International Human Rights Law in Constitutional Cases: The Supreme Court of Japan

By *Hiromichi Matsuda*[*]

Abstract: Although the Supreme Court of Japan has long been reluctant to apply international human rights law as binding law, some Justices recently referred to human rights treaties and recommendations of treaty bodies in a positive manner in constitutional cases. In particular, Justices Miyazaki and Uga's dissenting opinion provided an important theoretical bases for reference to the recommendations by the treaty bodies. Within the constitutional system of Japan, international law, regardless of its direct applicability, has domestic effect. While the recommendations are not legally binding, the executive branch is obliged to respond to human rights treaty bodies with detailed reasonings. Failure to appropriately respond to human rights treaty bodies with persuasive reasoning can indicate that domestic law has legal problems, and judiciary should take this fact into account in constitutional review.

Keywords: Supreme Court of Japan; Domestic Effect of Treaties; Treaty Bodies

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A. Introduction

This article analyzes how the Supreme Court of Japan refers to international human rights law in constitutional cases. Although the Supreme Court of Japan has long been reluctant to apply international human rights law as binding law, some Justices recently referred to human rights treaties and recommendations of treaty bodies in a positive manner. Against this background, this article will analyze this recent trend from a theoretical perspective.

This article is organized as follows: Part B discusses the status of international human rights law in the Japanese constitutional system. Part C describes important constitutional cases in which international human rights treaties are cited. Part D will provide a theoretical analysis. Part E concludes with future directions.

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B. International Law Within the Constitutional System

The Constitution of Japan has a strong commitment to internationalism. It was enacted in 1946, right after World War II. Reflecting upon the devastation of Asia-Pacific War caused by ultra-nationalism, the Preamble of the Constitution declares: "[w]e, the Japanese people, […] determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government […]."

Based on this spirit, Article 98(2) of the Constitution stipulates that "[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed." Most treaties are approved by both houses of the Diet before ratification (Article 61, 60(2) of the Constitution of Japan). The Emperor, with the advice and approval of the Cabinet, promulgates treaties (Article 7(1) of the Constitution of Japan).[1]

In line with its historical background, Article 98(2) of the Constitution should be interpreted as incorporating the "collaboration of powers" approach in the implementation of international obligations.[2] All state organs, including the legislative, executive, and judicial branches, must collaborate with each other to faithfully observe Japan's international obligations.[3] Although the scholarly debate on Article 98(2) is complicated[4], the text clearly obliges the State to observe treaty and other international laws.[5] The prevailing view in Japan maintains that both customary international law and treaty law acquire domestic effect through Article 98(2) of the Constitution and are ranked higher than statutory law but lower than the Constitution.[6]

1 *Hiromichi Matsuda*, International Law in Japanese Courts, in: Curtis A. Bradley (ed.), The Oxford Handbook of Comparative Foreign Relations Law, New York 2019, p. 537.

2 松田浩道『国際法と憲法秩序——国際規範の実施権限』[*Hiromichi Matsuda*, International Law and Constitutional Legal Systems. The Competence to Implement International Norms (in Japanese)], Tokyo, 2020, p.167.

3 For further information, see *Ayako Hatano / Hiromichi Matsuda / Yota Negishi,* The Impact of the United Nations Human Rights Treaties on the Domestic Level in Japan, in: Christof Heyns / Frans Jacobus Viljoen / Rachel Murray (eds.), The Impact of the United Nations Human Rights Treaties on the Domestic Level. Twenty Years On, Second Revised Edition, Leiden / Boston 2024, p. 608; *Matsuda*, note 1, p. 537.

4 *Hae Bong Shin*, Japan, in: Dinah Shelton (ed.), International Law and Domestic Legal Systems. Incorporation, Transformation, and Persuasion, Oxford 2011, pp. 365-376 (discussing domestic incorporation of international law in the Japanese legal system); Yuji Iwasawa, International Law, Human Rights, and Japanese Law. The impact of International law on Japanese Law, Oxford 1998, pp. 28-36, 95-103 (discussing domestic application of international law in Japan); *Yuji Iwasawa*, Domestic Application of International Law, Recueil des Cours 378 (2016), p. 9.

5 The text is even clearer than is the text of the German constitutional provisions that provide the basis of friendly attitudes toward international law (*Völkerrechtsfreundlichkeit*). See Articles 9(2), 23-26, and 59(2) of the German Basic Law.

6 *Iwasawa*, note 4, International Law, Human Rights, and Japanese Law, pp. 28–36, 95–103. Iwasawa further argues that international norms are divided into two types—directly applicable norms and

C. International Human Rights Law in Constitutional Cases

Part C will discuss important constitutional cases in which the Supreme Court of Japan discussed international human rights law. Section I. will describe cases where international human rights treaties are treated negatively, and Section II. will discuss the recent cases where the Supreme Court Justices referred to international human rights law and recommendations of treaty bodies positively.

I. Cases in Which International Human Rights Treaties Are Treated Negatively

Japanese courts have long been reluctant to deal with international human rights law. In 1998, Iwasawa pointed out the (a) tendency of the courts to ignore arguments based on international human rights law, (b) tendency of the courts to summarily dismiss arguments based on international human rights law, and (c) reluctance of the courts to find violations of international human rights law.[7] Below are symbolic cases that show the Supreme Court's reluctance to deal with international human rights law.

1. Fingerprinting Case

A Japanese American missionary was charged with refusing fingerprinting and argued that the system of fingerprinting stipulated in the Alien Registration Law violated not only the Constitution but also Articles 7 and 26 of the International Covenant on Civil and Political Rights (ICCPR). However, the Supreme Court dismissed the arguments based on ICCPR, stating merely that "Reasons for Appeal, including the reasons alleging a violation of the Constitution are, in substance, mere allegations of violations of laws; they, therefore, constitute no legitimate ground for appeal."[8] Thus, the Supreme Court ignored the arguments based on ICCPR.

2. Shiomi Case

In *Shiomi* case, the Supreme Court discussed the legality of the nationality clause of the National Pension Law. The Court stated that "Article 9 of the Covenant on Economic, Social and Cultural Rights confirms that the right to social security is worthy of protection by the national social policy of the contracting states and declares the political responsibility to actively promote social security policies towards the realization of this right, but it does not stipulate the immediate provision of specific rights to individuals."[9] Many scholars

not directly applicable norms—through subjective and objective criteria with a relative approach. Ibid., pp. 44–81.

7 Ibid., pp. 92-306.

8 The Supreme Court of Japan, Judgment,15 December 1995, 49(10) Keishu 842, p.847.

9 The Supreme Court of Japan, Judgment, 2 March 1989, 741 Hanrei Times 87, p. 90.

interpreted the Supreme Court's rulings as denying the "domestic applicability" of the ICESCR entirely.[10]

3. Sarufutsu Case

In the first instance of the *Sarufutsu* case, which deemed the application of the National Public Service Law prohibiting political activities by public servants unconstitutional, non-legally binding foreign laws and unratified treaties were examined in detail. The Asahikawa District Court mentioned the more lenient restrictions on the political activities of public servants in the United States, United Kingdom, and Germany, as well as trends in relevant legal amendments and changes in precedents within Japan. The district court then referred to an unratified treaty stating, "Article 1(a) of the ILO Convention No. 105 prohibits all forms of forced labor as a sanction against holding or expressing political opinions or views ideologically opposed to the existing political, social, or economic system, and calls on member states not to use such labor, with the government expressing in the Diet that it is considering ratification."[11] Based on the domestic and international context, the court stated, "Considering the extent of regulation of political activities of public servants in modern states, the current situation, and the social changes that have occurred after the implementation of the National Public Service Law and the Personnel Authority Regulation 14-7 as mentioned above, regardless of whether the public servants are engaged in operational activities or not, and irrespective of whether they have discretionary powers or not, it is necessary for this court to proactively examine whether it is rational and constitutionally permissible to impose restrictions on their political activities and to prescribe criminal penalties, not just disciplinary sanctions, for violations."[12] The District Court declared the application of the National Public Service Law against the defendant unconstitutional, citing American case law and ILO conventions.

In response, however, the Supreme Court stated, "Even if there are common elements in the constitutional provisions of various countries, each nation's historical experiences and traditions vary, and there are differences in the citizens' consciousness of rights and sense of freedom. Therefore, the criteria for judging the rationality of restrictions imposed on fundamental human rights cannot be established independently of the social foundation of that country. Foreign legislative examples are an important reference, but it is never the right attitude in constitutional judgment to apply them directly to our country, ignoring these social conditions."[13] The Court rejected references to non-legally binding foreign laws, and international norms were not even mentioned.

10 See *Matsuda*, note 2, p. 198. However, understanding *Shiomi* case as a complete rejection of domestic applicability would be too far because even under the Supreme Court's decision in the *Shiomi* case, the path to utilizing the ICESCR is theoretically possible.

11 Asahikawa District Court, Judgment, 25 March 1968, 28(9) Keishu 676, 682.

12 Ibid., p. 683.

13 The Supreme Court of Japan, Judgment, 6 November 1974, 28(9) Keishu 393, 406-07.

As these symbolic examples show, the Supreme Court has been reluctant to apply international human rights law. Iwasawa analyzed the reasons behind this reluctance as the following:

Japanese courts are reluctant to deal with international human rights law largely because they are unfamiliar with this relatively new branch of law. Japanese judges are inadequately trained in international law, and much less so in international human rights law. The courts' reluctance to find violations of international human rights law, however, is not a phenomenon peculiar to international human rights law. It is merely a reflection of the judicial restraint generally exercised by Japanese courts. Japanese courts are highly restraint in judicial review and generally reluctant to invalidate legislation on constitutional grounds.[14] Japan's unique practice of *implementing-legislation-perfectionism* (完全担保主義 *Kanzen Tampo Shugi*) is one of the reasons why the number of Supreme Court rulings that declare laws unconstitutional is relatively low. Every time the Diet introduces a statute, the Legislation Bureau carefully checks the compatibility and consistency of the bill with the Constitution, existing law, and international obligations.[15] After a careful review, the Legislation Bureau proposes necessary amendments or the implementation of legislation. Thanks to this system, the legislature can usually eliminate unconstitutionality and unconventionality of statutory law in advance. Some even refer to the Legislation Bureau as "the second Supreme Court," as its review is extremely strict and perfectionist in nature.

However, *implementing-legislation-perfectionism* cannot function properly in some field of law, namely international human rights. This is because international obligations can sometimes evolve after ratification. Since *implementing-legislation-perfectionism* is not always perfect, all state organs, including the legislative, executive, and judicial branches, must carefully refer to and respond to the authoritative interpretations of human rights treaty bodies while formulating, interpreting, and applying domestic law to comply with international human rights law.

After 2008, the situation has changed because some Justices started positively citing international human rights law and recommendations by the treaty bodies. The following section will discuss this recent trend.

II. Cases Where International Human Rights Law Played a Positive Role

This section will describe three crucial Supreme Court cases in which Justices cited international human rights law positively.

14 *Iwasawa*, note 4, p. 303.

15 *Matsuda*, note 2, p. 175.

1. Nationality Act Case (2008)

Under the jus sanguinis principle, the Nationality Act did not allow a child born out of wedlock to a Japanese father and a non-Japanese mother to acquire Japanese nationality without legal marriage of the parents. Article 3(1) of the Nationality Act provided that: "A child who has acquired the status of a child born in wedlock as a result of the marriage of the parents and the acknowledgment by either parent may acquire Japanese nationality, if the father or mother who has acknowledged the child was a Japanese citizen at the time of the child's birth, and such father or mother is currently a Japanese citizen."

The Court invalidated a part of Article 3(1) because it violated Article 14(1) (the equality clause) of the Constitution.[16] The Court acknowledged that "the legislative purpose itself has a rational basis" and that "at the time the provision was established, there was a certain rational relationship between the legislative purpose and the social norms and societal conditions." The Court then referred to international human rights treaties, stating:

> *"In various countries, there appears to be a trend towards eliminating legal discriminatory treatment of children born out of wedlock. In the ICCPR and the Convention on the Rights of the Child, which our country has ratified, there are provisions that children should not be subjected to any discrimination based on birth. Considering the changes in the domestic and international social environment surrounding our country, it has become difficult to find a rational relationship between the aforementioned legislative purpose and the requirement for acquiring Japanese nationality through notification after birth."*

There are various views on these Supreme Court's reference to international human rights law in the academic literature. While some scholars praise these cases for referring to the recommendations of the treaty bodies, there are criticisms against the fragility of the decision's logic.[17] Indeed, it was misleading that the majority opinion of the Nationality Act Case cited binding treaties and non-binding materials without clear distinction. The fact that ratified treaties are legally binding needs to be sufficiently considered.[18]

Some scholars only accept the obligation of consistent interpretation of treaties with the Constitution, not vice versa, because the prevailing view maintains that treaties are ranked lower than the Constitution. It is indeed problematic to allow substantial constitutional amendment by using consistent interpretation. However, one can argue that such ranking is not absolute, and that Article 98(2) allows Japanese courts to interpret the Constitution

16 The Supreme Court of Japan, Judgment, 4 June 2008, 62(6) Minshu 1367, ILDC 1814 (JP 2008).

17 For detailed discussion, see *Matsuda*, note 2, p. 207.

18 *See* 初川彬「自由権規約委員会と国内人権機関の関係についての一考察」[*Akira Hatsukawa*, A Study of the Human Rights Committee and National Human Rights Institutions (in Japanese)] Hitotsubashi Hogaku 19 (2), p. 700.

in line with international obligations.[19] The most desirable approach is probably one of restrictive consistent interpretation, whereby a court would use international law as one of the interpretive tools, while considering the balance between other branches.

A good example of desirable consistent interpretation is Justice Izumi's concurring opinion in the Nationality Act Case. Justice Izumi stated: The gist of the provision of Article 3, para.1 of the Nationality Act is to grant Japanese nationality to children who were born to Japanese citizens as their fathers or mothers and are ineligible for application of Article 2 of said Act,[20] and the "marriage of the parents" is merely one of the requirements to be satisfied to achieve this. Therefore, said gist of the provision should be maintained to the greatest possible extent even if the part requiring the "marriage of the parents" is unconstitutional, and this is what the lawmakers would have intended. Furthermore, applying Article 3, para.1 of the Nationality Act in this manner conforms to the gist of Article 24, para.3 of the ICCPR which provides that "Every child has the right to acquire a nationality" and that of Article 7, para. 1 of the Convention on the Rights of the Child (CRC).[21]

While conducting consistent interpretation with treaties, Justice Izumi also carefully paid attention to the relationship between the judiciary and the legislature, by mentioning that this construction "may not be permissible when there is a clear probability that the Diet, from the legislative perspective, will not maintain the provision of said paragraph."[22]

1. The Case of Inheritance Share of Children Born Out of Wedlock (2013)

When judging whether the provision in Article 900(4) of the Civil Code, which sets the inheritance share of "non-legitimate" children to half that of legitimate children, violates Article 14(1) of the Constitution, the court referred to foreign law and international law as follows: "countries other than ours that establish a difference in the inheritance shares between legitimate and non-legitimate children do not exist in Western countries, and globally, it is a limited situation".[23] Following this, the court mentioned international norms:

Our country ratified the International Covenant on Civil and Political Rights (Treaty No. 7 of 1979) and the Convention on the Rights of the Child (Treaty No. 2 of 1994). Both treaties contain provisions that children shall not be subjected to any discrimination based on birth. Moreover, as related organizations of the United Nations, the Human Rights

19 松田浩道「国際法の国内的効力——宮崎・宇賀反対意見のインパクト」(*Hiromichi Matsuda*, Domestic effect of international law. Miyazaki=Uga dissenting opinion) Horitsu Jiho 1169 (2021) p. 79.

20 Art. 2(1) of the then Nationality Act provided that a child was a Japanese citizen if the father or mother was a Japanese citizen at the time of birth.

21 The Supreme Court of Japan, Judgment, 4 June 2008, 62(6) Minshu 1367, (Izumi, J., concurring).

22 Ibid.

23 The Supreme Court of Japan, Decision of the Grand Bench, 4 September 2013, 67(6) Minshu 1320, https://www.courts.go.jp/app/hanrei_en/detail?id=1203 (last accessed on 25 August 2025).

Committee is established under the former treaty, and the Committee on the Rights of the Child under the latter treaty. These committees are empowered to express opinions, make recommendations, etc., regarding the performance of the treaties by the contracting states.

After touching on the concerns by the treaty bodies, the Supreme Court stated, "The various changes related to the rationality of the provision in question, such as those mentioned above, cannot be taken individually as a decisive reason to deem the distinction in statutory inheritance shares irrational". However, "considering the trends in society, the diversification of family in our country and the accompanying changes in public consciousness, the trend in legislation in various countries, the content of the treaties ratified by our country and the remarks from the committees established based on these treaties, changes in the legal system related to the distinction between legitimate and non-legitimate children, and repeated issues raised in our past case law, it is clear that the respect for individuals within the family community has been more clearly recognized". The Supreme Court concluded, "considering all of the above, even taking into account the legislative discretion, the rational basis for distinguishing between the statutory inheritance shares of legitimate and non-legitimate children had been lost."

In the Nationality Act Case (2008) and the Case of Inheritance Share of Children Born Out of Wedlock (2013), the Supreme Court of Japan did not discuss the theoretical basis for its reference to the opinion of treaty bodies. Similar to the criticisms against Atkins v. Virginia[24] and Roper v. Simmons[25] in the United States,[26] many Japanese scholars criticized the decision.[27]

24 536 U.S. 304 (2002).

25 543 U.S. 551 (2005).

26 See, e.g., *Curtis A. Bradley*, The Juvenile Death Penalty and International Law, Duke Law Journal 52 (2002), p. 485 (arguing that juvenile death penalty issue must be resolved through U.S. democratic and constitutional processes); Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) ("The Court's discussion of these foreign views […] is therefore meaningless dicta. Dangerous dicta, however, since 'this Court. . . should not impose foreign moods, fads, or fashions on Americans'.") (quoting Foster v. Florida, 537 U.S. 990, n.990 (2002) (Thomas, J., concurring in denial of certiorari)). See also *Roger P. Alford*, In Search of a Theory for Constitutional Comparativism, UCLA Law Review 52 (2005) p. 712 ("the use of contemporary foreign and international laws and practices to interpret constitutional guarantees is ill-suited under most modern constitutional theories."); *Steven Calabresi / Stephanie Dotson Zimdahl,* The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, William & Mary Law Review 47 (2005) p. 756 ("in the overwhelming majority of non-Fourth and non-Eighth Amendment cases, it is inappropriate for the Court to cite foreign law."); *Sarah Cleveland*, Our International Constitution, Yale Journal of International Law 125 (2006) ("international law has been a part of U.S. constitutional interpretation from the beginning and a principled resort to international law is fully part of the American tradition").

27 See e.g., 蟻川恒正「婚外子法定相続分最高裁違憲決定を書く(2)」/Tsunemasa Arikawa, Drafting Supreme Court Decision (2), Hogaku Kyoshitsu 400, pp. 132-133 (2014) (emphasizing the distinction between questions facti and question juris).

In the author's opinion, reference to persuasive authority in constitutional interpretation is desirable if the citation is "complete, careful and contextualized."[28] Japanese courts should add more reasoning on the relevance of persuasive authorities and distinguish foreign cases from Japanese ones when necessary. Otherwise, reliance on persuasive authority runs the risk of being ultra vires, because courts do not have the competence to substantially legislate nor amend the Constitution through interpretation.

In 2021, a detailed reasoning for referencing recommendations by treaty bodies appeared in the dissenting opinion by Justices Miyazaki and Uga, which will be discussed in the next section.

2. Surname Case, the Dissenting Opinion by Justices Miyazaki and Uga (2021)

In Japan, married couples need to have the same surnames. Plaintiffs claimed that requirements for the same surname in the Civil Code and the Family Register Act violate Article 14 of the Constitution, which guarantees equality before the law, and Article 24, which states that marriage should be based on "equal rights of husband and wife" and says laws must be enacted from the standpoint of individual dignity.[29]

The majority opinion largely omitted consideration of international law and rejected the constitutional challenge. In contrast, Justices Miyazaki and Uga provided meticulous reasoning based on the insights of international human rights law.[30] The dissenting opinion

28 See *Stephen Yeazell*, When and How U.S. Courts Should Cite Foreign Law, Constitutional Commentary 26, p. 71 (2009) ("'good' citation of foreign law will have the same characteristics as good citation of domestic law; they will be complete, careful, and contextualized.").

29 The Supreme Court of Japan, Decision of the Grand Bench, 23 June 2021, 1488 Hanrei Times 94.

30 An Opinion by Justice Miura also discussed "international trend" in detail: "the Convention on the Elimination of All Forms of Discrimination against Women […] obliges States Parties to eliminate all forms of discrimination against women, including indirect discrimination (Articles 1 and 2) and also obliges States Parties to eliminate discrimination against women in relation to the same right to enter into marriage only with their free and full consent as well as the same personal rights as husband and wife, including the right to choose a family name (Article 16, paragraph (1)(b) and (g)). In general recommendations, the Committee on the Elimination of Discrimination against Women stated that each partner has the right to choose his or her surname and that when by law or custom a woman is obliged to change her surname on marriage, she is denied that right. Furthermore, in the concluding observations on the periodic report of Japan, the same Committee has repeatedly recommended amendment to the provisions of law so that women can continue to use their pre-marriage surnames. As of 1947, many countries had adopted a system in which a husband and wife adopt the same surname. However, after going through the adoption and enforcement, etc. of the Convention on the Elimination of Discrimination against Women, there is no country acceding to the same Convention, except for Japan, that is now adopting a system that obliges a husband and wife to use the same surname. The legal system concerning marriage and the family is established in light of factors such as the social situation and the awareness of citizens of each country. However, in light of the universality of human rights and the purport of Article 98, paragraph (2) of the Constitution, it is also necessary to take into account the situation concerning international rules as mentioned above." 1488 Hanrei Times 104, see https://www.courts.go.jp/app/hanrei_en/detail?id=1824 (last accessed on 25 August 2025).

by Justices Miyazaki and Uga demonstrated that even though certain treaties may not have direct applicability in the sense of granting rights directly to citizens, they do possess the power to bind the organs of the state, including the executive, legislative, and judicial branches. Furthermore, Justices Miyazaki and Uga referred to the recommendations of the Committee on the Elimination of Discrimination against Women as a reason for violating Article 24(2) of the Constitution.

Justices Miyazaki and Uga said, "Based on the fact that Japan received the third formal recommendation requesting a legal amendment concerning the same surname system under the Convention on the Elimination of Discrimination against Women in 2016, it is strongly presumed that the same surname system is beyond the Diet's legislative discretion." The dissenting opinion said, "the legislative body has the obligation to sincerely comply with the Convention by revising and abolishing laws that are in violation of the obligations provided in the same Convention and by avoiding enactment of new laws that are against those obligations, as long as the provisions of the same Convention are stated by a legally binding text." After confirming the legally binding nature of the treaty provisions, the dissenting opinion discussed the concepts of "direct applicability" and "domestic effect":

> *"(C) Incidentally, as these provisions do not grant any right directly to Japanese nationals, the provisions are considered to be unlikely to be directly applied to citizens. However, this does not become a ground for denying that these provisions have a domestic effect. This is because in today's international jurisprudence, the possibility of direct application is not the premise of a domestic effect, and to the contrary, a domestic effect is generally considered as the premise of the possibility of direct application."*[31]

Justices Miyazaki and Uga further argued:

> *"The Diet has not amended Article 750 of the Civil Code for about a long period of 15 years from 2003, in which a problem was first pointed out to Japan regarding*

31 In order to fully understand this paragraph, we need to look back on the academic history on the question of "direct applicability" and "domestic effect" in Japan. The pioneering study on this topic in Japan was 高野雄一『憲法と条約』[*Yuichi Takano*, Constitution and Treaties (in Japanese)] Tokyo 1960. This work focuses on the significance of the involvement of the National Diet in the conclusion of treaties. After comparative legal analysis, Takano argued that Article 98(2) of the Japanese Constitution recognizes the domestic effect of treaties. However, the issue of domestic effect is only relevant to treaties possessing a self-executing nature, meaning that the concept of self-execution was taken as a premise for domestic effect. In response to this, Iwasawa, currently an ICJ Judge, reorganized the concept by making domestic effect a prerequisite for self-execution (direct applicability) in his work "Domestic Applicability of Treaties." *Yuji Iwasawa,* Domestic Application of International Law. Focusing on Direct Applicability, Leiden 2022. This book argued that "direct applicability" is a separate concept from "domestic effect," and "domestic effect" is a prerequisite for "direct applicability." Iwasawa's framework has become a prevailing understanding in Japanese international law studies. The dissenting opinion by Miyazaki and Uga followed this prevailing view and stated that direct applicability is not a prerequisite for domestic effect; rather, domestic effect is a prerequisite for direct applicability.

> *the same surname system by the Committee on the Elimination of Discrimination against Women, until the time when the Disposition was made. In 2016, after the 2015 Grand Bench Judgment, the Committee on the Elimination of Discrimination against Women made the third formal recommendation requiring Japan to perform the relevant obligation (the previous recommendation was made in 2003). These facts are inevitably considered to indicate that a reasonable period of time that is considered necessary to take that measure from a common sense standpoint has passed."*

The most significant point of this dissenting opinion is that the government's lack of counterarguments to the treaty bodies is recognized as one of the reasons for unconstitutionality. While recommendations formally do not have legally binding force, Japan has accepted the review by the treaty bodies and bears the obligation to report on the implementation of the covenant (e.g., Article 40 of the ICCPR; Articles 18 and 21 of the CEDAW). Having accepted the oversight by these treaty bodies through the ratification, it is necessary to appropriately counter the concerns of these bodies with valid reasons or explain why it is impossible to follow the recommendations. If Japanese government holds an interpretation different from the treaty bodies, it must provide particularly persuasive and detailed counterarguments. Failure to appropriately respond to human rights treaty bodies with persuasive reasoning can indicate that domestic law has legal problems. Justices Miyazaki and Uga said, "the Japanese government should be able to make a counterargument that the same surname system is not considered to lack the equality of a husband and wife. However, the Japanese government does not appear to have made such counterargument to the Committee on the Elimination of Discrimination against Women."[32] This fact is recognized as one of the reasons for unconstitutionality.

D. Theoretical Analysis

Professor Hajime Yamamoto interprets the dissenting opinion by Justices Miyazaki and Uga as referring to recommendation by treaty bodies as "influential authority."[33] Yamamoto has been advocating an interesting theory of "transnational human rights legal sources." Inspired especially by Jeremy Waldron's "*jus gentium*"[34] and Mayo Moran's "influential authority"[35], Yamamoto argues:

The legal standards, or sources of law, that domestic courts rely on to resolve human rights issues encompass transnational entities, thereby layering constitutional law with

32 1488 Hanrei Times 115, https://www.courts.go.jp/app/hanrei_en/detail?id=1824 (last accessed on 25 August 2025).

33 Ibid., p. 313.

34 *Jeremy Waldron*, Partly Laws Common to All Mankind. Foreign Law in American Courts, New Haven 2012.

35 *Mayo Moran*, Influential Authority and the Estoppel-Like Effect of International Law, in: George Williams / Hilary Charlesworth (eds.), The Fluid State, Sydney 2005.

international human rights norms and foreign human rights precedents in the domestic legal order. Transnational human rights legal sources are the totality of transnational human rights legal practices relevant to the Constitution of Japan, i.e., the totality of various basic human rights principles and their normative embodiment propositions.[36]

Yamada disagrees with Yamamoto and argues that "the theory of transnational human rights legal sources, while it could serve as a slogan to direct the attention of Japan's domestically inclined courts toward the transnational arena or to foster the nascent global perspective seen in the Supreme Court, currently seems to be merely a discussion that provides the courts with an irresponsible free hand."[37] It was true that both the Nationality Act Case (2008) and the Case of Inheritance Share of Children Born Out of Wedlock (2013) did not discuss a solid theoretical basis for the reference to the recommendation to the treaty bodies.

Justices Miyazaki and Uga's dissenting opinion provided a solid theoretical basis for reference to the recommendation by the treaty bodies, which had been lacking in the previous case law. Based on Justices Miyazaki and Uga's dissenting opinion, it would be essential to make clear that all state organs, including the legislative, executive, and judicial branches, must carefully refer to and respond to the authoritative interpretations of human rights treaty bodies while formulating, interpreting, and applying domestic law to comply with international human rights law.[38]

First, all Japanese state organs, including the legislative, executive, and judicial branches, are obligated to "faithfully observe" international law (Article 98(2) of the Constitution). Within the constitutional system of Japan, international law, regardless of its direct applicability, has domestic effect. Justices Miyazaki and Uga said, "the possibility of direct application is not the premise of a domestic effect, and to the contrary, a domestic effect is generally considered as the premise of the possibility of direct application."[39]

Second, Justices Miyazaki and Uga referred to the universality of human rights and the principle of equality to bridge the dimensional gap between international law and the Constitution. Justices Miyazaki and Uga says: "The equality of a husband and wife and the guarantee of the personal rights of a husband and wife as referred to in Article 16, paragraph (1), (g) of the Convention on the Elimination of Discrimination against Women are considered to have the same effect as the principles of individual dignity and the essential equality of the sexes referred to in Article 24, paragraph (2) of the Constitution.

36 山元一『国境を越える憲法理論＜法のグローバル化＞と立憲主義の変容』）[*Hajime Yamamoto*, Constitutional theory beyond borders. Globalization of law and transformation of constitutionalism (in Japanese)] Tokyo 2023, pp. 257-258, (translated by Matsuda).

37 山田哲史「人権の国際的保障」山本龍彦・横大道聡 編『憲法学の現在地』[*Satoshi Yamada*, International Protection of Human Rights, in: Tatsuhiko Yamamoto & Satoshi Yokodaido (eds)., The current position of constitutional study (in Japanese)] Tokyo 2020, pp. 108-109 (translated by Matsuda).

38 See *Matsuda*, note 19.

39 Ibid.

This idea just means that the Convention (international law) and the Constitution (domestic law) differ in the dimension but that the principles on which they are based are recognized to have mutually common universality."[40] The dissenting opinion, while adhering to the idea of the distinction between international law and constitutional law, positioned the recommendation by the treaty body as one of the reasons for the unconstitutionality. Although some scholars question this approach from the perspective of constitutional identity,[41] the present author considers that Justices Miyazaki and Uga have successfully bridged the dimensional gap between treaties and the Constitution.[42]

E. Conclusion

Although the Supreme Court of Japan has long been reluctant to apply international human rights law as binding law, some Justices recently referred to human rights treaties and recommendations of treaty bodies in a positive manner. In particular, Justices Miyazaki and Uga's dissenting opinion provided an important theoretical bases for reference to the recommendations by the treaty bodies. Within the constitutional system of Japan, international law, regardless of its direct applicability, has domestic effect. While the recommendations are not legally binding, the executive branch is obliged to respond to human rights treaty bodies with detailed reasonings. Failure to appropriately respond to human rights treaty bodies with persuasive reasoning can indicate that domestic law has legal problems, and judiciary should take this fact into account in constitutional review.

In Japan, all state organs, including the legislative, executive, and judicial branches, must carefully refer to and respond to the authoritative interpretations of human rights treaty bodies while formulating, interpreting, and applying domestic law to comply with international human rights law. In future cases, the Supreme Court should conduct a treaty conformity review rather than referring to international human rights law in the constitutional review. In accordance with the process of allocating the competence to implement international norms as stipulated in the Constitution of Japan, the Court has the responsibility to ensure the conventionality of domestic laws. Indeed, as the dissenting

40 Ibid.

41 For example, Professor Yukio Okitsu argues that "referring to treaties to fill the concrete meaning of the Constitution is in tension with the identity of the Constitution." 宍戸常寿ほか「<座談会>グローバル化と憲法のアイデンティティ――行政法学との対話」（*George Shishido,* et al., Roundtable: Globalization and Constitutional Identity. Dialogue with Administrative Law）Ronkyu Jurist 38 (2022), p. 176. See also, *Yamamoto*, note 36, pp. 315-16 ("Recognizing the normative imperativeness of recommendations seems to lead to a normative subjugation to some external 'other', as long as one simplistically regards "democratic legitimacy" as an issue pertaining to the self-governance principle.") (translated by Matsuda).

42 For more details, see 松田浩道「『個人』をめぐる憲法と国際人権法の交錯――宮崎・宇賀反対意見再論」[*Hiromichi Matsuda*, Interaction of constitutional and international human rights law. Revisiting Miyazaki-Uga dissenting opinion (in Japanese)], Yuhikaku Online, 30 April 2025, https://yuhikaku.com/articles/-/27834 (last accessed on 25 August 2025).

opinions of Miyazaki and Uga indicate, there is a way to bridge the treaty with another dimension of constitutional law. However, in future cases, Japanese courts should conduct a conventionality review directly rather than taking such a detour.[43]

43 Ibid.