Right to social security in international human rights law*

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Ⅰ. Introduction

To what extent can international human rights norms affect national policy? This article takes up the question of the right to social security and discusses the perplexing issues surrounding the topic.

This subject is of much interest, especially when considered from the perspective of the realisation of economic, social and cultural rights

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(ESC rights) in international human rights law. As is illustrated below, it was in the wake of WW Ⅱ that international human rights law began to address the issue of the recognition of the right to social security, although such right already existed in various jurisdictions, with different legal and philosophical traditions.[1] In 1944, the International Labour Organisation (ILO) redefined its aims in order to place human rights at the centre of social policy and called for the 'extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care'[2]. The right to social security was incorporated into the Universal Declaration of Human Rights,[3] the International Covenant on Economic, Social and Cultural Rights,[4] and other universal and regional human rights instruments. Since then, the right to social security has been viewed as an integral feature of international human rights law, and as inextricably intertwined with ESC rights. It is against this backdrop of the expansion of international human rights that national social security regimes will be examined.

The present article examines how the right to social security is debated in international human rights fora. For that purpose, it is intended firstly to deal with the normative nature and scope of the right to social security in international human rights law (Ⅱ). In carrying out this examination, attention will be paid to the nature of ESC rights,

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1 Angelika Nussberger, "Social Security, Right to, International Protection", *Max Planck Encyclopedia of Public International Law* (online), paras. 3-8.

2 ILO, Declaration concerning the Aims and Purposes of the International Labour Organisation (10 May 1944), section Ⅲ (f).

3 General Assembly Resolution 217A (Ⅲ), (10 December 1948).

4 Adopted December 16, 1966; 993 UNTS 3 (entered into force January 3, 1976).

together with the applicability of the principle of non-discrimination. It is then proposed to examine international and regional cases where the national social security regime was in dispute, especially where such dispute arose in the context of discrimination (Ⅲ). In looking at these cases, it will become clear that international monitoring bodies have incorporated ESC rights directly and/or indirectly into human rights law. The cases concerning social security will exemplify the manner in which such incorporation has taken place.

It is then further intended to examine certain national cases from the international human rights viewpoint (Ⅳ). It is unsurprising to see the different ways in which national courts have dealt with the right to social security. To show the different interpretations of the rights in question, a Japanese case will be selected for analysis.[5] The paper will conclude with some closing remarks (Ⅴ).

Two issues, in particular, merit special attention throughout the discussion: the nature and scope of the right to social security, and the applicability of principle of non-discrimination to this area of issues.

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5 This is also a part of my updated discussions based on Japanese court case commentaries. *See*, Yutaka Watanabe, "Impact of International Human Rights Standards on National Legislation: Japanese Perspective", 65 *UNB L. J.* (2014), pp. 249-268; Yutaka Watanabe, "Gaikoku-jin no Seikatsu-hogo jukyu-ken sairon [Right of permanent residents to receive social assistance benefit revisited]", 47(2) *HOSEI-RIRON* [Niigata University Journal of Law and Politics] (2015), 170 (in Japanese).

Ⅱ. Normative scope of right to social security

1. Normative scope of the right to social security in international instruments

As shown above, the first step in the legal recognition of a right to social security can be traced back to the Declaration of Philadelphia in 1944 and the Universal Declaration of Human Rights in 1948. The right is set forth in UN Human Rights conventions,[6] as well as in regional instruments.[7]

The right to social security is found in Article 9 of the International Covenant on Economic, Social and Cultural rights (ICESCR).[8] However, Article 9 simply refers to "social security" and fails to elaborate any further on its substantive content. The drafting history shows an extensive debate on how to articulate the right in the Covenant.[9] Whereas the Covenant does not specify necessary forms of social security, it is indisputable that, by virtue of Article 9, a strategy of social redistribution is required.[10] It is interesting to note that, at the same time, the Committee on Economic, Social and Cultural Rights (CESCR)

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6 *See*, Committee on Economic, Social and Cultural Rights, General Comment No. 19: The Right to Social Security (art. 9), UN Doc E/C.12/GC/19 (4 February 2008), p.3, footnote 3.

7 *Ibid.*, footnote 4.

8 Article 9 states:

> The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

9 Ben Saul, David Kinley, and Jacqueline Mowbray (eds.), *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials,* Oxford University Press, 2014, p. 612.

10 *Ibid.*, pp. 616-17.

cites examples of possible social security measures, relying upon the ILO Convention No. 102 concerning Minimum Standards of Social Security.[11]

According to General Comment No. 19 of the Committee, the right to social security includes 'the right not to be subjected to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies'.[12] The Covenant does not impose on state parties the obligation to provide specified forms of social security, but the General Comment mentions certain factors that state parties should take into consideration in the organisation and administration of the social security regime.

Words and concepts for illuminating the normative nature and scope of the right are common to those employed by the Committee in other of its General Comments. The Committee employs three criteria for establishing the normative content of the right to social security: availability, adequacy, and accessibility. The social security system should be available to ensure that benefits are provided for relevant social risks and contingencies.[13] Benefits must be adequate in amount and duration in order that everyone may realise his or her rights under the Covenant.[14] The social security system must be accessible to all persons without

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11 CESCR, General Comment No. 19, *supra* note 6, paras. 12-21.
ILO Convention No. 102 has 48 parties, and all of them are parties to the ICESCR. In other words, this guidance does not have any binding force to non-parties to the ILO Convention.

12 *Ibid*., para. 9.

13 *Ibid*., para. 11.

14 *Ibid*., para. 22.

discrimination.[15] Such specifications mean that the social security system should be structured so as not to exclude certain categories of persons, and to provide adequate coverage to sustain the lives of recipients, either by means of a contributive or non-contributive regime. In this respect, the principle of non-discrimination plays an important role in the realisation of the right.[16] In addition, marginalised and vulnerable persons are to be accorded special attention.[17] This principle also applies to discrimination against women and to racial discrimination.[18]

General Comment No. 19 declares that state parties to the Covenant have three kinds of obligations to discharge: to respect, to protect, and to fulfil. The obligation to respect requires states not to interfere with the enjoyment of the right to social security, such as by denial or limitation of equal access to adequate social security.[19] The obligation to protect extends to protecting individuals from arbitrary deprivation of access to social security regime by third parties, such as by taking measures that restrain third parties from denying equal access to social security schemes operated by them or by others and from imposing unreasonable eligibility conditions.[20] The obligation to fulfil requires state parties to take positive measures to assist individuals and communities to enjoy the right to social security. It includes, *inter alia*, according sufficient recognition of this right within the national political and legal systems,

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15 *Ibid*., paras. 23-27.

16 *Ibid*., para. 29.

17 *Ibid*., paras. 32-39.

18 *See*, *Ibid*., footnote 3 for substantive provision concerning social security in CERD and CEDAW.

19 *Ibid*., para. 44.

20 *Ibid*., para. 45.

preferably by way of legislative implementation and by adopting a national social security strategy and plan of action to realise the right.[21] It is also important to ensure that the right to social security is recognised especially for marginalised and vulnerable individuals and groups.[22]

The Committee makes its best efforts to clarify the normative scope of the rights and obligations as enshrined in the ICECSR, and General Comment No. 19 concerning Article 9 of the Covenant exemplifies its concern in this regard.

2. Principle of non-discrimination in ESC rights

Article 2(1) of the ICESCR requires that states '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…'.[23] It is clear from the text that state parties to the Covenant are accorded a wide margin of discretion in the realisation of rights enshrined in the Covenant. Considering the diverse economic and social conditions among states, it is not surprising to find the adoption of

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21 *Ibid*., paras. 47-48.

22 *Ibid*., para. 59(b) as one of the core obligations incumbent on state parties.

23 Article 2(1) provides:

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

discretionary approach to the realisation of rights.[24] In light of the fact that the obligations under the ICESCR permit of progressive realisation, the failure to immediately realise such rights was therefore considered a legitimate excuse for non-compliance. However, this understanding is not always valid. It is understood that not all of the obligations are susceptible to progressive realisation.

This understanding can be proven by two points. First, General Comment No. 3 emphasises – albeit in the context of the construction of Article 2(1) – that certain obligations are of immediate effect.[25] In other words, there are certain minimum obligations that all states must fulfil in accordance with the Covenant. General Comment No. 3 expresses this requirement in terms of "minimum core obligations".[26] The requirement is now widely recognised and is a recurrent theme in the General Comments.[27]

Second, General Comment No. 3 emphasises the principle of non-discrimination in the field of ESC rights.[28] This principle is enshrined in Articles 2(2) and 3. General Comment No. 19 states that the observance of non-discrimination and equality are obligations of immediate effect

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24 In the context of the right to social security, *see*, CESCR, General Comment No. 19, *supra* note 6, para. 66.

25 CESCR, General Comment No. 3: The Nature of States Parties' Obligations, reprinted in U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008), para. 1. *See* also para. 5 for a list of provisions of immediate application in national legal system.

26 *Ibid*., para. 10.

27 See, CESCR, General Comment No. 19, *supra* note 6, paras. 59-61, as for the core obligations in the right to social security.

28 CESCR, General Comment No. 3, *supra* note 25, para. 5.

under Article 9.[29]

Although resource constraint necessarily affects realisation of rights in the Covenant, it does not – in the case of ESC rights – legitimise a discriminatory circumstance. Rather, it has been held that a measure to eliminate discrimination through legislation is an obligation of immediate nature. In this regard, General Comment No. 20 – concerning Article 2(2) – states that state obligations necessarily include positive measures to combat discrimination.[30] It must be noted that, by contrast with the position taken in Japanese court with respect to ESC rights, state discretion in the determination of socio-economic policy does not influence this obligation.

There is, however, one exception to this principle. During the drafting of the Optional Protocol to the ICESCR, many state representatives expressed their concern that individual complaints could interfere with national socio-economic policy. In order to assuage this concern, in the final draft of the Optional Protocol – Article 8(4) –, a reference was made to the necessity for preserving a certain national discretion and a requirement of reasonableness in relation to the proposed measure.

In light of the foregoing, it is intended to examine international and regional cases that involved a question of discrimination in the field of social security.

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29 CESCR, General Comment No. 19, *supra* note 6, para. 40.

30 CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art.2, para. 2 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/20 (2 July 2009), para. 12.

Ⅲ. International and regional cases

1. Preliminary Observations

It is worth noting that not all international human rights treaties embody ESC rights, much less a right to social security. Certain treaties provide the right in the context of ESC rights, such as the ICESCR (Article 9), the European Social Charter (Articles 12 and 13),[31] and the

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31 Articles 12 and 13 provide:

Article 12 – The right to social security

With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

1. to establish or maintain a system of social security;

2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;

3. to endeavour to raise progressively the system of social security to a higher level;

4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:

a) equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;

b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

Article 13 – The right to social and medical assistance

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and

San Salvador Protocol to the Inter-American Convention on Human Rights (Article 9).[32] Such instruments are not sufficient to protect individuals directly. ICESCR explicitly addresses ESC rights, but it was not until 2008 that individuals were permitted to pursue remedies through an individual complaint mechanism. There is a particular case which has been filed concerning the right to social security and it is still pending before the Committee.[33] The European Social Charter has a

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who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;

2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;

3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;

4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

32 Article 9 of the San Salvador Protocol provides:

1. Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents.

2. In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.

33 Communication No. 1/2013, filed against Spain. It concerns discrimination in access to non-contributory pension while in prison. http://www.ohchr.

collective complaint mechanism which aims at addressing general human rights situations, rather than individual human rights violations. Under the San Salvador Protocol, certain rights are excluded from the scope of judicial remedies grantable by the Inter-American Commission of Human Rights and Inter-American Court of Human Rights.[34] The right to social security falls within the category of rights excluded. Such instruments are not therefore effective to protect individuals in the international dimension, even though the right to social security is embodied in these conventions.

Instead, in many international and regional cases, the right to social security has been indirectly incorporated via other substantive rights. An example can be found in the application of the principles of non-discrimination and equality before the law which have been interpreted as necessarily including the right to social security. Indirect incorporation can be found in the jurisprudence of the Committee on Civil and Political Rights (CCPR Committee), as well as the European Court of Human Rights. In the jurisprudence of the Inter-American Court of Human

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org/EN/HRBodies/CESCR/Pages/PendingCases.aspx, last visited on 23 January 2016).

34 Article 19(6) of the Protocol provides:

> Any instance in which the rights established in paragraph a) of Article 8 [right to form and join trade unions: note by the author] and in Article 13 [right to education: note by the author] are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

Rights, the right to social security has been incorporated via the right to property (Article 21), rather than a general provision on ESC rights (Article 26). The incorporation of ESC rights under the auspices of the right to property can also be found in the jurisprudence of the European Court of Human Rights. It may be concluded that the right to social security has been protected indirectly, rather than directly, via substantive clauses in human rights treaties that do not themselves embody ESC rights. The relevant case-law will be examined in depth in the following subsections.

2. Cases before the CCPR Committee: equality before the law

The International Covenant on Civil and Political Rights (ICCPR) does not contain ESC rights; however, ESC rights have been incorporated into the jurisprudence of its monitoring body, CCPR Committee (Committee on Civil and Political Rights). Article 26 of the ICCPR provides equality before the law,[35] as distinct from the principle of non-discrimination, which is enshrined in Article 2(1).

The first ESC rights case brought before the CCPR Committee concerned different treatment based on sex in relation to the issue of

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35 Article 26 provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (emphasis added)

eligibility for unemployment benefits in the Netherlands.[36] When the applicant, Mrs. Broeks, applied for the benefit in February 1980, the prevailing Dutch law provided that the benefits could not be claimed by married women who were neither breadwinners nor permanently separated from their husbands.[37] Her application was rejected because she did not fulfil the legal requirements. She brought a case before the CCPR Committee, invoking Article 26 of the ICCPR. The Dutch government insisted that the case be rejected as the case involved the right to social security (Article 9 of the ICESCR), which did not fall within the ambit of Article 26 of the ICCPR.[38] The CCPR Committee, for its part, considered the case and expressed its views. According to it, the ICCPR still applies even if a particular subject-matter is referred to or covered in other international instruments – in this case, the ICESCR.[39] The CCPR Committee held that Article 26 of the ICCPR derived from the principle of equal protection of the law without discrimination, as contained in Article 7 of the Universal Declaration of Human Rights.[40] Article 26 is thus concerned with the obligations imposed on States in

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36 *F. H. Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984, 9 April 1987, U.N. Doc. CCPR/C/OP/2 at 209 (1990); *S.W. M. Broeks v. the Netherlands*, Communication No. 172/1984, 9 April 1987, U.N. Doc. CCPR/C/OP/2 at 196 (1990).

37 *Broeks v. the Netherlands*, *supra* note 36, para. 8.2.

38 *Ibid*., para. 4.1.

39 *Ibid*., para. 12.1.

40 *Ibid*., para. 12.3.

Article 7 of the Universal Declaration of Human Rights provides:

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

regard to their legislation and the application of law. The question before the CCPR Committee, therefore, was whether the legislation providing for social security violated the prohibition against discrimination contained in Article 26 of the ICCPR and the guarantee given therein to all persons regarding equal and effective protection against discrimination.[41] The CCPR Committee thus proceeded to consider whether the different treatment that the applicant faced constituted discrimination within the meaning of Article 26 of the ICCPR.[42] It found that the Dutch law at the material time put married women at a disadvantage compared with married man. The situation in question was not therefore reasonable, and the CCPR Committee found a violation of Article 26.[43]

As is shown by this case, the CCPR Committee incorporated an ESC related-right through Article 26 of the ICCPR. Since the *Broeks* case, the Committee has examined cases concerning social security regimes, putting special focus on the ground of discrimination. The cases variously concerned the status of common partnerships in the context of disability pensions,[44] pensions for retired soldiers,[45] health insurance,[46] and

41 *Ibid*., para. 12.5.

42 *Ibid*., para. 14.

43 *Ibid*., paras. 14-15.

44 *L. G. Danning v. The Netherlands*, 9 April 1989, Communication No. 180/1984, U.N. Doc. CCPR/C/OP/2 at 205 (1990).

45 *Ibrahima Gueye et al. v. France*, Communication No. 196/1985, 6 April 1989, U.N. Doc. CCPR/C/35/D/196/1985 (1989); *Doukoure v. France*, Communication No. 756/1997, 29 March 2000, U.N. Doc. CCPR/C/68/D/756/1997 (2000).

46 *Sprenger v. The Netherlands*, Communication No. 395/1990, 31 March 1992, U.N. Doc. CCPR/C/44/D/395/1990 (1992).

widowers' pensions.[47]

General Comment No. 18 coloured the stance of the CCPR Committee. According to it, Article 26 does not merely duplicate the guarantee already provided for in Article 2 but provides in itself an autonomous right. The drafting history of the ICCPR shows that Article 26 flows from Article 7 – as distinct from Article 2 – of the Universal Declaration of Human Rights. Article 26 is therefore concerned with the obligations of states parties in regard to their legislation. Thus, when legislation is adopted by a state party, it must comply with the requirement of Article 26 in that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for by the Covenant.[48] By contrast, Article 2(1) of the ICCPR applies to 'the rights recognized in the present Covenant'.

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47 *Dietmar Pauger v. Austria*, Communication No. 415/1990, 26 March 1992, U.N. Doc. CCPR/C/44/D/415/1990 at 122 (1992); *Dietmar Pauger v. Austria*, Communication No. 716/1996, 30 April 1999, U.N. Doc. CCPR/C/65/D/716/1996 (1999); *Cornelis Hoofdman v. the Netherlands*, Communication No. 602/1994, 25 November 1998, U.N. Doc. CCPR/C/64/D/602/1994 (1998); *Cecilia Derksen v. Netherlands*, Communication No. 976/2001, 2 April 2004, U.N. Doc. CCPR/C/80/D/976/2001 (2004).

48 CCPR, General Comment No. 18, para. 12, reprinted in U.N. Doc. HRI/GEN/I/Rev.7, pp. 146-148, at 148.

See also, Syméon Karagiannis, « Considération sur l'article 26 du Pacte des Nations Unies relatif aux droits civils et politiques », *Les droits de l'homme au seuil du troisième millénaire, Mélanges en homage à Pierre Limbert*, Bruylant, 2000, pp. 467-497; Christian Tomuschat, "The Human Rights Committee's Jurisprudence on Article 26 – A Pyrrhic Victory ?", in Nisuke Ando (ed.), *Towards Implementing Universal Human Rights, Festschrift for the Twenty-Fifth Anniversary of the Human Rights Committee*, Martinus Nijhoff Publishers, 2004, pp. 225-247.

Therefore, it is possible to argue – theoretically at least – that the scope of Article 26 is so broad that it potentially encompasses all the laws in states which are parties to the Covenant. It is on this basis that the CCPR Committee can deal with complaints regarding ESC rights, including social security.

Having regard to the hypothetically broad applicability of Article 26, the normative expansion of the scope of the article may not be a progressive development. In examining the cases before the CCPR Committee concerning ESC rights – including the right to social security –, it is possible to identify two theoretical and practical concerns. Article 2(1) of the ICESCR provides for progressive realisation of rights enshrined in the Covenant. From this point of view, it is claimed that states have a wide margin of discretion as to the measures taken. Such claim was also factored into consideration in the drafting process of the Optional Protocol to the ICESCR. Article 8(4) was introduced in order to avoid excessive and arbitrary interference in national economic and social policy-making.[49]

Another concern is whether the CCPR Committee has sufficient expertise to deal with matters brought before it, as it is not an organ

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49 Article 8(4) of the Optional Protocol provides:

> When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

cf., Bruce Porter, "The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins", *Nordic Journal of Human Rights* Vol. 27, No. 1, 2009, pp. 39-53.

designated to deal with socio-economic policy. This point was debated in the case of *Oulajin & Kaiss v. the Netherlands*.[50] The case concerned the issue of the eligibility of a child living abroad to child benefit. The applicant lived in the Netherlands, and he had several foster children in Morocco. He applied for child benefit for the foster children. The Dutch law provided that foster children living abroad were not entitled to such benefit; therefore, his application was rejected. The CCPR Committee found that a distinction between a foster child and a biological child was not incompatible with Article 26.[51] In its decision, the following statement was expressed in an individual opinion;

> Unless the distinctions made are manifestly discriminatory or arbitrary, it is not for the Committee to reevaluate the complex socio-economic data and substitute its judgment for that of the legislatures of States parties.[52]

In theory, Article 26 of the ICCPR has a different scope from Article 2(1), and the wide scope accorded to Article 26 enables the CCPR Committee to deal with ESC rights indirectly. The same logic can be seen in the jurisprudence of the European Court of Human Rights as will be shown below.

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50 *Oulajin & Kaiss v. The Netherlands*, Communications Nos. 406/1990 and 426/1990, 5 November 1992, U.N. Doc. CCPR/C/46/D/406/1990 and 426/1990 (1992).

51 *Ibid*., para. 7.4.

52 *Ibid*., Appendix (Individual opinion of Messrs. Kurt Herndl, Rein Müllerson, Birame N'Diaye and Waleed Sadi).

3. Cases before the European Court of Human Rights

The European Convention on Human Rights (ECHR) does not contain ESC rights, except for a freedom to form and join in a labour union (Article 11). In spite of the absence of ESC rights in the text, the jurisprudence of the European Court of Human Rights (ECtHR) shows incorporation of certain ESC rights into the ECHR. It is possible to identify many cases involving social security regimes. The process of incorporation has taken place in two ways: expansion of the normative scope of substantive rights in the Convention, and, together with such normative expansion, application of the principle of non-discrimination.

a) Procedural protection of ESC rights

The early cases involving social security issues were brought to the Court under Articles 6 and 8. The first cases concerned the applicability of Article 6 in public and/or administrative proceedings. In the cases of *Deumeland v. Germany* and *Feldbrugge v. the Netherlands*,[53] the applicants claimed that their rights under Article 6 had been breached (in *Deumeland*, the widow's supplementary pension was at issue whereas, in *Feldbrugge*, the applicant's right to sickness allowance had triggered the dispute). The central question in these cases was whether Article 6 was applicable to a dispute concerning social security. As Article 6(1) deals with the right of an individual to a fair trial "in the determination of his

53 *Feldbrugge v. the Netherlands*, 29 May 1986, Series A. 99; *Deumeland v. Germany*, 29 May 1986, Series A. 100.
cf., Ida Elisabeth Koch, *Human Rights as Indivisible Rights*, Martinus Nijhoff Publishers, 2009, p. 183.

civil rights and obligations or of any criminal charge against him" (emphasis added), issues concerning public law and/or administrative law seem to be outside its scope.

However, the ECtHR recognised the claim, invoking the autonomous nature of the words in the Convention. It held that the words employed in the Convention were not to be interpreted in the same way as in the national laws of the states of the contracting parties; rather they are to be understood as having independent meanings and should be interpreted as they stand.[54] It is by this interpretation that cases involving social security were brought within the scope of Article 6(1). The approach adopted in these cases was also applied to ligation concerning pensions of public servants.[55]

It should be noted, however, that the incorporation of ESC rights via Article 6(1) does not mean *de facto* legal recognition for such rights. Expansion of the scope of Article 6(1) constitutes a procedural protection for certain ESC rights, including rights touching on social security. In this sense, the protection of ESC rights, occurring through this process, remains only partial.

b) principle of non-discrimination

By contrast with Article 26 of the ICCPR, Article 14 of the Convention does not create an autonomous right.[56] It is therefore

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54 cf., *König v. Germany*, 28 June 1978, Series A. 27.

55 cf., *Francesco Lombardo v. Italy*, 26 November 1992, Series A. 249-B.

56 Article 14 provides:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or

necessary to invoke other substantive rights in order to plead cases in the context of discrimination. In practice, entitlements under social security schemes were considered to fall either under the protection of private and family life (Article 8), or the right to property (Article 1 of the Protocol 1). In that context, the principle of non-discrimination became applicable in the jurisprudence of the Court. The incorporation of a right to social security via the principle of non-discrimination occurred in the 1990s. The first, and the most important, case was *Gaygusuz v. Austria*, which involved the payment of benefits based on contributory payments from wages.[57] In this case, the relationship between the payment and benefit was clear. Therefore, in circumstances where the applicant was refused the benefits of unemployment insurance, on the sole grounds of his nationality, such refusal was considered to be a violation of the Convention (Article 14 together with Article 1 of the Protocol 1). In contrast, the case of *Koua Poirrez v. France* involved a disability benefit for the non-French foster children of the applicant.[58] The judgment was not clear as to the applicability of a right to property to the non-contributory scheme, but it was declared that the impugned French law was in violation of Article 14 together with Article 1 of the Protocol 1.

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social origin, association with a national minority, property, birth or other status. (emphasis added)

Protocol 12 introduced an autonomous right of equality before the law, similar to Article 26 of the ICCPR.

57 *Gaygusuz v. Austria*, 16 September 1996, Application No. 17371/90, *Reports of Judgments and Decisions* 1996-IV.

58 *Koua Poirrez v. France*, 30 September 2003, Application No. 40892/98, *Reports of Judgments and Decisions* 2003-X.

In the case of *Stec and others v. the United Kingdom*, the issue was the difference in the retirement age between men and women.[59] In the proceedings before the Court, the UK government filed a preliminary objection, claiming that non-contributive benefit did not fall within the scope of any of the substantive rights of the Convention. In response, the Court found, in its decision as to admissibility, that, once a certain national scheme was established for the protection of rights enshrined in the Convention, that scheme fell within the scope of the Convention.[60] It was therefore possible for the Court to adjudge a national measure, even in the sphere of social security. However, it should be noted, at the same time, that the Convention itself is not prescriptive as to the normative content of "social security". Therefore, the main point of discussion may be in the application of the principle of non-discrimination.

On the basis of the above-mentioned framework, the ECtHR have decided cases concerning social security. Recent cases show a strict approach to the principle of non-discrimination, especially in cases of different treatment for non-nationals with respect to some social benefits. The cases have concerned refusal of child benefit for immigrants having only non-permanent status,[61] refusal of maternity benefit,[62] consideration of periods of work in the calculation of the amount of old-age pension,[63]

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59 *Stec and others v. the United Kingdom* [GC], 12 April 2006, *Reports of Judgments and Decisions* 2006-VI.

60 *Stec and others v. the United Kingdom* (dec.)[GC], 6 July 2005, paras. 40, *Reports of Decisions and Judgments* 2005-X.

The same position was also illustrated in the judgement on the merit, *Stec and others v. the United Kingdom*, *supra* note 59, para. 53.

61 *Okpisz v. Germany*, 25 October 2005, Application No. 59140/00.

62 *Weller v. Hungary*, 31 March 2009, Application No. 44399/05.

63 *Andrejeva v. Latvia*, 18 February 2009, Application No. 55707/00.

and refusal of family benefit.[64] In all of the cases, the circumstances had a common feature: the applicants were refused social security benefits because of their nationality (non-nationals, refugees, permanent foreign residents). In other words, the question at issue was the legality of the different treatment accorded to such category of persons.

In these cases, the ECtHR found a violation of the Convention, from the perspective of the principle of non-discrimination. On closer examination, it is possible to discern important factors applicable to cases of discrimination. First, the Court takes an orthodox approach in making a finding of factual discrimination: it considers whether certain different treatments were accorded to individuals or groups in similar situations. In most of the cases, the Court recognises that the applicants were placed in similar situations, but treated differently. Secondly, based on such findings, a test of proportionality between objectives and measures in question is applied. In this regard, the Court imposes a heavy burden of proof where nationality is invoked as a justification for different treatment. Thirdly, in the field of ESC rights, there is no substantial difference between the standard of review that applies generally and that which determines cases of discrimination.

In the jurisprudence of the ECtHR, certain remarks have been made in favour of preservation of national policy discretion in the context of ESC rights. *Stec* is an example of a case where findings of non-violation of the principle of non-discrimination were partly due to the exercise of national discretion. However, in *Dhahbi*, the Court, although partly recognising the budgetary burden, nonetheless, found a violation of the

64 *Fawsie v. Greece*, 28 October 2010, Application No. 40080/07; *Dhahbi v. Italy*, 8 April 2014, Application No. 17120/09.

measure in question.

4. Cases before the Inter-American Court of Human Rights

As illustrated in subsection 1. above, the San Salvador Protocol to the Inter-American Convention on Human Rights stipulates the right to social security, but the right is not susceptible to judicial review before the Inter-American Court of Human Rights. The Inter-American Convention itself incorporates general economic, social and cultural rights in Article 26.[65] It is clear from the title "Progressive Development", that the rights and obligations contained in Article 26 are not considered to be of an immediate nature. In one case involving entitlement to social security, another substantive right was invoked to buttress the applicant's claim.

In the case of *"Five Pensioners" v. Peru*,[66] the Inter-American Court of Human Rights, in its interpretation of the concept of "property", found that the case fell within the scope of Article 21 (Right to property). The case concerned a unilateral and retroactive reduction in payments of old-age pension for persons who worked in public enterprises. The Court interpreted the word "property" in a broad sense, and justified its

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65 Article 26 provides:

> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

66 *"Five Pensioners" v. Peru*, Judgment, 28 February 2003, Series C. No. 98.

interpretation by invoking cases from the ECtHR.[67] In so doing, the Court found the Peruvian government failed to exhaust procedural obligations incumbent on it under the Convention; thereby it found a violation of Article 21.

It is interesting to note that the allegation based on Article 26 was not taken up in cases before the Inter-American Court of Human Rights. This tactic was also adopted in another case, *Acevedo Buendía et al. v. Peru*.[68] The circumstance of the case was very similar to that in *"Five Pensioners" v. Peru*. The Court found a violation based on Articles 21 and 25 (judicial protection of rights). However, the Court found that it is *situations* which lead to violations of rights; Article 26 concerns only *measures* taken by state parties (and measures were not the subject-matter of the dispute in this case).[69]

5. Brief Summary

In international and regional cases, indirect ways of protecting ESC rights play an important role in safeguarding the right to social security. Substantive rights such as the right to property, and the right to protection of family life are the mechanisms by which ESC rights are incorporated into international law. The principles of non-discrimination and equality before the law play a pivotal role in cases involving social security.

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67 *Ibid*., para. 103.

68 *Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Peru*, Judgment of 1 July 2009, Series C. No. 189.

69 *Ibid*., paras. 100-101.

Two issues merit attention. The first concerns a consideration of the nature of ESC rights – the fact that such rights are brought into existence by way of progressive realisation. In an indirect approach to vindication of ESC rights, this aspect is not greatly emphasised as can be seen in the context of national adjudication. Rather, in the context of discrimination, the nature of the rights in question does not affect the criteria for considering the justification of the impugned measures. Secondly, in the discussion of discrimination against non-nationals, there is an assumption that a strong justification is required in the case of discrimination based on nationality. This assumption can be found in human rights jurisprudence, especially, that of the ECtHR.

Ⅳ. National cases

1. Japanese case: *X v. Oita City* (Japanese Supreme Court, 18 July 2014)

The Japanese case considered here concerned the applicability of Social Assistance Law to permanent foreign residents.[70] The plaintiff, Ms. X, was a women with Chinese nationality, who had permanent resident status. She was born in Japan in 1932 and had lived in Japan all her life. Her husband had a certain amount of assets and they lived on the income from the assets. He developed dementia and was subsequently hospitalised. Her brother-in-law deprived her of the income by abusive behaviour; she, thus, lost the means for sustaining herself. She applied for social assistance, but her application was rejected on the grounds of her

70 *See*, Watanabe, *UNB L.J., supra* note 5, p. 264 as a background of the case.

nationality, and the fact that she and her husband had a large amount of money in their bank account. She, therefore, filed a case before the court for revocation of the decision.

The Japanese social security regime is based on Article 25 of the Constitution.[71] The social assistance system is non-contributive in nature, by contrast with other social programmes such as medical coverage and labour-related insurance. Before the present Social Assistance Law was promulgated in 1950, Japanese public authorities considered the legal foundation of public assistance to be permissive rather than mandatory powers. Legal modification of the status of social assistance in 1950 was therefore understood as a recognition of the right to receive social assistance, a right which was grounded in Article 25 of the Constitution.

Article 2 of the Social Assistance Law explicitly limits access to the

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71 Constitution of Japan, promulgated on 3 November 1946. Article 25 states:

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

English translation of Japanese legal texts in this article are borrowed from the website: Japanese Law Translation, at http://www.japaneselawtranslation.go.jp/?re=02 (last visited on 21 February 2016). The website is run by Japanese Ministry of Justice, but the translation in the website is not an official one.

Social Assistance Law, Law No. 144 of 1950. Article 1 of the Law states this point as follows:

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

social assistance system to persons of Japanese nationality.[72] Nonetheless, in 1954, the Ministry of Health and Welfare (now Ministry of Health, Labour and Welfare) issued an intra-ministry instruction to the effect that foreign nationals were eligible for public assistance to the same extent as Japanese nationals.[73] The instruction (administrative measure) was not issued pursuant to a provision of the Social Assistance Law. Therefore, as a result, foreign nationals do not possess the right to claim and receive social assistance. The entitlements falling within the scope of the instruction are substantially limited to permanent residents. Statistics show that some 3% of social assistance recipients are foreign nationals.

The main issue in the case was therefore whether permanent foreign residents are legally entitled to receive social assistance.

The district court, 1st level of the court, rejected the plaintiff's claim and relied upon a textual interpretation of the Social Assistance Law. It found that the Law was clear in the exclusion of non-Japanese nationals. It added that the legal exclusion of permanent residents from entitlement to social assistance was compatible with Article 25 of the Constitution, as the government had a wide discretion as to the extent of protection to be granted under the Law. The plaintiff appealed. The High Court – the

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72 Article 2 of the Law provides:

> All citizens may receive public assistance under this Act (hereinafter referred to as "public assistance") in a nondiscriminatory and equal manner as long as they satisfy the requirements prescribed by this Act.

73 This is partly because of the status of non-Japanese nationals at that time. In 1952, persons from Japanese ex-colonies lost their Japanese nationality. It was necessary to protect former Japanese nationals living in Japan under the social assistance system, as immediate exclusion would have adversely affected them.

appeal court – allowed the appeal and admitted the plaintiff's claim. The High Court ruled that, notwithstanding the text of the Law, a certain category of foreign nationals had a 'legal interest' to claim for social assistance. The court relied upon a well-established practice of showing benevolence to non-Japanese nationals by the adoptions of appropriate administrative measures, and ruled that permanent residents were entitled to *de facto* protection.

The city government appealed. The Supreme Court declared that the High Court had erred in its interpretation of law and declared its judgment to be void. According to the Supreme Court, Articles 1 and 2 of the Social Assistance Law expressly states that only Japanese nationals are eligible for social assistance. Therefore, even though non-Japanese nationals had received social assistance via administrative measure, this did not mean that they were legally protected; they were merely entitled to be beneficiaries. In summary, the Supreme Court officially validated the legal exclusion of permanent foreign residents from Social Assistance Law.

The issues in this case can be examined in two ways: the status of the right to social security in the Japanese legal system, and the applicability of the principle of non-discrimination to ESC rights. The next subsections will deal with these issues, drawing a comparison with international and regional jurisprudence.

a) Status of right to social security in the Japanese Legal system

As shown above, the right to social security is enshrined in Article 25 of the Japanese Constitution, under the heading "right to subsistence". According to Japanese constitutional jurisprudence, the right embodied in Article 25 is not considered to be a human right but rather the

expression of a policy orientation to be realised through legislation.[74] Therefore, a broad margin of discretion is accorded to the government in the area of socio-economic policy, and it is not possible to claim certain entitlements based on Article 25.[75] Reflecting the trend in the jurisprudence, the least strict approach to interpretation was taken in the proceedings concerning the right to social security. In other words, the right to social security was declared not susceptible to judicial review before Japanese courts, a position similar to the attitude defined by Article 2(1) of the ICESCR. There have been Japanese cases concerning the right to social security in which the provisions of the ICESCR were invoked together with the Constitution. Japanese courts have, however, rejected such claims, holding that the ICESCR merely declares its policy orientation and does not confer on individuals claim-rights.[76]

This approach has some theoretical inconsistencies, having regard to prevailing international human rights standards, especially with respect to ESC rights. First, even taking cognisance of the nature of Article 25 of the Constitution, this does not preclude judicial review before the courts. The CESCR acknowledges this point in its General Comment No. 9.[77] According to this, judicial remedies in the case of

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74 Hiroshi Oda, *Japanese Law*, 3rd edition, Oxford University Press, 2011, p. 90.

75 *Ibid.*

76 *See*, Watanabe, *UNB L.J., supra* note 5, p. 250 as a general overview of the Japanese situation.

77 CESCR, General comment No. 9: The domestic application of the Covenant, reprinted in U.N. Doc, HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008), p. 47.

violation of rights should be available even in the case of ESC rights.[78] It should therefore be possible for courts to review measures enacted by legislatures for compatibility with obligations flowing from the Constitution and/or the ICESCR. Second, as discussed above in Section Ⅱ, the principle of non-discrimination plays an important role in the realisation of ESC rights. In addition, right to freedom from discrimination is not subject to progressive realisation and policy orientations. It is surely in this perspective that the right to social security is to be examined both with respect to international and national cases.

b) Principle of non-discrimination in the context of ESC rights

The Japanese Constitution enunciates the principle of non-discrimination in Article 14.[79] Reflecting the wide discretion accorded under Article 25, in Japanese jurisprudence, the least strict standard is also employed in the determination of discrimination in the field of ESC rights. This policy is seen in the district court judgment in the present

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78 *Ibid*., paras. 7, 9-10.
A necessity of remedies in case of violations of the right to social security is also emphasised in General Comment No. 19, *supra* note 6, para. 77.

79 Japanese Constitution, *supra* note 71. Article 14 provides:
All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.
Peers and peerage shall not be recognized.
No privilege shall accompany any award of honour, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

case. The court held that the legal exclusion of permanent residents from social assistance was compatible with Article 25 of the Constitution, as the government had a wide discretion as to the extent of protection to grant under Social Assistance Law.

This reasoning does not apply in international and regional cases in instances of discrimination. As shown in Section Ⅲ, international and regional cases do not make these types of distinctions even in cases concerning discrimination in the field of ESC rights. For example, in Europe, it is assumed that different treatment based only on nationality amounts to 'discrimination' unless a stringent justification is shown.[80] As mentioned above, Article 2(2) of the ICESCR prescribes a principle of non-discrimination, including on the ground of "nationality". In its General Comment No. 20, the CESCR affirms there should be no discrimination based on nationality.[81] This approach is consistent with that applied in other contexts.

The CESCR, in its General Comment No. 19, specifically addresses the right to equality in the context of discrimination and as it applies to the right to social security. The General Comment states that the social security regime must be accessible to all persons without discrimination,[82] and that it is one of the core obligations of states "to ensure the right of access to social security systems or schemes on a non-discriminatory

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80 For a case involving discrimination based on nationality in the field of non-contributive social benefit, *see, Koua Poirrez v. France, supra* note 58.

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

82 CESCR, General Comment No. 19, *supra* note 6, para 23.

basis".[83] It also states in the context of the prohibition of discrimination based on nationality that[84]

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

Yet, notwithstanding this clear direction, the Japanese government and the Japanese legal system continue to deny social assistance to foreign nationals on the basis that the country of one's nationality should be responsible for his/her social security. While this contention has its supporters, it must be questioned whether it is really fair to apply such an arbitrary distinction to justify the exclusion of a certain category of foreign nationals from access to basic and non-contributory social assistance programmes, especially in the context of the case under discussion. As mentioned, Ms. X holds Chinese nationality. However, her life is not in any way intertwined with China; nor does she have any substantive connections with China. She has lived in Japan all her life, and, except for her nationality, her life is not different from that of ordinary Japanese citizens. Put simply, her status is very close to that of Japanese citizens. Having regard to prevailing substantive protection for non-nationals under administrative measures, she could have expected to receive social assistance in the case of contingencies. In the present

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83 *Ibid*., para. 59(a).

84 *Ibid*., para 37. (emphasis added)

circumstances, she is excluded from legal protection, as she is not a Japanese national. Yet, the judges addressed the matter only in the context of Article 25 of the Constitution and disregarded the fundamental principle of non-discrimination and its applicability to the field of ESC rights. Such a judicial attitude to claims for access to social assistance programmes must be reconsidered in light of General Comments Nos. 9 and 20 to the ICESCR.

2. Constitutional Court of South Africa: *Khosa* case (Constitutional Court of South Africa, 4 March 2004)

As a comparator for the Japanese case, the case before the Constitutional Court of South Africa is an insightful one, because of the innovative approaches taken to ESC rights. The *Khosa* case[85] involved an exclusion of permanent residents from social benefits, similar to the case in Japan. In this case, the Constitutional Court of South Africa declared as unconstitutional the impugned legal provisions of the social security legislation.

The 1992 Social Assistance Act excluded non-citizens from social grants for the aged, child-support grants, and care-dependency grants.[86] The social grants in question were of a non-contributive nature. The applicants, Mozambican nationals with permanent resident status in South Africa, challenged the constitutionality of the relevant provisions

85 *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*, (hereinafter "Khosa case") [2004] ZACC 11 (South African Constitutional Court, 4 March 2004).

86 *Ibid*., paras. 1-11. The eligibility in question reads: "South African citizens"

of the Act, relying upon section 27 of the Constitution of South Africa.[87]

The majority found the legislation incompatible with the Constitution. The court held that, whereas some measure of differentiation between different classes of non-citizens would be reasonable pursuant to Section 27(2), the statutory exclusion of all permanent residents was not justifiable, even taking account of financial considerations.[88] The majority questioned the reasonableness of citizenship as a criterion of differentiation, and concluded that permanent residents – in contradistinction with temporary and illegal residents – were in the same position as citizens.[89] Although the majority recognised the legitimacy of concerns about the cost to the state of expanding social welfare entitlements, the judgment emphasised the vulnerability of non-citizens and the impact of their exclusion from social security. Exclusion from social security based on nationality was considered to have a strong stigmatising effect,[90] and the consequence of total denial of the right in

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87 Section 27 of the Constitution (Health care, food, water and social security) provides:

(1) Everyone has the right to have access to

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

88 Saul et al, *supra* note 9, p. 670.

89 Khosa case, *supra* note 85, para. 59.

90 *Ibid*., para. 74.

question was described as grave.[91] The majority therefore found that "the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance does not constitute a reasonable legislative measure as contemplated by section 27 (2) of the Constitution".[92] The majority found a solution to the problem by "reading in" the words "permanent residents" in the provisions in question.[93]

The dissent, however, cast serious doubt on the reasoning of the majority. It relied upon the objection that social grants entail financial burdens, as well as the possibility of foreign residents acquiring South African citizenship. It pointed out that the South African Citizenship Act allows for eligibility for citizenship after a certain period of time; therefore, the exclusion in question was neither absolute nor permanent.[94] In addition, considering resource restraints and the increasing cost of social security, the dissent insisted that it was justifiable to limit the scope of social security to only "citizens", as the government had an obligation to give priority to their needs.[95] Based on these arguments, the dissent claimed that the court should not interfere with decisions on socio-economic policy, which should be left to policy makers.[96]

3. Brief summary

The debate between the majority and the dissent in the *Khosa* case

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91 *Ibid.*, paras. 76-77.
92 *Ibid.*, para. 82.
93 *Ibid.*, para. 89.
94 *Ibid.*, paras. 115-116.
95 *Ibid.*, para. 120.
96 *Ibid.*, paras. 127-128.

illustrates fundamental questions about the nature and scope of ESC rights: justiciability, state obligations, and legitimate distinction. They are precisely the same questions that arose in the discussion about ESC rights in international human rights law. A precise normative discussion as to the relationship between resource constraints and non-discrimination is not yet found in international fora, even in the reporting procedures of the CESCR;[97] therefore, the *Khosa* case is helpful as a guidance in this field of discussion.

In comparison with the Japanese case, it may be said that the *Khosa* case examined in greater detail the *de facto* status of permanent residents and the impact of their statutory exclusion from welfare entitlements. Such considerations do not seem to have impinged on the court's reasoning in the Japanese case; greater consciousness of such relevant factors may have led to a more satisfactory outcome.

V. Conclusion

The author attempted to illustrate the existence of a *status quo* with respect to the right to social security in international human rights law. Despite the progressive manner in which this right is realised, it is possible to say that it has certainly been incorporated into the international human rights regime, albeit by different methods of incorporation. In the process of incorporation, the principle of non-discrimination has played an important role, especially in indirect

97 Saul et al, *supra* note, 9, pp. 655-658. This issue is more discussed in the CCPR Committee.

protection of the right, particularly especially in the ICCPR and the ECHR.

The Japanese case was chosen to analyse, from an international perspective, the theoretical issues arising in the interpretation of the right to social security. The case concerned the application of social assistance law to permanent residents. From the analysis of the case, in the author's view, three points merit attention. First, not all foreign nationals are to be treated in the same manner. In the present case in particular, the plaintiff did have Chinese nationality, but she had no substantive connection with her country of nationality. Rather, she had a strong connection with Japan. In such a circumstance, it is necessary to reconsider the legal justifiability of the present social assistance system that places permanent resident foreigners outside the protection of the law. This viewpoint was also addressed in the *Khosa* case.

Second, even if the present treatment may be justifiable, it should be considered in light of the principle of non-discrimination, especially discrimination based on nationality. As we have seen in the cases before the CCPR committee and the ECtHR, there has been a discernable shift to expanding the applicability of the principle of non-discrimination even to national measures on social security. In the author's view, the Japanese case took an excessively formalistic approach in exercising its adjudicative function; therefore, it is the Japanese case which should be criticised.

Lastly, even though it is possible for a court to judge a question of social security through the lens of discrimination – as in the *Khosa* case – it is necessary to admit several perplexing problems. This issue is also partly shown also by the CCPR Committee case of *Oulajin & Kaiss v. the Netherlands*. The issue is not a new problem in constitutional litigation; it

has arisen in countries such as Japan and the US (where it is particularly prevalent). However, international cases create the possibility of the development of international human rights standards for limiting the discretion of states, even in the sphere of national policy, such as social security.