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INTERNATIONAL HUMAN RIGHTS LAW IN JAPAN: THE VIEW AT THIRTY

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Japan has incorporated international human rights law in various ways over the past thirty years. By ratifying the International Covenant on Social, Economic and Cultural Rights ("ICESCR") and International Covenant on Civil and Political Rights ("ICCPR") in 1978,[1] Japan signaled a new openness to international law, and rapidly internalized a range of global norms. In the early 1980s, the legislature (Diet) actively engaged in this process, revising existing laws and passing new ones to implement international legal obligations. In the 1990s, judges began to apply international treaties directly in areas like criminal procedure and minority rights. At the same time, the Diet withdrew from its role as interpreter, arbiter and codifier of international law, either unable or unwilling to pass new laws to fulfill Japan's international legal obligations. In the new millennium, more conversant with international norms and protections, courts increasingly apply international law in human rights litigation. The Diet debates, but does not legislate, leaving the essential task of disseminating contemporary international human rights norms to judges.

The role reversal is subtle, but distinct. In the early 1980s, the Diet opened Japan's pension scheme and extended various protections to women to fulfill its obligations under international law. At that time, courts were relatively unresponsive to international legal claims in domestic litigation. They either denied the direct effect of international human rights law or ignored claims altogether. Fast forward to the 2000s, however, and the mirror image emerges. In the past decade, courts have directly applied the ICCPR, and the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"),[2] to hold acts of racial discrimination illegal, even though no domestic law specifically proscribes such conduct.

The genealogy of these judgments can be traced back to a handful of cases decided in the 1990s, when courts first directly applied the ICCPR over existing statutory law. Courts did not, all of a sudden, uniformly accept the idea that international treaties had direct effect in Japan. Instead judges gradually warmed to claims brought under international law, preceding today's judicial deployment in important ways. Judges claimed that they were using international law merely as an "interpretive standard" by which to define legal norms such as the right to equality or the right to

[1] *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force for Japan on Sept. 21, 1979) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force for Japan on Sept. 21, 1979) [hereinafter ICESCR]. For information on Japan's ratification of international human rights law, *see* U. Minn. Hum. Rts. Libr. Ratification of Human Rights Treaties—Japan, http://www1.umn.edu/humanrts/research/ratification-japan.html (last visited Mar. 2, 2010).

[2] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force for Japan on Jan. 14 1996) [hereinafter CERD].

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a fair trial. But this interpretive method, or indirect effect, turns out to be the major conduit through which the normative power of international human rights conventions is channeled. Courts currently invoke the remedial provisions of treaties as "interpretive standards," applying which whey can order damage awards, apologies, or other remedies for victims of international law violations.

The other political branches are aware of this *de facto* delegation to the judiciary. In the mid-1990s, the Diet debated revisions of the Civil Code that would have "legitimated" children born out of wedlock; this would have fulfilled Japan's international legal obligations under the ICCPR and Convention on the Rights of the Child. Likewise, in 2003 and 2005, the Diet discussed a human rights protection bill that would have buttressed various forms of protection against racial discrimination. Neither debate yielded legislation. With the occasional exception, the Diet has largely ceded the importation of international human rights norms to the judiciary.

The Cabinet, for its part, has played a muted role. Despite occasionally calling the Diet to action, the Cabinet largely acquiesces to the Diet's inertia, justifying and reinforcing the lack of legislation. Explicitly or implicitly, the political branches have essentially entrusted judges with importing international law into Japan.

This Article examines Japan's reorientation towards international human rights law over the past three decades. How does Japan adhere to the structures, obligations and norms prescribed by these treaties? By highlighting the important legislation and revisions of the 1980s, and the lawsuits of the 1990s and 2000s, the effect can be charted. In the early 1980s, the Diet actively revised Japanese laws to promote gender equality, for example. This period corresponded with a rather dim view of international law taken by the judiciary, which either openly or implicitly denied these treaties had direct effect. Over the course of the 1990s, both perspectives shifted. The Diet receded from prominence, passing no new legislation to incorporate international legal obligations, and only occasionally revising existing laws. Simultaneously courts turned to international law, initially the ICCPR, for new standards by which to judge domestic legal principles and practices. These instruments drew focus on those areas where Japan diverged from internationally accepted standards, and provided remedies where violations had occurred. Nowadays, judges play the pivotal role in fusing the spheres of international and domestic law, while the other branches have consigned themselves to silence.

Section I provides background on the status of international law in Japan. Section II examines the early period of Japan's reception, when the Diet played a more active role in promoting international human rights,

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and the courts a lesser one. Section III provides case studies of judicial enforcement (or non-enforcement) of three international human rights treaties: the ICESCR, ICCPR and CERD. This trio permits exposition of the ongoing adoption of international law by Japanese courts. Section IV briefly concludes.

I. STATUS OF INTERNATIONAL LAW IN JAPAN

The Japanese Constitution states that treaties "shall be faithfully observed."[3] Conventional scholarship maintains that, so long as Japan ratifies and duly publishes the treaty, international law has "domestic legal force in Japan."[4] That may hold as a general proposition, but the actual manifestations of "domestic legal force" vary quite considerably across time and space.

First, various actors—government lawyers, officials, judges, plaintiffs, academics—diverge in their views of "legal force." Government lawyers tend to argue that international law does not have binding effect, while many plaintiffs have argued the contrary.[5] Academics argue that international law has binding effect, but judicial practice suggests otherwise.

Even within a single group of actors, consensus may not have formed. Judges, for example, are neither static nor homogeneous, but respond to a matrix of influences: training, exposure to international law, worldview, and facts of the case. Over the course of three decades, judges have changed their minds on whether the ICCPR has direct effect in Japan.[6]

It is perhaps most correct to say that the effect of international human rights law in Japanese courts is *contextual*, dependent on the existing state or absence of law, whether the law is constitutional or statutory, the precision of the treaty obligation at issue, the nature of the alleged violator (government or private person), and the type of conduct (action or omission).[7] To this list, one could add that an individual judge's favorable disposition to international human rights law also plays a role.[8]

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[3] KENPŌ, art. 98, para. 2.
[4] *See* YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS AND JAPANESE LAW 28–29 (1998).
[5] Saitō Yoshitaka, *Kokusai Jinken Kiyaku B Kiyaku no Wagakuni Saibansho ni okeru Tekiyō* [*Applications of the International Covenant on Civil and Political Rights by Japanese Courts*], *in* GENDAI KOKUSAI SHAKAI TO JINKEN NO SHOSŌ: MIYAZAKI SHIGEKI SENSEI KOKI KINEN [ASPECTS OF CONTEMPORARY INTERNATIONAL SOCIETY AND HUMAN RIGHTS: TO COMMEMORATE THE 70TH BIRTHDAY OF PROFESSOR MIYAZAKI SHIGEKI] 55, 66–75 (Sumiyoshi Yoshihito ed., 1996).
[6] *See infra* Section III(B).
[7] *See* IWASAWA, *supra* note 4, at 48–49.
[8] Judges can indicate their interest in international human rights norms by, among other methods, discussing their views of it. In the *Bortz* decision, *discussed infra* III(C)(1)(a), the judge wrote an extremely discursive history of the development of human rights. Bortz v. Suzuki, 1045 HANREI

Judges first look to see whether there is controlling domestic law. In the Japanese legal hierarchy, international treaty law ranks below the Constitution, but above statutes, administrative regulations, agency decisions, local ordinances and so on.[9] Upon deducing a constitutional correlate, judges generally defer to the level of protection offered by the Constitution. Alternatively, if there is a statute on point, courts first attempt to circumscribe the protective ambit of international law to that occupied by statutory law. But when judges are unable to square the statutory circle, they may use international law as a supplementary yardstick by which to evaluate conduct. International treaties like CERD and ICCPR provide basic standards for rights such as the right to equality, the right to counsel, and minority rights. When these are violated, moreover, the treaties require remedies for the victims. In short, treaties function most critically in the remedial phase of international human rights litigation.

Next, the language of the treaty is scrutinized. A clearly stated international provision that directly opposes a domestic law stands a chance of overturning it. But a more ambiguous obligation, or one phrased as a program of rights to be achieved over time, such as those set out in the ICESCR, is unlikely to overturn domestic law. In most cases, courts harmonize the treaty's language with domestic law, either by conflating the two, or by interpreting the treaty so as to avoid direct conflict with existing law.

Courts additionally consider whether government action is at stake. As a rule, courts are more likely to find against the government when state action is involved, less so when the government does *not* act. In the 1990s, judges first directly applied the ICCPR against state actors, such as prison officials, administrative agencies, and court clerks.[10] By contrast, if the case is over an omission by the government, such as the Diet's "failure to legislate," judges rarely find for plaintiff.

In lawsuits between private parties, courts once hesitated to apply international law. In the 1980s and 1990s, judges upheld the classical view of international law as a set of principles regulating state relations, but not private ones. Lately, however, judges have warmed to the idea that international law applies to private persons.[11] More recently, a string of racial

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TAIMUZU 216, 217 (Shizuoka D. Ct. Hamamatsu Branch, Oct. 12, 1999), *translated in* Timothy Webster, *Bortz v. Suzuki, Judgment of October 12, 1999, Hamamatsu Branch, Shizuoka District Court*, 16 PAC. RIM L. & POL'Y J. 631, 633 (2007).

[9] *Id.* at 2.

[10] *See infra* Section III(B).

[11] Pe v. Kitaura 1468 HANREI JIHŌ 122, 130 (Osaka D. Ct., June 18, 1993), *partially translated in* 37 JAPANESE ANN. INT'L L. 152 (1994). Judge Itō Masahiko wrote that the Constitution and ICCPR

discrimination lawsuits has challenged the old distinction between private and public. By applying international treaties to interpersonal relations, courts can help *remedy* violations otherwise unaccounted for in Japanese domestic legislation.

Finally, a judge's disposition towards international law may influence, or perhaps mirror, the ultimate adjudication. In their opinions, judges signal their openness to international law by citing, analyzing and interpreting its provisions. Sometimes they may discourse at length about the evolution of human rights. Or the opinion may include a detailed analysis of the treaty's *travaux préparatoires*, recent developments before the European Court of Human Rights, or pronouncements from United Nations bodies. At other times, they omit discussion of the treaty altogether. As a general rule, the longer the discussion of international law, the likelier a judge will adopt its provisions into the verdict.

Strategically speaking, plaintiffs rarely rely on international law to the exclusion of domestic law. At best, they append international law claims to corresponding constitutional rights, such as equality and access to courts.[12] By appealing to international human rights law, plaintiffs widen the ambit of the court's deliberation to the international plane. Newly emergent global standards can mingle, and at times meaningfully influence, Japanese constitutional law.

To be sure, such interactions are rare; courts far more frequently resort to existing constitutional parameters to restrict the effect of international law. Throughout the 1980s and 1990s, for instance, judges have on a number of occasions held that the mandatory and repeated fingerprinting of resident aliens, including permanent residents, was constitutional.[13] After considerable international pressure, the Diet revised the fingerprinting system in 1992, ultimately abolishing it in 2000.[14] But throughout the legal challenges of the 1980s and 1990s, courts never found the system unconstitutional.

When judges have reached out to apply international legal standards over domestic ones, they have done so in only a handful of areas: criminal procedure, right to counsel, and minority rights. This is a somewhat un-

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"are rules governing relations of individuals to the power of the state and do not apply directly to juridical relations between individuals." *Id.* at 153.

[12] *See* KENPŌ, art. 14 (equality under the law), art. 37 (public trial by an impartial tribunal in criminal cases).

[13] As early as 1982, the Tokyo District Court recognized that fingerprinting would be illegal if it served no rational purpose. But since it helped distinguish citizens from non-citizens, it was sufficiently rational to satisfy Article 14's right to equality. *See* IWASAWA, *supra* note 4, at 150–54.

[14] *See* Iwasawa Yūji, *Gaikokujin no Jinken o Meguru Aratana Tenkai* [*New Developments on the Human Rights of Foreigners*], 238 HŌGAKU KYŌSHITSU [LEGAL CLASSROOM] 14, 15 (2000).

expected blend, but highlights both the gaps where Japanese law diverges from international standards, and judicial attempts to fill them. These judicial interventions provide a check on abuses by prison guards and officials, and on aspects of the criminal justice system. By declaring an act illegal and then fashioning a remedy (usually an award of damages), judges import the normative pith of international human rights law into Japanese society.

II. INTERNATIONAL HUMAN RIGHTS LAW: THE EARLY YEARS

Japan ratified a number of international instruments in the late 1970s and early 1980s. Scholars attribute this reorientation toward international human rights law to the expansively intrusive gaze of international society. Economic sanctions and international boycotts on states such as Israel, Chile and South Africa meant that internal human rights conditions could have external consequences.[15] In the early 1980s, the international community seriously scrutinized Japan's treatment of its resident Korean population. In 1980, a group of resident Koreans complained to the United Nations Human Rights Commission ("HRC") using the confidential 1503 procedure, subjecting Japan to a process most often deployed against countries with troubled human rights records like Argentina, Burma and Cambodia. The symbolism was not lost on the Diet, which quickly proposed legislative amendments to satisfy the HRC.[16] The International Commission of Jurists, a leading non-governmental organization dedicated to promoting the rule of law, opined on the issue in two separate reports.[17]

In addition, Japan sought to play a role in international affairs commensurate with its economic might. To assert its global good citizenship, Japan needed to show it was attuned to the standards of international society. Accordingly, Japan assumed a host of new international legal obligations, signing the ICESCR and ICCPR in 1978, the Women's Convention in 1980, and the Refugee Convention in 1982.[18] Significantly

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[15] *See* Ebashi Takashi, *Nihon no Saibansho to Jinken Jōyaku* [*Japanese Courts and Human Rights Treaties*], 2 KOKUSAI JINKEN [HUM. RTS. INT'L] 18, 18 (1991).

[16] Saitō Yasuhiko, *Kokuren no 1503 Tetsuzuki ni tsuite: Zainichi Kankoku-Chōsenjin Mondai to Kokuren Jinken Iinkai* [*The UN's 1503 Procedure: Resident Korean Issues and the UN Human Rights Commission*], HŌRITSU JIHŌ 85, 86 (1981).

[17] *See Protection Against Discrimination in Japan*, 23 INT'L COMM'N JURISTS REV. 10 (1979); *Japan's Denationalisation of the Korean Minority*, 29 INT'L COMM'N JURISTS REV. 28 (1982). "[T]he Koreans in Japan were, and to a large extent still are, discriminated against in many spheres of life. Equality in jobs, housing or welfare is not assured." *Id.* at 33.

[18] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force for Japan on July 25, 1985) [hereinafter Women's Conven-

for the present discussion, Japan only ratified the Women's Convention in 1985, five years after signing. The intervening period gave the Diet ample opportunity to acclimatize to the obligations imposed by the Women's Convention.

Previously, after ratifying the ICESCR and ICCPR, the Diet did not revise existing legislation or pass new laws.[19] It certainly could have, elaborating protections for women, minorities or other disadvantaged groups as mandated by Article 26 of the ICCPR, and Articles 2(2) and 3 of the ICESCR.[20] Instead, the Diet tackled certain elements of ethnic discrimination upon acceding to the Refugee Convention. Similarly, after ratifying the Women's Convention, the Diet put in motion checks on gender discrimination in the workplace.[21] In the early 1980s, the Diet actively infused international legal obligations into Japan's domestic legal framework.

After signing the Women's Convention in 1980, the Diet revised two laws and one regulation to comply with obligations under the Convention.[22] First, the Diet amended the Nationality Act to end the longstanding practice of *jus sanguinis a patre*; Article 9(2) of the Women's Convention requires States Parties to "grant women equal rights with men with respect to the nationality of their children."[23] Previously, only Japanese fathers could pass their citizenship on to their children. But after the revisions, Japanese mothers and fathers alike could confer nationality on their children.[24]

Second, the Diet expanded workplace protections for women by passing the Equal Employment Opportunity Law ("EEOL").[25] The Women's

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tion]; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (entered into force for Japan on Jan. 1, 1982) [hereinafter Refugee Convention].

[19] *See* Kimio Yakushiji, *Domestic Implementation of Human Rights Conventions and Judicial Remedies in Japan*, 46 JAPANESE ANN. INT'L L. 1, 2 (2003) (noting that the Diet took no legislative measures when ratifying the ICCPR, ICESCR, CERD, Convention on the Rights of the Child and the Convention Against Torture).

[20] ICCPR, *supra* note 1, art. 26 (guaranteeing equality before the law); ICESCR *supra* note 1, art. 2(2) (guaranteeing equality before the law), art. 3 (guaranteeing equality of men and women).

[21] COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 844–45 (Kenneth L. Port & Gerald Paul McAlinn eds., 2003).

[22] Sayoko Kodera, Note, *Implementation of the Convention on the Elimination of All Forms of Discrimination against Women within Japan*, 39 JAPANESE ANN. INT'L L. 149, 157 (1996). The ordinance was changed to make boys, as well as girls, study home economics in grade school. *Id.* at 158.

[23] Women's Convention, *supra* note 18, art. 9(2).

[24] Kiyomi Nakashima, *Japanese Implementation of International Gender Equality Law: Monitoring via the Convention on the Elimination of All Forms of Discrimination against Women*, *in* GENDER & LAW IN JAPAN 31, 37 (Miyoko Tsujimura & Emi Yano eds., 2007).

[25] Kodera*, supra* note 22, at 157. Scholars have long criticized the inefficacy of the EEOL, which only exhorted, but did not obligate, employers to practice equality in hiring, promotion, and so on. *See id.* at 159.

Convention requires a wide array of safeguards in various stages of employment: hiring, promotion, benefits, training, dismissal, and so on.[26] Building on the principle of equal pay for equal work enshrined in Japan's Labor Standards Law, the EEOL banned discrimination in recruitment, hiring, promotion, training, retirement and dismissal.[27] Through revisions in 1997 and 2006, the Diet has continued to ratchet up pressure on Japanese companies to treat women better. These revisions suggest a commitment to women's rights, at least in the workplace, one of the few areas of international law where the Diet has repeatedly legislated.

Likewise, after acceding to the Refugee Convention, the Diet revised the pension scheme.[28] Article 24(1)(b) of the Refugee Convention requires that states extend the same "social security" benefits to refugees as it does to their own nationals. At that time, Japan did not provide social security benefits to resident Koreans and Chinese, who already had a much closer relationship to Japan than any refugee could. Recognizing the irony, the Diet amended the National Pension Law in 1982. The revised law protected all "persons aged 20-59 having residence in Japan," instead of only those "Japanese nationals aged 20-59."[29] Denationalizing social welfare benefited hundreds of thousands of resident Korean and Chinese residents. Unfortunately it also excluded people born before and after the prescribed times, which has resulted in legal challenges into the present.[30]

Apart from contemporaneous revisions, the Diet has also amended its laws after extensive discussions with UN bodies, such as the Human Rights Commission (monitoring ICCPR compliance) and the Women's Commission (monitoring CEDAW compliance). In 1987, for instance, the Mental Hygiene Law was amended as the Mental Health Act (the present Act on mental health and welfare for the mentally disabled) to grant more autonomy to persons deemed fit for institutionalization.[31] Likewise, as noted above, in 1997 and 2006, the Diet revised the EEOL to strengthen prohibitions on gender discrimination in the workplace.

The Diet played an important domesticating function in the 1980s. After ratifying a spate of international human rights treaties, the Diet al-

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[26] Women's Convention, *supra* note 18, art. 11.
[27] Vera Mackie, *Gendered Discourses of Rights in Postwar Japan*, *in* EMERGING CONCEPTS OF RIGHTS IN JAPANESE LAW 49, 61 (Harry N. Scheiber & Laurent Mayali eds., 2007).
[28] Hiroshi Shigeta, *Accession of Japan to the Convention and Protocol Relating to the Status of Refugees: Its Impact on Japan*, 26 JAPANESE ANN. INT'L L. 37, 50 (1983).
[29] *Id*.
[30] *See Top Court Rejects Appeal by Koreans Seeking Disability Benefits*, JAPAN ECON. NEWSWIRE NEWS, Dec. 25, 2007.
[31] *See* Miyazaki Shigeki, *Jinken Kiyaku no Igi to Yakuwari—Hijun kara Jūgonen Nani ga Kawatta ka* [*The Meaning and Role of Human Rights Treaties—Fifteen Years after Ratification, What Has Changed?*], 304 HŌ TO MINSHUSHUGI [LAW & DEMOCRACY] 3, 5 (1995).

tered the nationality requirements of the pension scheme, and introduced prohibitions on gender discrimination law in the workplace. The impact of these amendments is, of course, debatable. But one cannot deny that the Diet recognized the need to alter the underlying domestic legal order. Since this initial period, however, the Diet has withdrawn from prominence. It has sporadically revised laws to maintain the international obligations assumed in this early period, but it has not introduced any new legislation to implement treaties ratified in the 1990s or 2000s, such as CERD and the Children's Convention. As the next section shows, the courts now increasingly step in to fill this legislative void.

III. THREE CASE STUDIES: ICESCR, ICCPR, CERD

Japanese courts have warmed to international law over the past thirty years, especially in the last decade. This evolution is evident from the change in attitudes towards international human rights treaties, such as the ICESCR, ICCPR and CERD. Since the early 1980s, courts have uniformly maintained that the ICESCR does not have direct effect in Japan. Because the treaty specifies that its provisions shall be achieved progressively, courts have routinely refused to apply it over contravening domestic laws. But they have come to different conclusions about the ICCPR. Early judgments denied its direct effect, as evident in challenges to Japan's fingerprinting system, the pension rights of resident Koreans, and the prohibition on taking notes during court proceedings.[32] But judges changed their minds in the 1990s, applying the treaty directly in cases involving criminal procedure and minority rights. The latter field has been buttressed by Japan's ratification of CERD in 1995. Judges now directly apply provisions of the ICCPR and CERD to create remedies to victims of *private* acts of racial discrimination.

Whereas the Diet played a relatively active role in domesticating international law in the 1980s, courts played a far less prominent role. Japanese scholars attributed this early period of judicial inactivity to various causes, such as excessive deference to the Diet, or "legislative discre-

[32] *See* Imai Tadashi, *Kokusai Jinken Hō no Kokunai Saibansho ni okeru Tekiyō no Genjō to Kadai* [*The Present Status and Issues of Applying International Human Rights Law in Domestic Courts*], 304 HŌ TO MINSHUSHUGI [LAW & DEMOCRACY] 6, 7 (1995); Han 1208 HANREI JIHŌ 66 (Tokyo H. Ct., Aug. 25 1986), *partially translated in* 7 WASEDA BULL. COMP. L. 122, 123 (1986) ("The fingerprinting system, therefore, is not repugnant to Article 13 of the Constitution or Article 7 of the International Covenant on Civil and Political Rights."); Yan v. Principal Examiner of Osaka Immigration Bureau, 37 GYŌSAI REISHŪ 1444, 1448 (Osaka H. Ct., Dec. 23, 1986) ("one cannot say that the ICCPR directly controls the effect of administrative measures issued under the laws that regulate immigration in Japan.").

tion."[33] Writing in a private capacity, former Supreme Court Justice Itō Masami expected the ratification of the ICESCR and ICCPR would be a "big shock to the Japanese legal system."[34] Instead he found lower courts' judgments to be "immature" in deploying these treaties, while the Supreme Court neither addressed international legal claims nor extended legal protections beyond those outlined by the Constitution.[35] Since that time, however, judges have shown greater willingness to adopt the norms and obligations of international human rights law.

A. International Covenant on Economic and Social Rights (ICESCR)

Courts have repeatedly determined that the ICESCR does not have direct effect. This in part reflects the nature of the treaty itself, which was framed as a program of rights to be implemented incrementally.[36] Japanese courts have concluded that this programmatic or progressive quality negates the self-executing nature of the Covenant. Instead, courts treat the rights and obligations contained in the ICESCR as "political responsibilities," i.e. policy choices that are left to the ultimate discretion of the Diet, not "legal responsibilities" that courts must construe or enforce.

The ICESCR remains a potentially rich source of social and economic rights that Japanese judges have, by and large, not tapped. One frequently litigated issue involves the pension rights of non-citizens.[37] Since the late 1970s, resident Korean plaintiffs have based challenges to the nationality restriction of Japan's pension system on the ICESCR. The ICESCR provides, in pertinent part, "States Parties to the present Covenant recognize the right of everyone to social security, including social insurance."[38] Japanese courts have rarely interpreted the word "everyone" to extend

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[33] *See* Ebashi, *supra* note 15, at 20. Professor Ebashi criticized Japanese courts for holding the fingerprinting system "100% constitutional" in a number of legal challenges in the 1980s.

[34] *See* Itō Masami, *Kokusai Jinken Hō to Saibansho* [*International Human Rights Law and Courts*] 1 KOKUSAI JINKEN [HUM. RTS. INT'L] 7, 9 (1990).

[35] *Id.* at 10. The author specifically pointed to a "need to theoretically debate the idea that the protections of the ICCPR exceed those of the Japanese Constitution, since these international guarantees developed in the two decades after the 1946 promulgation of the Japanese Constitution." *See id*. at 11.

[36] *See* ICESCR, *supra* note 1, art. 2(1). "Each state Party . . . undertakes to *take steps* . . . to the *maximum* of its *available* resources, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant" (emphasis added).

[37] Pensions have, of course, been a thorny issue even among Japanese citizens. In October 2008, the Supreme Court upheld an agency decision to deny disability pensions to two schizophrenic men. The National Pension Law provides a basic pension for those who receive medical treatment before turning 20. Since the two were not diagnosed with the disease until ages 20 and 21, they did not qualify. *See Japan's Supreme Court upholds age-based criteria for disability pensions*, YOMIURI SHIMBUN, Oct. 12, 2008. *See Supreme Court rejects disability pension appeals*, DAILY YOMIURI, Oct. 12, 2008, at 4.

[38] ICESCR, *supra* note 1, art. 9.

pension rights to non-citizens, even permanent residents who have duly paid into the pension scheme.[39] The Tokyo District Court held that Article 9 of the ICESCR "only obligates the States Parties to actively promote the social security policy. One cannot take it that concrete rights are accorded to aliens thereby."[40] This construction has held sway ever since, and won approval from the Supreme Court in 1989, which found that this Article "does not immediately grant concrete rights to an individual."[41]

For over thirty years Japan has been a state party to the ICESCR, which itself dates from 1966. The question arises: Is there a deadline for the fulfillment of these provisions? If Japan, with its material wealth and healthy respect for international law, cannot achieve the rights enshrined in the ICESCR, which country can? The programmatic language of international treaties provides an escape valve for judges who do not wish to, or cannot, comply with the treaty, though it does at least force them to consider the discrepancy between domestic practice and international law. As late as 2004, a Japanese judge cited the treaty's exceptions for "developing countries" in order to deny granting social security benefits to resident Koreans.[42]

B. The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR has gone from rhetorical ballast to occasional buttress of civil and procedural rights. In the 1980s and early 1990s, courts tended to deny that it had direct effect, either not addressing claims based on its provisions, or conflating them with existing constitutional rights. But a shift can be discerned in 1993, when a court first declared that the ICCPR had direct effect. To this day, it remains an occasional check on Japan's criminal procedure and treatment of minorities.

Professor Saitō Yoshitaka has identified six methods by which Japanese courts handle ICCPR claims.[43] This paper focuses on the small subset of cases (following number six), where courts clearly acknowledged that the treaty was self-executing.[44] But Professor Saitō theorized that

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[39] Kim v. Chief of Social Insurance Agency. 1055 HANREI JIHŌ 7 (Tokyo D. Ct. Sept. 22, 1982).
[40] *Id.* at 18.
[41] Shiomi v. Governor of Osaka, 35 SHŌMU GEPPŌ 1754, 1761 (Sup. Ct., Mar. 2, 1989).
[42] Seven Korean Nationals v. Japan (Osaka H. Ct., Oct. 27, 2005), *partially translated in* 49 JAPANESE ANN. INT'L L. 155, 156 (2006).
[43] *See* Saitō, *supra* note 5, at 75–80.
[44] Self-executing treaties do not require state action to be applied; rather, once ratified, they apply directly to the legal relations, rights and obligations of citizens. By contrast, non-self-executing treaties require legislative measures in order to create legal relations. *See* TAKANO YŪICHI, KENPŌ TO JŌYAKU [THE CONSTITUTION AND TREATIES] 98–99 (1960). But this terminology often distracts from the essential questions of *how* the court interpreted international law, *what* violation it found, and *whether* it ordered a remedy. I thus speak of "directly applying" treaty provisions.

courts also (1) ruled based on the corresponding constitutional or statutory law, without referencing plaintiff's citation to the ICCPR; (2) made substantive rulings of *no* ICCPR violation, but without directly addressing the issue of whether the ICCPR has direct effect; (3) made substantive rulings based on the language of ICCPR provisions, again without addressing whether the ICCPR has direct effect; (4) bracketed the issue of direct effect and ruled on the substance of the treaty; (5) clearly ruled that the ICCPR is—like the ICESCR—not self-executing; and (6) acknowledged that the ICCPR is self-executing and ruled accordingly.

One should not, however, confuse direct effect with actual application of the ICCPR. Courts routinely claim that the ICCPR "possesses self-executing and immediately executable character,"[45] yet do not necessarily apply its provisions over contravening domestic law. When resident Koreans challenged Japan's fingerprinting system, courts repeatedly held that fingerprinting resident aliens born and raised in Japan did not constitute degrading treatment.[46] In many cases, then, the ICCPR has not significantly affected, or effected, human rights in Japan.

There are exceptions, however. The ICCPR's major impact is most apparent in the area of criminal procedure, and somewhat less so in minority rights. When the treaty's text is unmistakably clear, indeed *insusceptible* to interpretation, courts may directly apply it against countervailing domestic law. Since 1993, courts have repeatedly determined that Japan's Criminal Procedure Law, Prison Law and related regulations run afoul of the international standards set forth in the ICCPR.

In the second area, minority rights, the ICCPR has exerted less influence. Nevertheless these cases opened the door to judicial discussion of minority rights, an area that has gained momentum since the ratification of CERD. We first examine the ways that the ICCPR has disciplined Japan's criminal procedure laws and practices.

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[45] *See*, *e.g.*, Seven Koreans v. Japan (Osaka H. Ct., Oct. 27, 2005), *partially translated in* 49 JAPANESE ANN. INT'L L. 155, 157; *aff'd* (Sup. Ct., Dec. 25, 2007). The Osaka High Court held that social rights, such as disability rights, are not determined by the ICCPR, but rather by the ICESCR. As the ICESCR is non-self-executing, the right to "social insurance" guaranteed in Article 9 did not reach the disabled plaintiffs.

[46] *See* Saitō, *supra* note 5, at 77 (describing decision by Tokyo High Court where fingerprinting system was not considered degrading treatment according to Article 7 of the ICCPR). *See generally* Chon v. Minister of Justice 41 GYŌSAI REISHŪ 404 (Tokyo D. Ct., Mar. 13, 1990).

1. Criminal Procedure and the Right to Counsel

a. 1993 Tokyo High Court

In 1993, the Tokyo High Court ruled that the ICCPR "has self-executing effect," and for the first time overruled a conflicting measure of domestic law. A Nigerian defendant required the services of an interpreter during his criminal trial. After convicting the defendant, the trial court—pursuant to domestic law—charged the convicted defendant court costs, which included interpretation fees.[47] This assessment went directly against the ICCPR, which guarantees "the free assistance of an interpreter."[48] The contradiction was evident, but the result far from conclusive. Indeed, the trial court deferred to domestic statutory law,[49] as most courts had done up to that point.

On appeal, the Tokyo High Court reversed. It charted new territory, giving effect to the ICCPR's guarantee of free interpretation services. The court realized that "the right to assistance of an interpreter . . . had not previously been known in Japanese law."[50] This is a rare case where a court directly applies an ICCPR provision over and above contravening domestic law. Though an outlier, the decision expanded Japanese courts' horizon of legal standards from the domestic to the international plane. To be sure, not all Japanese courts have heeded the Tokyo High Court's invitation to provide free interpretation to criminal defendants.[51] But courts increasingly rely on the ICCPR as a prism through which to view Japan's criminal procedure.

b. 1996 Tokushima District Court/1997 Takamatsu High Court

The second case also took place against the backdrop of a criminal trial. Three lawyers were representing a prisoner who had been beaten by prison guards. In preparing their client's civil claim against the prison, the lawyers tried to interview him. The director of the prison, however, impeded their access in several ways. Plaintiffs charged that he (a) limited

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[47] IWASAWA, *supra* note 4, at 52.
[48] ICCPR, *supra* note 1, art. 14(f).
[49] *See generally* Naganuma Noriyoshi, *Tsūyakuryō to Soshō Hiyō* [Interpretation Fees and Courts Costs], 1043 JURISUTO 31, 31 (1994) (explaining that Article 181 of the Criminal Procedure Law allows sentencing courts to impose court fees, in whole or part, on convicted defendants).
[50] GAIKOKUJIN HANZAI SAIBAN REISHŪ [JUDICIAL CASES OF CRIMES BY FOREIGNERS] 55 (Tokyo H. Ct., Feb. 3, 1993).
[51] *See*, *e.g.*, 867 HANREI TAIMUZU 298 (Urawa D. Ct., Sept. 1, 1994) (charging a convicted defendant for interpreter's fees). The Urawa court falls under the jurisdiction of the Tokyo High Court, but there is no *stare decisis* in Japan.

their interviews to 30 minutes; (b) rejected requests for access to their client; (c) interrupted client meetings; and (d) required the presence of prison staff during their conversations.[52]

The Tokushima District Court determined that the first of these acts was illegal, as being either beyond the director's "discretionary power or . . . an abuse of it."[53] The court awarded the prisoner and three lawyers 50,000 yen per meeting in damages for emotional distress subject to the time restrictions.[54] The client received an additional 100,000 yen in emotional distress damages for the violation of his right to counsel.[55] On appeal, the Takamatsu High Court lowered the damages awards, but held, "it is appropriate to interpret [the ICCPR] as guaranteeing the right of a convict to communicate with and consult counsel in his or her legal suit, as well as equality of means between the parties."[56]

Importantly for present purposes, both courts probed the issue of international law in some depth. The trial court recognized that Japan's compliance with international treaties was not uniform, but rather reflected the language and level of obligation set out in the treaty. If a treaty merely articulates "abstract and general principles or political obligations," it would require "specific legislative measures" to be applied as domestic law.[57] But the ICCPR was no such "declaration of abstract and general principles." Since Article 14(3)(b) specifically guarantees "adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing," Judge Hōnoki Toshihiko determined that the prison had violated the ICCPR.[58]

The appeals court took an unusually catholic approach to interpreting international law, referencing the European Convention on Human Rights ("European Convention"), decisions by the European Court of Human Rights ("ECHR"), and a resolution of the United Nations General Assembly.[59] The court noted that the European Convention can "serve as a

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[52] 1597 HANREI JIHŌ 115 (Tokushima D. Ct., Mar. 15, 1996), *partially translated in* 40 JAPANESE ANN. INT'L L. 118 (1997), 17 WASEDA BULL. COMP. L. 114 (1997) (the three lawyers and the prisoner sued for violations of his right to counsel, and their right to represent clients).
[53] *Id.* at 126, *translated in* 40 JAPANESE ANN. INT'L L. 118 at 123 (1997).
[54] *Id.* at 129, *translated in* 40 JAPANESE ANN. INT'L L. 118, at 123 (1997).
[55] The client received 500,000 yen (eight visits plus 100,000 yen), while each lawyer received a lesser amount: 350,000 yen (seven visits); 200,000 yen (four visits); 100,000 yen (two visits). *See* Four Individuals, 1597 HANREI JIHŌ 115, 119.
[56] 1653 HANREI JIHŌ 117 (Takamatsu H. Ct., Nov. 25, 1997), *partially translated in* 41 JAPANESE ANN. INT'L L. 87, 90 (1998).
[57] 1597 HANREI JIHŌ 115, 123 (Tokushima D. Ct., Mar. 15, 1996), *translated in* 40 JAPANESE ANN. INT'L L. 118, 120 (1997).
[58] *Id.* at 124–26, *translated in* 40 JAPANESE ANN. INT'L L. 118, 122–23 (1997).
[59] 1653 HANREI JIHŌ 117, 120–21 (Takamatsu H. Ct., Nov. 25, 1997), *translated in* 41 JAPANESE ANN. INT'L L. 87, 90 (1998).

guide in the interpretation of Article 14(1) of [the ICCPR]."[60] The use of a foreign convention as an "interpretative guide" provided the court with an alternate set of practices by which to compare and evaluate Japanese law, and presaged the use of international law as an "interpretive standard" as more fully explained below in Section III.C.

Reference to the European Convention was critical in expanding the scope of the ICCPR. Like Article 14 of the ICCPR, Article 6 of the European Convention ensures the right to counsel to a criminal defendant. But the European Convention extends this right to cases involving either "the determination of [one's] civil rights and obligations or of any criminal charge against [one]."[61] The ECHR has interpreted this provision to safeguard the right to counsel to prisoners filing civil litigation for prison abuses.[62] The Takamatsu High Court availed itself of this European interpretation to buttress the due process rights of criminal defendants.

The cosmopolitanism of these judgments was a rare jaunt by the Japanese judiciary through comparative and international jurisprudence. The ICCPR merely guarantees a defendant's right to prepare an adequate defense to *criminal* charges, but says nothing about preparing a civil lawsuit for compensation while in prison. Nevertheless, by reading international law through a comparative lens, these judgments infused global developments into Japanese case law. Critically, and unlike the above case involving the "free" assistance of an interpreter, the ICCPR was *not* unambiguous on this point. This is a rare case where Japanese courts have actively interpreted international standards to heighten protections offered by Japanese law.

c. 2004 Osaka District Court

A more recent case supports the thesis that the ICCPR's deepest impact has been in the areas of criminal procedure. Defense lawyer Gotō Sadato wanted to show his client, a convicted criminal then housed in an Osaka detention facility, a videotape used in evidence during his trial. The detention authorities demanded to inspect the tape, but Gotō refused, claiming it would interfere with his client's right to counsel and confidentiality. The detention facility then denied Gotō's request to show his client the video. He later sued the detention facility for interfering with his right to prepare a defense on behalf of the detainee. The Osaka District Court

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[60] *Id.* at 121, *translated in* 41 JAPANESE ANN. INT'L L. 87, 90 (1998). The ICCPR provides "All persons shall be equal before the courts and tribunals." *See* ICCPR, *supra* note 1, art. 14(1).

[61] *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221.

[62] *See* Golder v. United Kingdom, 18 Eur. Ct. H.R. (Ser. A) 1 Eur. H.R. Rep. 524 (1975).

agreed by awarding him 1.1 million yen (roughly US$10,000) in damages.[63]

The court reaffirmed that the ICCPR has "self-executing power as domestic law."[64] Referencing several UN documents that explain the right to counsel, the court explained that such documents "should be taken into consideration to a certain extent as analogues to 'supplementary means of interpretation'" under the Vienna Convention.[65] The court acknowledged that these documents were not legally binding, but should nonetheless "be taken into consideration in interpreting the Covenant."[66]

2. Minority Rights

The second important area in which the ICCPR has affected Japanese human rights jurisprudence involves minority rights. These cases have had a more muted impact than the cases discussed above, in which courts found that Japanese laws and practices were illegal and ordered remedies accordingly. The minority rights cases lack the clear-cut causality that characterizes the criminal procedure cases, but are useful in showing the judiciary's evolving receptivity towards international human rights norms. They also helped initiate the discussion of how Japan should treat minorities, an extraordinarily complex issue that stretches back into Japan's colonial period.

a. 1993 Osaka District Court

The relationship between the ICCPR and minority rights first surfaced in this critical decision, where a resident Korean had agreed to rent an apartment from a real estate agency. But when the real estate agent told the co-owners of the property that the interested tenant was a resident Korean, the co-owners balked. They would not rent to a resident Korean. The resident Korean then sued the real estate agent, the property owners, and the city of Osaka for violations of the Constitution, the ICCPR and ICESCR.[67]

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[63] Gotō v. Japan, 1858 HANREI JIHŌ 79 (Osaka D. Ct., Mar. 9, 2004), *partially translated in* 48 JAPANESE ANN. INT'L L. 164 (2005).
[64] *Id.* at 87, *translated in* 48 JAPANESE ANN. INT'L L. 164, 165 (2005).
[65] *Id.*, *translated in* 48 JAPANESE ANN. INT'L L. 164, 166 (2005). The Vienna Convention provides both general rules and supplementary means to interpret international treaties. Vienna Convention on the Law of Treaties arts. 31, 32, May 23, 1969, 1155 U.N.T.S. 331.
[66] Gotō, 1858 HANREI JIHŌ at 87–88 (Osaka D. Ct., Mar. 9, 2004), *translated in* 48 JAPANESE ANN. INT'L L. 164, 166.
[67] Pe v. Kitaura, 1468 HANREI JIHŌ 122 (Osaka D. Ct., June 18, 1993), *partially translated in* 37 JAPANESE ANN. INT'L L. 152 (1994).

The court found against the property owners, but not the city of Osaka. Specifically, the defendants' refusal to rent property to a resident Korean violated the principle of good faith (*shingisoku*) that governs the formation of contractual relationships. Accordingly, the court found that the defendant property owners were jointly and severally liable to plaintiff in the amount of 267,000 yen (approximately US$2500). But the prefecture was not liable, because the Constitution, ICESCR and ICCPR "do not impose a duty to act on governments with regard to each individual. Therefore, the Constitution and the International Covenants do not provide a legal basis for the exercise of supervisory power [over] Osaka."[68] In other words, a person could not require a municipality to pass a law simply by suing it with a reference to the applicable international treaty.

Judge Itō Masahiko further determined that the ICCPR and ICESCR did not have direct effect against private individuals because their provisions "govern[] the relations of individuals to the power of the state and do not apply directly to juridical relations between individuals."[69] So even while the court explicitly *stated* that international law did not apply between private individuals, the anti-discrimination provisions of the ICCPR and ICESCR were used to interpret domestic law. Japanese critics call this "indirect effect," that is, deploying international law as an interpretive prism through which to evaluate domestic law.[70] But that should not distract us from the overall result: compensation for a victim of racial discrimination based on international law. This decision marks one of the first instances where a litigant raised international legal claims against private persons. As Section C shows, this has been a fruitful avenue for the simultaneous advancement of international law and minority rights in Japan.

b. 1997 Sapporo District Court (Nibutani Dam Decision)

This case involves the cultural rights of the Ainu minority, the native inhabitants of northern Japan. In 1994, the Hokkaido Development Bureau, a government agency, completed a dam that flooded lands where the Ainu held ceremonial rituals. In 1993, two Ainu landowners filed suit in the Sapporo District Court to invalidate an administrative approval from 1989 that permitted the forcible seizure of their land.

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[68] *Id.* at 124, *translated in* 37 JAPANESE ANN. INT'L L. 152, 154 (1994).
[69] *Id.* at 129, *translated in* 37 JAPANESE ANN. INT'L L. 152, 153 (1994).
[70] *See* Imai, *supra* note 32, at 6. By contrast, scholars understand "direct effect" to mean that a violation of international treaty law automatically leads to the invalidation of the contravening domestic law. *See id.* But as Professor Imai wrote soon after this decision was handed down, "[w]hether indirect effect or direct effect, viewed comprehensively, it cannot be denied that Japanese courts' application of international human rights law is still passive." *Id.* at 9.

The court effectively split the baby. On the one hand, the court held that the administrative agency had failed its obligation, under the ICCPR, to safeguard an ethnic minority's "right, in community with the other members of their group, to enjoy their own culture."[71] The court found that the agency's approval exceeded the discretion granted by Article 20 of the Land Expropriation Act, and was therefore illegal.[72]

But since the dam was completed by the time of the verdict, the court ruled that removing the dam would run counter to the public welfare. The court then dismissed the claim based on the Administrative Litigation Law, which allows courts to weigh the effect on the "public welfare" against the harm done to plaintiffs. Since the dam served the purpose of stopping floods, and would require great expense to remove, the court determined that it would remain in its present location.[73]

As to the effect of international law, the decision is also murky. As Professor Iwasawa explained:

> This case may be an example of *indirectly applying* the treaty. Using international human rights law as an interpretive standard for domestic law can be considered *indirect effect* of international human rights law. Here, what was determined to be illegal was the state's inadequate respect for a minority's right to enjoy its culture, as provided by Article 27 of the ICCPR. In actuality, the treaty served as the *central basis* for this decision. Thus, while the court did not clearly recognize the possibility of direct effect for the ICCPR, one can say that it *directly applied* the convention.[74]

Whether one calls this indirect effect or direct application—Professor Iwasawa does both—is secondary to the court's determination that the government acted *illegally*. More robust adherence to international law would be possible, though it is doubtful a court in another country would have required the destruction of the dam. But in stepping beyond the confines of domestic law, and against a state agency, the Sapporo District Court ventured forth cautiously. Whatever the court's underlying motiva-

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[71] ICCPR, *supra* note 1, art. 27.

[72] *See* Kayano v. Hokkaido Expropriation Committee, 1598 HANREI JIHŌ 33 (Sapporo D. Ct., Mar. 27, 1997), *translated in* Mark A. Levin, *Kayano v. Hokkaido Expropriation Committee*, 38 Int'l Legal Materials 394 (1999).

[73] *Id.* at 49, *translated in* Mark A. Levin, *Kayano v. Hokkaido Expropriation Committee*, 38 Int'l Legal Materials 394, 428–29 (1999).

[74] Iwasawa Yūji, *Nibutani Damu Hanketsu no Kokusaihōjō no Igi* [*The Significance of the Nibutani Dam Decision for International Law*], 9 KOKUSAI JINKEN [HUM. RTS. INT'L] 56, 59 (1999) (emphasis added).

tion, the decision evinces the Japanese judiciary's slow embrace of international law, and a growing willingness to entrench minority rights.

One can safely predict that lawyers will continue to challenge Japan's criminal procedure laws by invoking the ICCPR. The ICCPR could also be used to enfranchise permanent residents, an issue that has been repeatedly litigated in Japan. Most relevantly, the cases involving the ICCPR have initiated the debate on minority rights in Japan, which rounds out the discussion.

C. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

After ratifying CERD in 1995, the Diet neither revised existing laws nor wrote new ones to infuse CERD into the domestic sphere. In effect, the Diet gave the courts discretion as to how to apply CERD. Practically speaking, this means that individual judges, without any legislative guidance, decide whether acts of racial discrimination are illegal. While interesting jurisprudentially, judicial resolution of racial discrimination cases has a necessarily *ad hoc* quality. The lack of a clear prohibition on racial discrimination has led to a series of legal challenges to all manner of discriminatory conduct.

In response, courts now routinely apply CERD to the private sphere. I consider this to be the most important development in the past decade of Japanese international human rights law. By applying international standards to interpersonal relationships, courts have literally humanized the normative obligations historically reserved to states. This represents a dramatic shift from the classic understanding of international law as a series of interstate obligations, a formulation by which Japanese courts continue to abide in their decisions.

By American standards, Japanese judges seldom "legislate from the bench." There is great deference to the legislature with regard to both the substance and the absence of statutory law. But when there is no law on point, judges have a freer hand in resolving the dispute. Viewed collectively, these suits have allowed judges to regulate private conduct in fields such as housing, employment, membership of private associations (golf clubs), public facilities, financial services, and so on.[75] This iterative approach to proscription means that the law against racial discrimination in Japan is not a codified set of obligations, but a serially *rewritten* one.

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[75] *See generally* Timothy Webster, *Reconstituting Japanese Law, International Law and Domestic Litigation*, 30 MICH. J. INT'L L. 211, 232–38 (2008).

Article 2(d) of CERD obligates States Parties to "prohibit and bring to an end, by all appropriate means, including *legislation* as required by circumstances, racial discrimination by any *persons*, *group* or *organization*."[76] Since Japan ratified CERD in 1995, the Diet has introduced no anti-discrimination legislation, though it debated a human rights protection bill in 2003 and 2005. The issue is clearly on the legislative radar, but divisive enough to prevent coalescence among politicians. The executive branch has acquiesced to the Diet's inertia. According to the Ministry of Foreign Affairs, at least, the Diet does not need to pass laws banning discrimination, as the courts are fully capable of handling incidents when they arise.[77] The problem is that the incidents continue to arise *because* there is no law on point.

To make up for the legislative lacuna, judges decide whether discrimination is permissible, or "rational." While this is an important step in the ongoing judicial digestion of international law, it also highlights the lack of political will against racial discrimination. With no law on point, courts now thread CERD, often coupled with an ICCPR claim, through domestic tort law to render illegal certain acts of racial discrimination.

Not every racial discrimination lawsuit succeeds. But a series of successful cases suggests that courts are generally sympathetic to such claims. A plaintiff that meets the high evidentiary burden needed to prevail in Japanese civil litigation stands a decent chance of receiving compensation, and perhaps an apology.[78] Many recent cases make this point, but two in particular explicate the relationship between international and domestic law.

1. Cases

a. 1999 Shizuoka District Court: Bortz v. Suzuki

The first Japanese court to apply CERD to private relations was the Shizuoka District Court. The employees of a Japanese jewelry store shooed away a foreign customer, journalist Ana Bortz, upon discovering that she was Brazilian; they initially thought she was French. One em-

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[76] *See* CERD, *supra* note 2, art. 2(1)(d) (emphasis added). Similarly, the Women's Convention requires States Parties "[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise." *See* Women's Convention, *supra* note 18, art. 2(e).

[77] *See* Ministry of Foreign Affairs, *Comments of the Japanese Government on the Concluding Observations Adopted by the Committee on the Elimination of Racial Discrimination on March 20, 2000 Regarding Initial and Second Report of the Japanese Government*, para. 5(1) (2001), *available at* http://www.mofa. go.jp/policy/human/comment0110.html.

[78] *See generally* Timothy Webster, Case Note & Commentary *McGowan v. Narita*, 9 AUSTL. J. ASIAN L. 346, 349 (2008).

ployee asked her to leave the store, pointing to a sign on the wall that said, *inter alia*, "foreigners are strictly forbidden."[79] When she refused to leave, he called the police. After an hour and forty minutes of remonstrations, charges of human rights violations, demands for apologies, refusals to apologize, and general miscomprehension, Ms. Bortz left the store. She then filed a lawsuit, which in turn elicited a strong rebuke of racial discrimination by the Shizuoka District Court.

The court grappled with the effect of international law on domestic law at some length. Judge Sō Tetsurō explained that Japan is a monist country, adopting the conventional view that "CERD is beneath the Constitution, but still has effect in this country as domestic law."[80] He then obliquely criticized the executive branch's view that new legislation was "not needed to effectuate this treaty." Noting the absence of legislation, he went on:

> This means that if an act of racial discrimination violated a provision of CERD, and the state or local body did not take the measures that it should have, then one could, in accordance with Article 6 of CERD, at the very least seek compensation for damages, or take other measures for relief, against the state or local body for the omission.
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> Thus, assuming that the Ministry of Foreign Affairs is correct—that no legislative measures are necessary—in a case involving a compensation claim against an individual for an illegal act, the text of CERD should be used as an *interpretative standard*.[81]

This reading of CERD is fairly bold. First, it obliquely criticizes the legislature for not taking "the measures that it should have." It then cites the Ministry of Foreign Affairs' diagnosis that law is unnecessary in this field. In other words, the court is explaining the absence of applicable law to justify its direct deployment of CERD. To minimize the discursive effect of using international law, the court claims merely to use CERD as an "interpretative standard." But the court directly applied Article 6 of CERD, which provides "effective protection and remedies" for acts of racial discrimination by "competent national tribunals."[82]

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[79] Bortz v. Suzuki, 1045 HANREI TAIMUZU 216, 217 (Shizuoka D. Ct. Hamamatsu Branch, Oct. 12, 1999), *translated in* Webster, *supra* note 8, at 633.
[80] *Id.* at 224, *translated in* Webster, *supra* note 8, at 651.
[81] *Id*. at 225, *translated in* Webster, *supra* note 8, at 652.
[82] "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals . . . against any acts of racial discrimination . . . ." CERD, *supra* note 2, art. 6.

In effect, this opinion instantiated CERD by providing an "effective remedy" to Ms. Bortz. This remedy took two forms: a 1.5 million yen damages award, meant to cover attorney's fees and compensation for her emotional distress; and an apology from defendant, for injuring plaintiff's dignity and honor.[83] This decision provided an important, though not binding, precedent for future litigants who have experienced racial discrimination. Subsequent verdicts have also cited CERD as an "interpretive standard," helping channel international legal norms into the social fabric of Japanese private relations.

b. 2002 Sapporo District Court: Arudou v. Earth Cure

The *Bortz* decision inspired many foreigners to sue for racial discrimination in Japan. One of them was Arudou Debito, né David Aldwinckle, a self-styled human rights activist. In the late 1990s, Arudou noticed several bathhouses in northern Japan had posted "No foreigners" signs on their front doors. In September 2000, he arranged for a group of foreigners (Caucasian and Asian) and Japanese citizens to see if the Yunohana bathhouse would enforce the "Japanese Only" sign on their door.[84] The bathhouse turned away the white foreigners, but let in the other Asians, including a Chinese woman. It allowed in one of Arudou's biracial daughters (the more phenotypically Asian one), but denied the other daughter, who more closely resembled her Caucasian father.

Arudou returned a month later to try again, this time a newly naturalized citizen of Japan. He was again denied. Even though he was legally Japanese, the manager explained, other customers would not understand that. Out of concern for the putatively xenophobic clientele, he could not let Arudou in. Together with two other white men who had been refused entrance, Arudou filed suit in February 2001. He sued the bathhouse for racial discrimination, and the Otaru municipal government for not taking adequate measures to ban racial discrimination.

The Sapporo District Court found against the bathhouse, but not the city. As in *Bortz*, the court applied CERD in substance, even while denying its direct effect as between private persons:

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[83] *Bortz*, 1045 HANREI TAIMUZU at 231, *translated in* Webster, *supra* note 8, at 666.

[84] Arudou v. Earth Cure, 1150 HANREI TAIMUZU 185 (Sapporo D. Ct., Nov. 11, 2002), *translated in* Timothy Webster, *Arudou v. Earth Cure: Judgment of November 11, 2002, Sapporo District Court*, 9 ASIAN-PAC. L. & POL'Y J. 297 (2008). The bathhouse claimed that Russian sailors had created havoc in the baths, generating a number of complaints. Only after receiving these complaints did the bathhouse impose its categorical ban. *See id.* at 188, *translated in* Timothy Webster, *Arudou v. Earth Cure: Judgment of November 11, 2002, Sapporo District Court*, 9 ASIAN-PAC. L. & POL'Y J. 297, 304–05 (2008).

> Article 14(1) of the Constitution, the ICCPR, and CERD do not apply directly to relations between private persons. But if private conduct specifically violates, or risks violating, another person's basic rights or equality, these provisions can be used to evaluate social norms. Articles 1 and 90 of the Civil Code, among others, generally regulate private autonomy, and protect an individual's interests against illegal infringements of basic rights and equality. Thus, Article 14(1) of the Constitution, the ICCPR, and CERD can serve as a standard to interpret the above provisions of private law.[85]

Instead, the Sapporo District Court finessed the constitutional right to equality and international proscription of racial discrimination as "interpretive standards" by which to judge acts between private persons. Even as the court stated that international treaties do not apply to personal relations, it used international law to create the tort of racial discrimination. No domestic law in Japan bans this type of conduct, so the court made an independent evaluation of international social norms.[86] If the court surveyed only domestic norms and attitudes, it could very well have come out in favor of defendant, which had certainly offered a rational basis for its policy. The problem, it seems, was that the bathhouse's policy was excessive, excluding many foreigners who would not create havoc in the baths.

As for the claim against the city, the court determined that the city was under no "clear and uniform obligation" to pass anti-discrimination laws.[87] CERD requires that "Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any person, group or organization."[88] In short, the court determined that the circumstances did not "require" legislation by the city of Otaru. Thus, like the Osaka District Court's ruling that the governor of Osaka was not liable to the resident Korean applicant, the Sapporo District Court did not find that a political actor had

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[85] *Id.* at 193, *translated in* Timothy Webster, *Arudou v. Earth Cure: Judgment of November 11, 2002, Sapporo District Court*, 9 ASIAN-PAC. L. & POL'Y J. 297, 317 (2007). The court went on to note that Yunohana's conduct amounted to "discrimination based on race, skin color, descent, ethnic origin or racial origin. In light of Article 14(1) of the Constitution, Article 26 of the ICCPR and CERD, these amount to private acts of racial discrimination that ought to be eliminated."

[86] The court used domestic tort law as a channel for international legal norms. Article 90 of the Civil Code voids violations of the public order, a provision often used in gender discrimination cases. MINPŌ, art. 90.

[87] *Arudou*, 1150 HANREI TAIMUZU at 195, *translated in* Timothy Webster, *Arudou v. Earth Cure: Judgment of November 11, 2002, Sapporo District Court*, 9 ASIAN-PAC. L. & POL'Y J. 297, 320 (2007).

[88] CERD, *supra* note 2, art. 2(1)(d).

violated the law. The court thus completely inverted the traditional view of who is subject of international law. It held private persons liable for violating international law, even though international law supposedly does not apply against private actors. But it determined that a state actor, ostensibly bound by international law, was not liable for its legislative omission.

Since *Bortz* and *Arudou*, courts have provided remedies to several victims of racial discrimination in housing and the provision of goods and services.[89] These judgments have not analyzed the interrelation between domestic law and international law with great scrutiny, but do seem to accept the basic premise of citing CERD to craft a remedy for a victim of racial discrimination. Together with constitutional guarantees of equality, CERD likely persuaded judges that the underlying discrimination was illegal.

Even where judges find against plaintiffs—as they have in lawsuits over membership to private associations, access to mortgages, and participation in national sports tournaments—judges recognize that racial discrimination is illegal. In these cases, however, the defendant's justification for the practice is "reasonable," roughly analogous with rational basis scrutiny in the United States. The defense need not be airtight, just *rational*—literally, having a basis in reason. For instance, a bank's refusal to provide a foreigner with a mortgage was "reasonable," since foreigners were more likely to flee the country without having paid their mortgage. The bank provided no statistical support for this defense, but could offer a rational relationship between its policy and a hypothetically heightened risk posed by non-residents.

2. Analysis

While the results have not been uniform, the application of CERD to the private sphere marks a critical passage in Japan's ongoing integration of international law norms into its domestic law. By applying international standards to interpersonal relations, judges domesticate international treaty obligations. Courts decide which forms of private discrimination are illegal, and which are, in jurisprudential parlance, "rational." Categorically denying entrance to foreigners—by a store, bar, or public facility—is clearly illegal. But private associations, such as golf clubs, may refuse members because of their ethnic background due to the constitutionally guaranteed freedoms of assembly and association. So while courts do not force Japanese citizens to fraternize with foreigners on the fairway, bath-

[89] *See generally* Webster, *supra* note 75.

houses do not implicate the same constitutional rights, and thus may not legally discriminate.

This development deviates from the classical view of international law as a body of interstate obligations. Treaties such as CERD cover violations by private individuals and organizations, and not just state actors.[90] It is untenable, indeed contrary to the language of the treaty, to interpret international legal provisions as solely applying to states. As seen in cases such as *Arudou*, and the 1993 Osaka District Court decision involving the resident Korean tenant, Japanese courts have consistently refused to require local governments to pass legislation, and have also declined to find such omissions illegal or compensable.

Across the various opinions, discussion of international law fluctuates widely. Size matters, it seems, as the length of a judge's discussion of international law correlates with the weight he ascribes to international law obligations. If legal realism has taught us anything, it is that judges do not always mean what they write. The stated rationale could as easily conceal as reveal the reason that a judge decides a particular way. Judges that do not want to deal with CERD or ICCPR claims simply do not discuss the obligations imposed under those treaties.

In the above cases, judges ostensibly read CERD and the ICCPR as "interpretative standards," but in fact they have directly applied provisions of CERD. Article 2(1)(d) bans "racial discrimination by any persons, group or organizations," summoning courts to regulate interpersonal relationships, whether legal persons or natural persons.[91] Article 6 guarantees "effective protection and remedies, through the competent national tribunals and other State institutions . . . ."[92] By serving as such tribunals, and providing remedies to victims of racial discrimination, courts effectuate the obligations imposed by these articles.

Viewed historically, Japanese judges have evolved as disseminators of international law. Having gained familiarity with international human rights law, judges now frequently apply its provisions.[93] Indeed, the recent experience with CERD and the ICCPR suggests a more active engagement with international law, and hints that new directions will emerge in the private sphere, and not in challenges to municipal governments.

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[90] *Id.*
[91] *Id.*
[92] *Id.* art. 6.
[93] One recent survey listed over 300 cases that cited the ICCPR and ICESCR as of July 2006. Over 150 of these cases were decided from 1990 to 2000, and another ninety from 2000 to 2006. *See* Obata Kaoru, *Kokusai Jinken Kiyaku: Nihonkoku Kenpō Taikei no shita de no Jinken Jōyaku to Tekiyō* [*International Human Rights Treaties: The Application of Human Rights Conventions under the Constitutional System of Japan*], 1321 JURISUTO 10, 11 (2006).

IV. CONCLUSION

Since Japan ratified the ICCPR and ICESCR over thirty years ago, international human rights law has played an increasingly prominent role in Japanese society. Judges show greater fidelity to international human rights obligations than they did a generation ago. But there still is a reluctance to apply international law when it conflicts with domestic law. This is to be expected to a certain extent, as judges generally favor the domestic laws passed by their legislature to international laws to which the country has acceded. Courts are most likely to apply international over domestic law when an explicit international law provision clashes frontally with domestic law. By contrast, when the treaty is written in progressive or programmatic terms, Japanese courts exploit the leeway to avoid direct application of the treaty. In the absence of domestic legislation, judges can make bold and often unprecedented applications of international law.[94] Without legislative guidance on point, individual judges decide whether the narratives they hear, and the evidence supporting those narratives, constitute *illegal* acts of racial discrimination.

As more and more plaintiffs have cited international law, so too have judges expanded its protective penumbra. In the 1980s and 1990s, judges hesitated to apply international legal provisions against private persons. But a recent series of racial discrimination lawsuits has helped blur the public-private divide that traditionally insulated people from international law, offering a clue as to future developments in this area. Japanese judges will likely continue to use international law to regulate interpersonal relationships, unless and until the Diet reenters the conversation.

[94] *See generally* Webster, *supra* note 75.