great value on granting social and economic rights without discrimination, the Japanese courts have overlooked the significance of the ICESCR by stating that it merely requires progressive realization, stipulates the same content as that in the Constitution of Japan, and does not grant individual rights. As long as ratifying the ICESCR, which recognizes the right to social security of "everyone," the framework presented in the McLean case – the right to social security of aliens is granted only in a particular case – should be reexamined. On the basis of admitting the right of "everyone," whether the State has neglected its minimum obligations should be carefully examined when rights are not realized, taking into account the interpretation shown by the CESCR, the Limburg Principles, and the Maastricht Guidelines. Even if Article 9 itself does not grant the right to individuals, its justiciability should be affirmed, especially when there is discrimination. The freedom from discrimination in enjoying all ESC rights gives rise to obligations of immediate effect. When the right has to be restricted only to specific persons, the courts should examine whether the reason is legitimate and whether the method is rational and has proportionality with the purpose by referring to the judgement framework used in the ECHR. Only after conducting such an examination, the judiciary can be admitted as having fulfilled its obligation as a state authority.

Needless to say, the legislature's discretion regarding the economic and social policy should be acknowledged, but as long as the ICESCR is ratified, the judiciary should always examine whether the purpose of the Covenant is realized within the State. Instead of clinging to the theory on the nature of the right that was established before the ratification of the ICESCR, the interpretation of the Constitution should be reviewed in line with the purpose of the ratified Covenant. It is already problematic if the ICESCR is not mentioned in the judgement; however, even if it is mentioned, there is no point in ratifying it if it is mentioned in a way that would endorse the traditional interpretation of the Constitution. The Covenant, at the very least, should be referred to in a way that chooses an interpretation of the Constitution that is most compatible with its aim. It is worthwhile that the lower courts are gradually mentioning the ICESCR and trying to challenge the framework of the McLean case. The Supreme Court is also expected to take a more favorable position.

Actively responding to obligations under international law also aligns with fulfilling the obligation imposed on the judiciary by Article 98.2 of the Constitution of Japan. Therefore, if

there is a legal solution suggested by international human rights law, for example, in the form of a precedent for interpreting the treaty, a view based on the individual communication procedure, and "General Comments" on each article of the ratified human rights treaty, judges are expected to play a role of mediating the demands of the Covenant and the demands of the Constitution and the domestic legal system. Only by doing so, the judiciary can be acknowledged as having fulfilled its duty under the Constitution of Japan and the ICESCR.

One of the remaining issues this thesis could not cover is the compatibility with the ILO Conventions. The right to social security is also prescribed in the ILO Conventions, and the compatibility with the Conventions should be examined. In addition, this thesis mentioned some standards and guidelines that had been developed to examine whether the States Parties had mobilized the maximum of their available resources but did not have enough space to argue how to take advantage of them. The effective monitoring system that utilizes the progressive realization standard requires an enormous amount of good quality data and statistical sophistication, but there must be few States Parties that have either requisite data or the willingness to share such detailed data with a UN supervisory body or with NGOs. How to make the most of these standards not only in Japan but in States Parties is also an issue to be considered.

The most fundamental issue regarding the implementation of the ICESCR is whether the progressive realization is always possible; in other words, whether it is realistic to consider retrogression should never happen. In addition, how to examine whether the States Parties have mobilized maximum of available resources to realize the stipulated rights is an issue to be considered. Although the obligation to ensure some of the ESC rights – so-called minimum rights – should never be derogated due to their essentiality for making a living, it is difficult to delineate a boundary between what is "minimum" and what is beyond "minimum." The Committee has established some conceptual indicators and methods to evaluate it, but it is unclear how to put it into calculable indicators and who is responsible for conducting such an assessment. These are the vital issues that the ICESCR connotes and we have to deal with.

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