Globalization of Domestic Legislation in Japan: Beyond "Reception of Law" and Self-Executing Treaty

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Contents

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I. Introduction: Three types of “globalization of law”

No legal system is free from the influence of globalization. As for Japanese law, its modern history started by the reception of European continental legal system in the late 19th Century. Just after the end of the feudal “Edo” government the new “Meiji” government decided to introduce the modern legal system from abroad[1]. As a result of much heated debate and political struggle, the German legal system was received as the “mother law” in Japan. During the Meiji era (1868-1912), all basic legislations based on German law were enacted, e.g., the Constitution in 1889, the Civil Code in 1896, and the Penal Code which replaced the old Penal Code in 1911. It was a typical “reception of law”[2] and could be deemed as the most traditional style of “globalization of law.”

Under the concept of “reception of law”, “globalization” could bring two meanings. First, at the stage of legislation a child legal system includes basic Codes e.g., the Civil Code, the Penal Code, or Constitution, shall be enacted following a mother law. Of course, if mother law is a case law, a child legal system shall accept mother case law as a whole instead of enactment of basic Codes. Here, a child legal system succeeds fundamental features, concepts, and institutions of mother law. Secondly, at the stage of interpretation, lawyers use the mother law as *de facto* source of law for interpreting a child law. For example, if there is no definition of the concept “A” in a child law, interpreters are able and expected to follow the definition of concept “A” in the mother law. In this paper, I will examine this type of “globalization of law” in Section II.

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1) For understanding Japanese legal system in English, see generally, Carle E. Goodman, “The Rule of Law in Japan: A Comparative Analysis” (Kluwer Law International, 2003) and Hiroshi Oda, “Japanese Law”, Third Ed. (Oxford University Press, 2009).
For general reference of the Constitution of Japan in Japanese, Nobuyoshi Ashibe and Kazuyuki Takahashi, “Kenpo” 6th ed. (Iwanami Shoten, 2015) , and Yasuo Hasebe, “Constitution” 5th ed. (Shinseisha,2011). For general reference of the International Law, Takane Sugihara, “Gendai Kokusai Ho Kogi” 5th ed. (Yuhikaku, 2012).

2) For understanding “reception of law”, see Yoshiaki Sanada, “Hogaku Nyumon” (Chuo University Press, 1997).

The second type of "globalization of law" came from international law, especially international treaties. Although all sovereign states have the authority to conclude treaties, once a treaty is concluded, it bounds the party state and its legal system. Therefore, some local law or legislations are bound by or are under the influence of international law. For example, international treaties on copyrights including "The Berne Convention for the Protection of Literary and Artistic Works" and "The World Intellectual Property Organization Copyright Treaty" and others bound party states. Thus, each party state must establish its local legislation on copyright in line with these treaties.

Another example is international treaties on human rights. Different from copyright treaties, these treaties usually do not require establishing of specific provisions in its local law for the party state government, but ask for the local law to be enforced consistently with the treaties to the government and courts of each party state. If a court in party state find any inconsistency between any local law and the treaty, the court should change the interpretation of the local law for fitting the treaty or declare invalidity of the local law, if the court is authorized under the Constitution of the state. After World War II, the international community has developed this type of "globalization of law" mainly in the field of human rights protection. In this paper, I will show this type of "globalization of law" in Section III.

Thirdly, as we are now in the "global economy" era, we are able to see, and have to see other kinds of "globalization of law" or global impacts on the local legal system which is under development.

Today, each legal system is influenced not only from "mother law" but from many other norms including law or custom, e.g., law of neighbor jurisdiction, international law, international rules of arbitration, or business customs used in the "global market." Under the traditional theory of law, law of other jurisdictions has no meaning to interpret a local law except "conflict of law" issues. On the other hand, international treaties have binding power beyond the influential power

to the party state. But, along with expansion of the global economy, laws of other jurisdictions are developing strong influences on the interpretation, legislation or enforcement of local law; and courts tend to use international law or treaties as a rule to show the general principle of law. In this case, courts avoid to declare the inconsistency between local law and the international law but to lead their interpretation of the Constitution or important statues of the nation.

Law academics have started to research on the meaning of the third kind of "globalization of law." For example, the Science Council of Japan which is "the representative organization of Japanese scientist community ranging over all fields of sciences subsuming humanities, social sciences, life sciences, natural sciences, and engineering",[3] established a sub-committee of "Globalization and Law" affiliated to the Law Committee in 2005. In line with this approach, the author tries to describe the current situation of global impacts on Japanese law focusing on cases and legislations related to human rights as well as the Constitution in Section IV and V of this paper.

Finally, I will conclude that we are at the starting point of globalization of local law on human rights in Section VI.

II. Traditional Example of "Globalization of Law" in the Supreme Court Decision

As mentioned above, Japan introduced continental law at the beginning of its modernization. In addition, after WWII, Anglo-American law has been implanted on the basis of civil law. For example, although the Penal Code has been survived, German styled inquisitorial system in the criminal procedure has been replaced by American styled adversarial one. Old Meiji Constitution (officially, The Constitution of the Great Empire of Japan), which was strongly influenced by the Constitution of Preußen of 1850, has been replaced by the Constitution of

3) http://www.scj.go.jp/en/scj/index.html

Japan. The Constitution of Japan includes a complexed feature of legal traditions, but some parts including Chapter 6 (Judiciary) are truly under the influence of the U.S Constitution and its tradition.

However, as mentioned above, since Anglo-American law has been implanted "on" the civil law or continental tradition of law, many issues of interpretation have arisen just after the new "reception of law."

On July 8, 1948, the Supreme Court of Japan delivered the opinion in which the Court explained the relationship between the judicial power and the constitutional review power. The issue was whether Article 81 of the Constitution[4] gives special constitutional review power to the Supreme Court of Japan or not. The Supreme Court as itself answered negative. The Court said: "Today, it is generally accepted that the constitutional review power is provided by Article 81 of the Constitution. But, based on deeper analysis, if there would not be a provision like that, the constitutional review power could be clearly derived from the supreme law clause of Article 98, Article 76, or the judges' obligation to respect and uphold the Constitution in Article 98. Although the U.S. Constitution does not include any counterpart provision to the Article 81 of the Constitution of Japan, many [U.S.] cases following *Marbury* v. *Madison* (1803) have interpreted and established the constitutional review power based on the supreme law clause and judges' obligation to respect and uphold the Constitution. Article 81 of the Constitution of Japan is remarkable because it expressly established the constitutional review power which has been established by the interpretation of the U.S. Constitution."[5]

In this opinion, the Supreme Court used foreign law to interpret the Constitution of Japan. It is a typical example of how the traditional concept of "globalization of law" i.e. "reception of law" works. The Court interpreted that, at least as far as judicial power goes, the U.S. Constitution is the mother law of the Japanese

4) English translation of Japanese statutes and the Constitution are prepared by the Government of Japan through its Ministry of Justice at http://www.japaneselawtranslation.go.jp/ .

5) The Supreme Court, Grand Bench Decision on 1948 (Re) 189, July 8, 1948, Keishu Vol.2, No.8, at 801. Translated into English by the author.

constitutional provisions. It concluded that the constitutional review power of judicial courts under the Constitution of Japan is truly the same power as the ones under the U.S. Constitution.

Of course, we have to remind ourselves that the case was delivered in 1948. It was during the occupation and just two years after the proclamation of the Constitution. The Court paid much attention to the influence of U.S. law as a mother law. Actually, in another decision in 1952[6], the Court delivered a very similar answer about the power and jurisdiction of judicial courts without any mention of the U.S. law. Generally speaking, now, it is not usual that courts explicitly use the specific provision or case law of foreign jurisdiction as the "mother law" for interpreting a specific provision of Japanese statues, because courts already have enough of its own cases in most fields of law. In sum, there is no need to mention mother law anymore. But, it also means that courts and legislations are not free from "mother law" even now.

In this section, we saw the typical example of the traditional style of "globalization of law". Foreign law as a mother law could have strong influences on Japanese law in nature. But, the ripeness of child law system would hind explicit mention to the "mother law" i.e. "globalization of law." In contrary, we can find an explicit figure of "globalization of law" in the next section.

6) The Supreme Court, Grand Bench Decision on 1952 (Ma) 23, October 8, 1952, Minshu Vol.6, No.9 at 783. Translated version of the case delivered by the Supreme Court at http://www.courts.go.jp/app/hanrei_en/detail?id=4

III. Second type of "Globalization of Law": Local law bound by International Law and Treaties

The second type of "globalization of law" comes from international law or treaties. In its capacity of a sovereign state, each state can conclude treaties and follow international law, that is to say it can limit its legislation power within the boundary of the treaties. Doing this, each state incorporates global values behind the treaties or international law in its local legal system.

Usually, international treaties or law are divided into two categories, that are (1) self-executing ones, and (2) non self-executing ones. This classification originally came from the U.S. case law[7]. Usually, a self-executing treaty is defined as a treaty that becomes judicially enforceable upon ratification. It means that if a state ratifies following its official procedure, the treaty shall be the legal binding power without any additional procedure and shall be enforceable by the court of the state. On the other hand, a non self-executing treaty needs additional procedures, which is usually a domestic legislation implementing the treaty, for enforcement. Of course, since the distinction between self-executing and non self-executing is difficult, courts shall be in charge of the matter in the end. Usually, however, the national legislature has a priority to decide whether a treaty is self-executing or not. If it decides a treaty is non self-executing, it has to establish a new legislation for enforcing the treaty in its jurisdiction. In this section, I will examine how a self-executive treaty works in the field of human rights through a case study.

1. Tokyo High Court Decision on February 3, 1993[8]

This was the first case that the judicial court in Japan applied an international treaty to a concrete case directly.

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7) See, Foster v. Neilson, 27 U.S. 253 (1829).

8) Tokyo High Court Decision, February 3, 1993, Tokyo Koto Saibansho (Keiji) Hankety Jiho, Vol.44, No.1-13 at 11.

This was a criminal case in which the defendant was not able to understand the Japanese language. At the trial court, the Yokohama District Court appointed an interpreter for him under Article 175 of the Criminal Procedure Act that read, “When the court has a person who is not proficient in the national language to make a statement, it shall have an interpreter interpret it.” After the trial decision that was found guilty, the trial court ordered to the defendant to pay the interpreter’s fee under Article 181(1) of the Act “When the court renders punishment, it shall have the accused bear all or part of the court costs; provided, however, that this shall not apply when it is clear that the accused cannot afford the court costs because of indigence.”

The defendant appealed and argued that the order to pay the interpreter’s fee violates Article 14, 3(f) of the International Covenant on Civil and Political Rights (Article 14, 3 “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:” (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court”).

The High court decided in favor of the defendant based on three reasons. First, the International Covenant on Civil and Political Rights is a self-executing treaty and the right of the assistance of an interpreter shall have the statutory basis on the treaty. It is different from the existing interpreter system provided under the Article 175 of the Criminal Procedure Act. Secondly, the right of the assistance of an interpreter is, different from the right to counsel, a right without exception. Thirdly, the Covenant uses the word “free.” “Free” is different from “public expense" defined in Article 37 (2) of the Constitution. “Public expense” permits a claim for compensation but “free” does not permit it. Forth, a concept of “free assistance” rejects any conditions including the defendants’ economic condition.

In summary, the High court found that the court could not order the payment of the interpreter’s fee to the defendant, therefore quashing the trial court’s order.

As mentioned above, this decision was the first case that applied the International

Covenant on Civil and Political Rights directly. However, the reasoning of the case was difficult to understand. The High court did not declare the Article of 175 of the Criminal Procedure Act in this decision. Instead, the court interpreted that the Article cannot be applied to a person who cannot understand or speak Japanese. That is to say, if the court would apply Article 175 of the Criminal Procedure Act to the defendant in this case, it would be a violation of the International Covenant on Civil and Political Rights. Therefore, although the Covenant seemingly did not apply to the case, it did.

2. Sapporo District Court Decision on March 27, 1997 (Nibutani Dam Decision) [9)]

The plaintiffs were Ainu people who were a minority as defined in Article 27 of the International Covenant on Civil and Political Rights. They were the owners or heirs of owners of land subject to administrative confiscation of land ownership rights and orders to vacate and surrender in pursuit of a dam construction project (Nibutani Dam Project). They argued that the administrative confiscation of land ownership rights was illegal because the confiscation was done without due consideration to the minority culture protected by Article 13 of the Constitution and Article 27 of the International Covenant on Civil and Political Rights.

The Sapporo district court decided in favor of the plaintiffs. However, the Dam construction had been completed during the trial, and the court avoided to cancel the administrative confiscation, only declaring the illegality of the confiscation on the basis of Article 31 of the Administrative Case Litigation Act.

The court said about the meaning of the right of minority people as follows: “It is proper to understand that the International Covenant on Civil and Political Rights” “guarantees to individuals belonging to a minority the right to enjoy that

9) Sappro District Court Decision, march 27, 1997, Hanrei Jiho Number 1598 at 33. English translation of the case delivered by Professor Mark Levin at University of Hawaii. http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1635447_code624452.pdf?abstractid=1635447&mirid=1

minority's distinct culture. Together with this, there is an obligation imposed upon all contracting nations to exercise due care with regard to this guarantee when deciding upon, or executing, national policies which have the risk of adversely affecting a minority's culture, etc. Thus, the Ainu people, as a minority which has preserved the uniqueness of its culture, are guaranteed the right to enjoy their culture by the International Covenant on Civil and Political Rights Article 27, and accordingly, it must be said that, as set out in the provisions of Art. 98 (2) of the Constitution, our nation has a duty to faithfully observe this guarantee." "Indeed, the rights arising under the International Covenant on Civil and Political Rights Article 27, are not unlimited. It is true that as the defendants correctly argue, those rights are subject to the limits for the public welfare included in Articles 12 and 13 of the Constitution 61. But in light of the aims of the International Covenant on Civil and Political Rights Article 27, any limits on the guarantee of rights must be kept to the narrowest degree necessary."

The court did not declare the administrative confiscation violating the Article 27 of the Covenant. Instead, Ainu peoples' rights protected by the Covenant should be considered when the administrative committee decide whether the administrative confiscation is permitted or not under the Article 20 item 3 of the Land Expropriation Act[10]. Seemingly, the court found the failure of application of this Article to the plaintiffs. Therefore, there could be an argument whether the international treaty did apply to the case or not. However, in this case, the court found the plaintiffs' rights protected by the Covenant first and later incorporated it in the interpretation of the range of the discretion under Article 20 of the Land Expropriation Act. In my view, the court applied the Covenant to the case for making boundary of administrative discretion.

10) "A project plan shall contribute to the appropriate and rational use of land."

3. Analysis

In this section, I introduced two cases by lower courts. Indeed, no decision of the Supreme Court exists that apply an international treaty or law to decide an actual case. In addition, there are a few cases other than the cases mentioned above.

In theory, it is not difficult for courts to apply a self-executing treaty to the actual case for protecting rights. It is fully in the jurisdiction of the judicial court under Article of 76, 81 and 98 of the Constitution of Japan. Courts can bind local laws “hardly” by international law and treaties. Why did the courts avoid using this approach? There are some possible reasons.

First, the judiciary have the power to interpret all sources of law including international treaties, but, as mentioned above, political or administrative organs would like to keep their priority to enforce the treaty, because treaties are in nature the strong policy tool. This demands the ability to fully meet a judicial self-restraint based on the judges’ self-recognition – which is a lack of democratic endorsement.

Second, the courts prefer to keep compatibility between local law and international law by strict interpretation of local law rather than declaring the invalidity of local law and/or activities. In other words, the courts would like to keep a greater room for interpretation on Japanese local law rather than to bind them “hardly” by international law or treaties. This is a reason why courts are moving to the third type of “globalization of law.”

IV. Third type of "Globalization of Law": New "Built in" style of "Globalization"? [11)]

Third type of "globalization of law" is a developing concept. However, in the "global economy" era, we are now able to see, and have to see other kinds of "globalization of law" or global impacts on the local legal system.

In the previous section, we saw "hard" bound local law by international law and treaties. Actually, it is not difficult to understand this type of "globalization of law." In the capacity of sovereign state, each party state agreed to be bound by international law or treaties. In effect, local courts, especially the Court of the Nation, should declare invalidity of local law if it finds the inconsistency between international law and local law.

However, the growing global economy needs more "flex" or "soft" framework of "globalization of law." For example, the courts in commonwealth jurisdictions frequently cross-refer each decisions or precedents. Of course, for the most commonwealth jurisdictions, decisions of English (or neighbor jurisdiction's) courts have no direct binding authority anymore. But, they are sharing the common law system and traditions, and can use decisions by other commonwealth jurisdictions that has persuasive value and are truly effective to bridge the differences of laws and avoid conflicts among jurisdictions.

Another example of a similar phenomenon is using international law of treaties as a persuasive resource to interpret local laws. Different from the second type of "globalization of law", the courts do not declare that a local law shall be invalid due to inconsistency with the treaty. Instead, courts interpret a local law being consistent with the treaty, or to interpret local Constitution (or superior laws) in

11) For the general reference to the discussion in this section,
Akiko Ejima, "International Human Rights Law as a Catalyst for Changing the Constitutional Law into the Human Rights Law" (text written in Japanese), *Human Rights International* No.22 (2011) at 69. See also, Hiromichi Matsuda, "International Human Rights in Japanese Courts: Restructuring the Theory of Domestic Application" (text written in Japanese), *The University of Tokyo Law Review* Vol 5. (2010) at 148.

favor of the treaty and declares that local law shall be invalid due to infringement of the Constitution (or superior laws).

In sum, in these cases, foreign law, foreign cases, international law or treaties are "built in" the interpretations of local law.

In the next Section, I would like to describe this new phenomenon by analyzing a constitutional case recently decided by the Supreme Court of Japan.

V. Supreme Court Decision on September 4, 2013

1. Overview

On September 4, 2013, the Supreme Court of Japan unanimously held[12] that a provision of the Civil Code was in violation of Article 14, paragraph (1) of the Constitution of Japan. That is to say, the provision which read "the share of the inheritance of a child out of wedlock shall be one half of the share in inheritance of a child in wedlock" was declared inconsistent with the equality under the law clause of the Constitution. In response to this decision, the Diet[13] passed a bill to amend the Civil Code on December 5. The act, which abolished the distinctive treatment of the share of the inheritance, was proclaimed and came into effect on December 11, 2013.[14]

Of course, this act is just a local, i.e. domestic, legislation by the Diet of Japan. However, the act is one good example of "globalization[15] of local legislation"

12) The Supreme Court, Grand Bench Decision on 2012 (Ku) 984, September 4, 2013, Minshu Vol.67, No.6, at 1320. Translated version of the case delivered by the Supreme Court at http://www.courts.go.jp/app/hanrei_en/detail?id=1203.

13) Parliament of Japan is called the "Diet."

14) An Act to amend a part of the Civil Code, Law # Heisei 25 -94.

15) Defining "globalization" is difficult issue because the concept has multiple meanings. Here, just for the avoidance of confusion, I follow an explanation in a record of the Science Council of Japan.

"Generally speaking, globalization is a process where national border is going to lose its meaning in the inter-national society which is mainly composed by sovereign states." The Science Council of Japan, "Law in Globalization: What are issues?" (Record of the Sub-committee on Globalization

because it is a parliamentary response to the Supreme Court decision which protected the human rights with global perspectives.

2. Background

The Supreme Court of Japan held that the provision of the first sentence of the proviso to Article 900, item (iv) of the Civil Code was in violation of Article 14, paragraph (1) of the Constitution of Japan on September 4, 2013 (hereinafter referred to as the "2013 Decision").

Article 900 at that time read as follows:

Article 900 (Statutory Share in Inheritance)

If there are two or more heirs of the same rank, their shares in inheritance shall be determined by the following items:

(i) if a child and a spouse are heirs, the child's share in inheritance and the spouse's share in inheritance shall be one half each;

(ii) if a spouse and lineal ascendant are heirs, the spouse's share in inheritance shall be two thirds, and the lineal ascendant's share in inheritance shall be one third;

(iii) if a spouse and sibling(s) are heirs, the spouse's share in inheritance shall be three quarters, and the sibling's share in inheritance shall be one quarter;

(iv) if there are two or more children, lineal ascendants, or siblings, the share in the inheritance of each shall be divided equally; *provided that the share in inheritance of a child out of wedlock shall be one half of the share in inheritance of a child in wedlock, and the share in inheritance of a sibling who shares only one parent with the decedent shall be one half of the share in inheritance of a sibling who shares both parents.* (Emphasis *in italic* added by the author. This is the first sentence of the proviso to Article 900, item (iv). Hereinafter, "the Provision")

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and law, the Specialty Committee on Law) (July 28, 2008) at 6.
http://www.scj.go.jp/ja/member/iinkai/kiroku/1-0728.pdf, last visited June 28, 2016.

This provision was a residue of former “IE” (“family”) system. Under the old Constitution, the family law of Japan included some feudal elements like the “IE” system. “IE” was not just a family but a smallest legal unit of the society. There was a “head of family” who had the authority to decide the legal status of other “IE” members. After WWII, the “IE” system was abolished but the provision was survived.

Article 14 paragraph (1) of the Constitution of Japan read as follows:

(1) 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.

The issue was that the Provision is consistent with paragraph (1), Article 14 of the Constitution (equality under the law clause). Of course, there is a distinction between a child born out of wedlock and a child born in wedlock on the matter of statutory share in inheritance. However, since the traditional interpretation of equality under the law clause[16] permits distinction on “reasonable ground,” existence of the “reasonable ground” was the actual problem in this case.

On this point, there has been a precedent - the decision of the Grand Bench of the Supreme Court decided on July 5, 1995[17] (hereinafter referred to as the "1995 Decision"). The Supreme Court’s 2013 Decision summarized it as follows:

“[It] took into consideration that the provisions concerning the statutory share in inheritance, including the Provision, do not require that inheritance be conducted according to the statutory share in inheritance of each heir, but function as supplementary rules to be applied in cases such as in the absence of designation of the shares in inheritance by a will.” “[T]he Supreme Court accounted for the

16) Article 14, paragraph (1) of the Constitution should be interpreted as prohibiting any discriminatory treatment by law unless such treatment is based on reasonable grounds in relation to the nature of the matter. This is the case law established by the precedent rulings of the Supreme Court. E.g., 1962 (O) No. 1472, judgment of the Grand Bench of the Supreme Court of May 27, 1964, Minshu Vol. 18, No. 4, at 676; 1970 (A) No. 1310, judgment of the Grand Bench of the Supreme Court of April 4, 1973, Keishu Vol. 27, No. 3, at 265.

17) The Supreme Court, Grand Bench Decision on 1991 (Ku) No. 143, July 5, 1995, Minshu Vol. 49, No. 7, at 1789.

purport of the Provision, which sets the statutory share in inheritance of a child born out of wedlock as one half of that of a child born in wedlock, holding as follows: ‘As long as the Civil Code adopts the principle of legal marriage, the Provision gives preferential treatment to the spouse who has been in a marital relationship with the deceased and their child(ren) in terms of the statutory share in inheritance, while at the same time, it assures that a child born out of wedlock will have a certain statutory share in inheritance so as to protect such child.’ In conclusion, the Supreme Court ruled that the Provision cannot be regarded as going beyond the bounds of the reasonable discretion vested in the legislature and therefore it cannot be deemed to be in violation of Article 14, paragraph (1) of the Constitution .”[18)]

The 2013 Decision explicitly overruled the 1995 Decision and declared the Provision shall be void for several reasons.

3. Reasons of the Court

In the unanimous opinion of the Court, there are some reasons of the unconstitutionality of the Provision.

The first reason is domestic social change. The Court said that: [A] “However, since the 1947 Civil Code revision, the actual state of marriage and family in Japan has changed along with the changes in social and economic circumstances, and it is said that people's perceptions of marriage and family have also changed accordingly. Although there may be differences by region or type of work, a family composed of husband and wife and their children who have not grown up became the common minimum unit to support workers' lives and the number of families of such composition increased amid the rapid economic development in the post-war period. At the same time, along with the progress in aging of the population, it has become increasingly necessary to provide security for the lives of surviving spouses, bringing about a drastic change to the significance of inheritance property,

18) 2013 Decision, supra note 12.

which had largely served as the means of living of the descendants. This led to the increase in the spouse's statutory share in inheritance, which is included in the partial revision to the Civil Code by Act No. 51 of 1980. Moreover, the number of children born out of wedlock had been on a declining trend until around 1979, but then it took an upward turn and has been continuing to increase until today. Since the beginning of the Heisei era (from 1989), more people tend to marry later or choose not to marry, and the birth rate has continued to decline. Along with these trends, there has been an increase in the number of households wherein middle-aged single children live with their parents and the number of single-person households, and there has also been an increase in the number of divorces, and, in particular, the numbers of divorces and remarriages involving minor children. In view of these facts, it is said that the forms of marriage and family have greatly diversified, and people now have diversified perceptions of marriage and family accordingly.”

The second reason is the current situation of the foreign legislation on this matter. The Court said as follows on this point: [B] “There has also been a dramatic change in the situations in other countries, which had an influence on the process of introducing the Provision in the existing Civil Code as mentioned in A. above. In other countries, and in the United States and European countries in particular, there used to be a strong sense of discrimination against children born out of wedlock due to religious reasons. At the time of the 1947 Civil Code revision, a tendency to award only a limited share in inheritance to children born out of wedlock was seen in many countries, and this had an influence on the process of introducing the Provision. However, since the late 1960s, most of these countries promoted equal treatment between children born in wedlock and children born out of wedlock from the perspective of protecting children's rights and enacted laws to abolish discrimination in terms of inheritance. At the time when the 1995 Grand Bench Decision was rendered, among the major countries where such discrimination still existed, Germany enacted Erbrechtsgleichstellungsgesetz (Act

on Equalization of Succession Rights) in 1998, and France enacted Loi n° 2001-1135 du 3 decembre 2001 relative aux droits du conjoint survivant et des enfants adulterins et modernisant diverses dispositions de droit successoral (Law No. 2001-1135 of December 3, 2001 on the Rights of the Surviving Spouse and Children Born out of Wedlock and Modernizing Various Provisions of Inheritance Law) in 2001, thereby eliminating discrimination in terms of the share in inheritance between children born in wedlock and children born out of wedlock. At present, among the United States and European countries, no country maintains a distinction in terms of the share in inheritance between children born in wedlock and children born out of wedlock, as Japan still does. Thus, such treatment can be said as being rare on a global scale."

The third reason is international law. The Court said as follows on this point: [C] "Japan ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979 (Treaty No. 7 of 1979) and the Convention on the Rights of the Child (CRC) in 1994 (Treaty No. 2 of 1994). These treaties provide that children must be protected against discrimination of any kind by birth. Furthermore, as organizations affiliated with the United Nations, the United Nations Human Rights Committee was established under the ICCPR and the Committee on the Rights of the Child was established under the CRC. These committees are vested with the authority to express opinions, make recommendations, etc. to the contracting States with regard to matters such as the status of implementation of the respective covenant and convention." "As for the status of implementation of the ICCPR and the CRC by Japan in relation to treatment of children born out of wedlock, the United Nations Human Rights Committee made a comprehensive recommendation in 1993 that Japan should remove the discriminatory provisions relating to children born out of wedlock, and since then, both committees have repeatedly expressed concerns, recommended legal revision, etc. to Japan, specifically criticizing the discriminatory provisions relating to nationality, family register, and inheritance, including the Provision. Recently, in 2010, the Committee on the Rights of the Child again

expressed its concern about the existence of the Provision.”

The fourth reason is recent changes of Japanese law about the distinction of children in wedlock and children out of wedlock. The Court said: [D] “Under the changing global circumstances as described in B. and C. above, the Japanese legal systems, etc. relating to the distinction between children born in wedlock and children born out of wedlock have also changed. In 1988, an action was brought against the requirement of making an entry of a child's relationship with the head of his/her household in his/her residence certificate. In 1994, while this case was pending before the court of second instance, the Guidelines for Handling Affairs Relating to the Basic Resident Registers were partially revised (Jichi-Shin Notice No. 233 of December 15, 1994), and, as a result, it was provided that a child of the head of the household shall be indicated simply as a "child," irrespective of whether the child is born in wedlock or out of wedlock. In addition, another action was brought in 1999 against the requirement of making an entry of the relationship of a child born out of wedlock with his/her mother or father in the family register. In 2004, after the court of first instance rendered a judgment on this case, the Ordinance for Enforcement of the Family Register Act was partially revised (Ordinance of the Ministry of Justice No. 76 of 2004), and, as a result, it was provided that a child born out of wedlock must be indicated in the same manner as a child born in wedlock, for example, the "first son/daughter." With regard to the indication of the relationship of a child born out of wedlock with his/her mother or father already entered in the family register, it was announced by a circular notice (Circular Notice Min-Ichi No. 3008 of November 1, 2004, issued from the Director-General of the Civil Affairs Bureau) that such indication should be corrected according to the new rule mentioned above upon request. Furthermore, in 2006 (Gyo-Tsu) No. 135, the judgment of the Grand Bench of the Supreme Court of June 4, 2008, Minshu Vol. 62, No. 6, at 1367, the court declared that Article 3, paragraph (1) of the Nationality Act (prior to the revision by Act No. 88 of 2008), which provided for different rules for the treatment of

children born out of wedlock from that of children born in wedlock in terms of acquisition of Japanese nationality, had been in violation of Article 14, paragraph (1) of the Constitution as of 2003 at the latest. When said revision was made to the Nationality Act in response to this Supreme Court judgment, children born out of wedlock who had made a notification for acquisition of Japanese nationality before 2003 were deemed to be entitled to acquire Japanese nationality."

The fifth reason is the existence of substantive effort to amend the Provision. The Court explained: [E] "The necessity to equalize the statutory share in inheritance of children born in wedlock and that of children born out of wedlock had been recognized earlier on. In 1979, the Counsellor's Office of the Civil Affairs Bureau of the Ministry of Justice released a draft outline of the Civil Code revision relating to inheritance as an outcome of the deliberation at the Personal Status Law Subcommittee of the Civil Law Committee of the Legislative Council of the Ministry of Justice, in which the office proposed equalization between the statutory share in inheritance of children born in wedlock and that of children born out of wedlock. In addition, said office released a draft outline of the Civil Code revision relating to the marriage system, etc. in 1994 also as an outcome of the deliberation at said subcommittee, and the Legislative Council reported to the Minister of Justice an outline of a bill for partial revision of the Civil Code in 1996, and in these documents, it was clearly stated that the statutory share in inheritance should be equalized for both categories of children. Furthermore, in 2010, the government prepared a revision bill addressing the same point as the abovementioned outlines of the bill with a view to submitting it to the Diet, but neither of them actually reached the Diet."

4. Unconstitutionality of the Provision

After the detailed analysis of five points, the Court express its conclusion as follows: [F]

"As a result of the revisions made as explained in D. above with regard to

the matters for which the abovementioned committees had expressed concerns, recommended legal revision, etc., the distinction in treatment between children born in wedlock and children born out of wedlock has been largely eliminated, but the revision to the Provision has not been achieved yet. Looking at the reasons for this situation, one would notice the following facts. In the United States and most European countries, children born out of wedlock account for a large share in all new born children, and in some countries, the share of these children exceeds 50 percent. In Japan, in contrast, although the percentage of children born out of wedlock has been increasing every year, the number of such children was only slightly over 23,000 in 2011, accounting for only about 2.2 percent in all new born children. In addition, couples' decision to submit a notification of marriage seems to be closely dependent on the pregnancy of their first child. Thus, one possible reason for the abovementioned situation in Japan may be that Japanese people as a whole tend to avoid having children born out of wedlock, or in other words, despite the fact that people's perceptions regarding family are said to have become diversified, the attitude to respect legal marriage seems to still widely prevail among Japanese people.” “However, the reasonableness of the Provision, which sets the statutory share in inheritance of a child born out of wedlock as one half of that of a child born in wedlock, is a question of law which should be determined while taking various factors into comprehensive consideration and examining whether or not the Provision unduly violates any rights of children born out of wedlock in light of the Constitution that provides for individual dignity and equality under the law. None of the factors mentioned above, namely, the wide prevalence of the attitude to respect legal marriage, the actual number of children born out of wedlock, and the percentage of such children in Japan as compared to that in other countries, can be regarded as being directly associated with the answer to the abovementioned question of law.”

IV. Analysis of the 2013 Decision

As introduced above, the 2013 Decision overruled the 1995 Decision and declared the Provision shall be unconstitutional inconsistent with the equality under the law clause of Article 14 of the Constitution. The conclusion of the Court was anticipated because there were some split decisions on the Provision after the 1995 Decision and dissenting opinions in them were growing in strength. But, from the viewpoint of "globalization of law," reasons of the Court were truly interesting.

Here, five reasons could be divided into two groups, i.e., (1) A, D and E, and (2) B and C. (1) are domestic ones and (2) are foreign or global ones. Of course, domestic reasons are important and essential because the Provision was a part of Japanese law. Why did the Supreme Court mentioned foreign and global reasons? What is the purpose of these reasons? To answer these, we should take a closer look.

1. Foreign Law

In section B, the Court introduced the current situation of foreign legislations on this matter. Importantly, these legislations were not "mother law" of the Provision which was a residue of the "IE" system. But, when the "IE" system was abolished by the Diet in 1947, the Diet decided to survive the Provision endorsed by similar legislations in foreign jurisdictions including Germany and France. Therefore, the Court mentioned how the foreign legislation has been changed since 1947. In other words, the primary purpose of the Court in this section was to show the disappearance of endorsement to the Provision by foreign legislations. The Court said "At present, among the United States and European countries, no country maintains a distinction in terms of the share in inheritance between children born in wedlock and children born out of wedlock, as Japan still does. Thus, such treatment can be said as being rare on a global scale."

However, to read this section B in connection to next section C, we can find

more active intention of the Court.

2. International Treaty

In Section C, the Court mentioned two international treaties including the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC).

Importantly, here the Court did not declare the invalidity of the Provision against the treaties. Instead, the Court explained that these treaties provide that (a) children must be protected against discrimination of any kind by birth; (b) in addition, they established the committees that are vested with the authority to express opinions, make recommendations, etc. to the contracting States with regard to matters such as the status of implementation of the respective covenant and convention; (c) and they had expressed their concern about the existence of the Provision and released recommendations to revise the Provision.

3. Combination of Two Reasons

As mentioned above, the Court found that the Provision was unconstitutional against Article 14 of the Constitution. It did not declare that the Provision was invalid because it violated the two treaties.

This reasoning is very interesting. In Japan, although the Constitution is the supreme law of the nation, international treaties have constitutional status as well. Article 98 of the Constitution of Japan reads “(1) This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity. (2) The treaties concluded by Japan and established laws of nations shall be faithfully observed.” Of course, the Government cannot conclude treaties against the Constitution, but treaties consistent with the Constitution shall have the authority as same as the Constitution. In a word, no acts against treaties shall have legal force or validity.

The Court has two options for declaring the invalidity of the Provision - either inconsistent with the Constitution, or inconsistent with the ICCPR and CRC. If the Court selected the latter, it could be the first Supreme Court case that shall be classified as the second type of "globalization of law." However the Court did not, and selected the former approach. Here, inconsistency with the two treaties, along with the legal situation in foreign jurisdictions, was just a reason that supported the unconstitutionality of the Provision. That is to say, two treaties and foreign laws were "built in" the interpretation of the Constitution of Japan. This is an interesting method of reasoning. In theory, the legal situation in foreign jurisdictions and inconsistency with the two treaties are truly different reasons. We are not able to declare "invalidity against foreign law" because foreign law does not have binding authorities except in "conflict of laws" cases. On the contrary, any law inconsistent with treaties shall be invalid. However, the Court in this case, treated both reasons at the same level. Both were "persuasive reasons" explaining the unconstitutionality of the Provision.

It is the reason why this case shall be a good example of the third type of "globalization of law" – "built in."

4. Advantage of the Third type of "globalization of law"

Why did the Supreme Court choose to declare unconstitutionality instead of incompatibility with two treaties? It is an interesting question both in theory and in practice.

In theory, from the viewpoint of judicial positivism or juridical self-restraint on constitutional review, "Strict Necessity" shall be required for constitutional decision.

If lower law can be applied to the case, the Court should avoid to mention to the Constitution under the "Strict Necessity" rule. A generally accepted interpretation in Japan explains that international treaties are a lower rule than the Constitution on the point of domestic effectiveness. Therefore, in theory, it

could be said it was exceptional that the Court declared unconstitutionality in this case. Why? A practical viewpoint is needed.

In practice, the judiciary in Japan tends to avoid using international law or treaties. As mentioned in section III of this paper, there are very few cases of lower courts and no cases of the Supreme Court that applied treaties to the concrete disputes. In practical viewpoint, it could be reasonable for the judiciary.

First, treaties are international tools for the policies. Of course, although domestic laws are tools for the policies as well, courts are familiar to handle domestic law with a balance between the policy branch of the government. Decision based on the legislative facts with judicial courtesy is a good starting point for the Justices and judges. However, since treaties include international bargaining among the countries, it is difficult to find "legislative facts" for interpretation in Japanese jurisdictions. Legislative or administrative interpretations have *de facto* priority from this practical point of view.

Second, as far as interpretation of treaties goes, the Supreme Court could not be the last resort. Needless to say, since treaties are agreement among sovereigns, they shall be interpreted in each party state. That is to say, there are many "final" interpreters of a treaty in the world. Suppose there is a bilateral treaty. Both party A's highest court and party B's highest court are the last resort in its jurisdiction. In case of A's highest court and B's highest court interpret same provision in totally different manner, two highest courts are not able to unify these interpretations. Only one way is amendment of the treaty by both governments.

This could be a serious reason why the Supreme Court avoids applying treaties directly to the concrete cases. The Supreme Court of Japan as the highest court should avoid conflict among the highest courts.

From these reasons, the third type of "globalization of law" has some advantages to the second type of "globalization of law", at least for the judiciary. But does it bring benefits for the people? I would like to discuss on this point in the final section of this paper.

VI. Conclusion

1. Three types of “Globalization of Law”

In this paper, I proposed three types of “globalization of law” by analyzing the Japanese case.

(1) Reception of law

Japan received a continental legal system at the beginning of the modern era and the Anglo-American legal system after the World War II. “Reception of Law” is an example of “globalization of law” at least in two senses - reception as itself and using mother law for interpreting child law.

(2) Direct application of international law / treaties to the dispute in domestic courts

Self-executing treaties can be applied to the concrete disputes in domestic courts. We can see “globalization of law” both when the court finds an inconsistency between treaty and local law and declares the invalidity of local law, and when the government enacts new legislation in response to the court decision.

(3) “Built in”

Different from the second type of “globalization of law”, courts do not declare the inconsistency between treaty and local law. Instead, foreign law, foreign case, international law or treaty are “built in” the interpretation of local law by the courts.

2. The Third type of "Globalization of Law": Benefits of "built in"

In theory, the second type of "globalization of law" could be the most due because the treaties and international law have quasi constitutional status under the Article 98 of the Constitution of Japan. However, the courts prefer to use "built in" type of "globalization of law" rather than the second approach for avoiding the disputes on interpretation of international law / treaties among the highest courts in the world. As analyzed above, this preference is based on some due reasons for the courts. The problem is whether it brings benefits for the people or not.

I think that "built in" could be a good approach for "globalization of law" and bring benefits for people, especially in the field of human rights.

First, by using the "built in" approach, we can use not only self-executive treaties but also non self-executive treaties before the Court. Japan is a member state of many international treaties on human rights. But, there are huge and serious discussions over whether the provision shall be self-executive. Sometimes, even the government of Japan failed to make a uniform opinion through the ministries. For example, the Government of Japan recognized the self-executing character of some provision of International Covenant on Civil and Political Rights in its "Fourth periodic reports of States Parties due in 1996 Addendum JAPAN [19]" in 1997 which was prepared by the Ministry of Foreign Affairs. The report read: "9. Provisions of treaties concluded by the Government of Japan have legal effect as part of its internal law in accordance with article 98, paragraph 2, of the Constitution. Whether or not to apply directly provisions of treaties is determined in each specific situation, taking into consideration the purpose, meaning and wording of the provisions concerned. This applies also to the Covenant." However, the Ministry of Justice showed its objection to this interpretation. Although the Supreme Court has the authority to decide on this matter, it should make a careful judgement under these circumstances because only

19) Human Rights Committee, United Nations International Covenant on Civil Political Rights, CCPR/C/115/Add.3 (October 1, 1997).

the self-executing provisions can overrule local acts. On the contrary, the “built in” approach is one of the suitable resolutions for expanding human rights because the Court is able to use it both for the self-executing treaties and for non self-executing treaties.

Second, by using the “built in” approach, we can use not only the self-executive treaty but also foreign laws before the Court. Of course, we cannot directly apply foreign laws to the concreate disputes except in “conflict of laws” cases. But, they could be “built in” as one of the elements.

Third, we can override the “vagueness” issue. Most provisions in treaties are too vague to be interpreted in concrete cases before the courts. Vague provisions could and should not be applied to the case directly. But, they could be “built in” the interpretation of local law including the Constitution with some other elements to support the court decision. Actually, the Supreme Court of Japan did this in its 2013 Decision. The benefit of this approach is apparent. It can offer the reasonable reason to the Supreme Court to overrule old decisions. The parties before the Supreme Court can enhance their argument by using “built in” as well.

Fourth, we can enhance the Constitution without its revision. A rigid constitution has a conservative nature to accept new social values. It serves a “legal stability” of the society. However, in the globalizing society, “predictability” could be more important rather than “legal stability.” We have to develop local laws including the Constitution with predictability instead of keeping it stable. In this context, treaties could be good as an “advance notice.” Especially, if a treaty would be “built in” a dissenting opinion of the Supreme Court decision, we could find a sign of change in it.

3. Another Example of “built in”

Unfortunately, we do not have enough number of “built in” cases before the Supreme Court. I can introduce only one additional unconstitutional case decided by the Supreme Court on June 4, 2008 [20] as an example of “built in.”

In this decision, the Court declared that Article 3, para.1 of the Nationality Act was unconstitutional. The Article provides that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth may acquire Japanese nationality only if the child has acquired the status of a child born in wedlock as a result of the marriage of the parents, thereby causing a distinction in granting Japanese nationality, and in 2003, at the latest, this distinction was in violation of Article 14, para.1 of the Constitution.

The majority opinion mentioned foreign law and international treaty two times and these were "built in" the reason of need for overruling old Supreme Court. First, "In light of the *aforementioned trends in the nationality law systems enforced in foreign states at the time of introduction of the provision* of said paragraph, a certain reasonable relevance can be found between the provision that requires legitimation in addition to acknowledgment for granting Japanese nationality, and the legislative purpose mentioned above (Emphasis *in Italic* added by the author)." This was the explanation of legislative fact at the act was established.

The second one explained the elements why the old precedent should be changed. "In addition, it seems that other states are moving toward scrapping discriminatory treatment by law against children born out of wedlock, and in fact, *the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child*, which Japan has ratified, also contain such provisions to the effect that children shall not be subject to discrimination of any kind because of birth. Furthermore, after the provision of Article 3, para.1 of the Nationality Act was established, many states that had previously required legitimation for granting nationality to children born out of wedlock to fathers who are their citizens have revised their laws in order to grant nationality if, and without any other requirement, it is found that the father-child relationship with their citizens is established as a result of acknowledgement." "In light of these changes in social and other

20) The Supreme Court, Grand Bench Decision on 2007 (Gyo Tsu) 135 and 2008 (Gyo Tsu) 184, June 4, 2008, Minshu Vol.62, No.6, at 1367. Translated version of the case delivered by the Supreme Court at http://www.courts.go.jp/app/hanrei_en/detail?id=955.

circumstances *at home and abroad,* we should say that it is now difficult to find any reasonable relevance between the policy of maintaining legitimation as a requirement to be satisfied when acquiring Japanese nationality by making a notification after birth, and the aforementioned legislative purpose (Emphasis *in Italic* added by the author)."

This case was decided 5 years prior to the 2013 Decision and there was germination of "built in" approach. Based on these two cases, the third type of "globalization of law" or "built in" approach is expected to be developed. We are now at the starting point of the new "globalization of law."

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<Abstract>

No legal system is free from the influence of globalization. As for Japanese law, its modern history started by the reception of European continental legal system as “mother law” in the late 19th Century. It was a typical “Reception of law” and could be deemed as the most traditional style of “globalization of law” or “global impact on local legislation.” However, “globalization of law” is a developing concept. At least, we can find two other styles of “globalization of law.”

The second concept comes from international law, especially international treaties. Although all sovereign states have the authority to conclude treaties, once a treaty is concluded, it bounds the party state and its legal system. Therefore, some local law or legislations are bound by or influenced under international law. These local laws could be seen as globalized laws.

Thirdly, as we are now in the era of the “global economy,” we are able to see, and need to see other kinds of “globalization of law” or global impacts on the local legal system which is under development. Today, each legal system is influenced not only from “mother law” but from many other norms, e.g., law of neighbor jurisdiction, international law, and business customs used in the “global market.” The meaning of influence or impact is developing as well. For example, under the traditional theory of law, law of other jurisdictions has no meaning to interpret a local law except “conflict of law” issues. But, along with the expansion of the global economy, laws of other jurisdictions are developing strong influences on the interpretation, legislation or enforcement of local law.

In this paper, the author tries to show examples of these three types of “globalization of law” describing their current situation, focusing on cases and legislations related to human rights as well as the Constitution. By analyzing some recent cases of the Supreme Court of Japan and the following legislations, I will conclude that we are at the starting point of the “globalization of local law” in the third meaning.

Key Words : Globalization of law in Japan, Reception of law, international law, treaty, self-executing, unconstitutionality

일본 국내법의 세계화

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어떠한 법률체계도 세계화의 영향으로부터 자유로울 수 없다. 일본의 현대법사는 19세기 후반에 “모법”인 유럽의 대륙법체계를 수용함으로써 시작되었고, 이는 전형적인 “법의 수용”으로 “법의 세계화” 혹은 “지역법제에 미치는 세계화 영향”의 가장 전통적 방식으로 간주되었다. 하지만 “법의 세계화”는 발전하는 개념이며, “법의 세계화”의 유형에는 적어도 2가지가 더 있다.

두 번째 개념은 국제법, 특히 국제조약으로부터 나온다. 모든 주권국가는 조약체결권을 갖지만, 일단 조약이 체결되면 조약의 당사국과 그 법률체계는 조약에 구속된다. 따라서 일부 지역법률과 법제는 국제법에 구속되거나 국제법의 영향을 받으며, 이러한 지역법제를 세계화된 법으로 볼 수 있다.

셋째, 가시화된 “세계 경제”의 시대에서 우리는 다른 종류의 “법의 세계화” 혹은 후진국의 지역법률체계에 미치는 세계적 영향들을 볼 수 있고 볼 필요가 있다. 오늘날 각국의 법률체계는 “모법” 뿐만 아니라 많은 다른 규범들 (주변국가의 법), 국제법 및 “세계 시장”에서 사용되는 상관습으로부터 영향을 받고 있다. “영향 혹은 영향력”의 의미도 발전하고 있다. 예를 들어, 전통적인 법이론 하에서는 다른 국가의 법률은 “법의 충돌” 이라는 문제를 제외하고는 다른 한 국가의 법을 해석할 때 어떠한 의미도 가지지 않는다. 그러나 세계경제의 확대와 함께 다른 국가의 법들이 지역법률의 해석, 제정 및 시행에 미치는 영향력은 날로 증대되고 있다.

본 논문에서는 헌법과 인권에 관한 사례들과 법제를 중심으로 현재의 상황을 묘사하는 세 가지 유형의 “법의 세계화” 와 그와 관련된 현재 상황을 예를 들어 제시하고자 한다. 본 논문은 일본 대법원의 최근의 판결 사례들과 이후의 법제들을 분석함으로써 우리가 세 번째 의미의 “지역법률의 세계화”의 출발점에 있다고 결론 짓는다.

주제어: 일본에서의 법의 세계화, 법의 수용, 국제법, 조약, 자동발효, 위헌

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