

# **Comparative Judicial Sovereignty Nationalism: The Rupture and Selective Performance of Coordinative Obligation in the Coordinate Space**

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## **Abstract**

This paper anatomizes the phenomenon of judicial elites across jurisdictions systematically failing to fulfill the coordinative obligation required by Soji Yamamoto's coordinate theory (coordination theory), utilizing the methodology of comparative sociology of law. Drawing on Pierre Bourdieu's concepts of field, habitus, and capital, this study compares the behavioral patterns of judicial elites across six typologies: Japan and India (Type Ia), the United Kingdom (Type Ib), France (Type Ic), Germany (Type Id), the United States and Israel (Type II), and Hungary (Type III), thereby establishing three propositions.

First, the evaluative axis in the coordinate theory is not "which nationalism" but "whether coordination was attempted." Germany, the UK, and France each made attempts at dialogue while maintaining robust sovereign pride. Second, there are two worst-case manifestations: the "Japanese model (unconscious absence)," where the very existence of the question is not even recognized, and the "Hungarian Orban model (conscious destruction)," which physically eliminated the actors responsible for such dialogue. Third, behind the phenomena observed as "inconsistency" lies a coherent selective pattern: the obligation "functions in the direction of expanding state authority and governmental interests, but is evaded in the direction of constraint."

Furthermore, in the United States, instead of active rejection by the judiciary, Congress and the executive branch became the primary battleground for coordinate-theoretical struggles—the three-tiered clash over the Gulf War Authorization for Use of Military Force and the invocation of Section 5(c) of the War Powers Resolution in Somalia stand as records of this, the details of which are deferred to "The Transformation of the Problem Domain in Coordinate Theory."

This paper does not present the philosophical grounding for "why the coordinative obligation is required." That question is deferred to "The Philosophical Foundations of Coordinate Theory." However, even if the basis for the coordinative obligation remains unresolved, the fact that judicial elites in various countries so precisely and selectively evade something paradoxically suggests the existence of that very thing being evaded—this is the question handed over to the reader.

**Keywords:** Coordinate theory, coordinative obligation, judicial sovereignty nationalism, comparative sociology of law, habitus, dialectical link, Lacuna Executionis

## **Part I: Setting the Question Chapter 1: The Starting Point—The Question Left by the Lack of Execution Section 1: From Accusation to "Why"**

In March 2020, Shizuo Aijima (72) was incarcerated in the Tokyo Detention House based on charges that were later determined to be fabricated. Even after being diagnosed with advanced stomach cancer, his eight requests for bail were repeatedly denied with boilerplate text, and in February of the following year, he passed away outside the courtroom. The Tokyo High Court ruling, finalized in June 2025, recognized the illegality of the investigation. However, not a single one of the 37 judges has been held legally accountable.

Yet, this accusation left behind a more fundamental question.

Why did the 37 judges fail to refer to international human rights standards? The rights of detainees stipulated in Articles 7, 9, and 10 of the International Covenant on Civil and Political Rights, and the protection of physical integrity mandated by the Convention against Torture—these treaty obligations bind Japan. Nevertheless, no judge raised the question, outside of standard boilerplate phrases, of "whether this is permissible under international law." Was this ignorance? Negligence? Or the operation of a deeper, structural force?

While the International Court of Justice repeatedly issued provisional measures orders, and UN Special Rapporteurs continued to warn of a "reasonable risk of genocide," domestic courts remained silent. Treaty obligations exist. Enforcement mechanisms fail to function. Why does this divergence emerge, and how is it institutionally maintained?

This paper attempts to answer this "why." Not, however, on the plane of legal interpretation, but on that of the comparative sociology of law.

Notes to Section 1

[1] For detailed factual circumstances and an international legal analysis of the Ohkawara Kakohki case, see the author's preceding article, "Death in Detention and State Inaction" (<https://zenodo.org/records/19657890>)(<https://zenodo.org/records/19657890>). Regarding the Tokyo High Court ruling (finalized in June 2025), refer to the addendum of the same article. A lawsuit for state compensation against the 37 judges was filed on April 6, 2026.

### **Section 2: Fundamental Questions Regarding Coordinate Theory**

Before setting out our questions, we must confront the fundamental doubts that can be raised against the coordinate theory—or coordination theory—upon which this paper attempts to rely.

[2]

The first doubt is the question of whether coordinate theory is substantially different from dualism. The proposition that international law and domestic law are "each supreme in its own field" was also shared by the representative proponents of dualism (Triepel, Anzilotti). If this is the case, the question remains: "Why does the fact that the two systems are independent and unrelated necessarily mean they are coordinate?" If one asserts that coordinate theory differs from dualism, one is required to concretely demonstrate the points of difference. [3]

The second doubt concerns the uniqueness of the "coordinative obligation." If one scrutinizes the substance of the proposition that states "bear a legal obligation to coordinate conflicting obligations," it may be argued that this is merely one component of positive international legal norms intended for domestic implementation, rather than a norm of a unique category distinct from the international legal norms themselves. Even under dualism, it has been recognized that treaty norms intended for domestic implementation entail a requirement for the state to adapt its domestic law into a form appropriate for fulfilling its international obligations. [4]

The third doubt arises from observing the realities of both public and private international law. In transnational cases, courts in various countries process matters using their own conflict rules or domestic legal interpretative frameworks, devoid of any consciousness of "coordinating two coordinate legal orders." In the Wang Jingxiang divorce petition case (Kyoto District Court, July 7, 1956; Osaka High Court, April 18, 1958), the Japanese court recognized the law of the unrecognized People's Republic of China as the governing law. However, this was the result of referencing the concept of a state under customary international law to interpret the "husband's national law" stipulated in Article 16 of the Horei (Act on General Rules for Application of Laws) at the time; structurally, no conflict between international and domestic legal obligations occurred there. [5] On the other hand, in the Berne Convention case (Supreme Court, First Petty Bench, March 2, 2011), the Supreme Court blocked the treaty obligation of copyright protection via the theory of state recognition. Furthermore, in the North Korea Repatriation Project damages case (Tokyo District Court, March 23, 2022), it denied sovereign immunity under customary international law by ruling that an unrecognized state is not included in the definition of a "state" under the Act on the Civil Jurisdiction of Japan with respect to a Foreign State. [6] Conversely, in the ODECO case (Tokyo District Court and High Court), the sovereign right over the continental shelf under customary international law was directly applied without domestic implementing legislation, serving as the basis for the power of taxation. [7] Faced with these "inconsistencies"—a mixture of cases that actively invoke customary international law and treaty obligations alongside cases that evade them—it is difficult to conclude that a unified norm of "coordinative obligation" functions in reality.

These doubts naturally arise from a cross-sectional observation of practice and precedents in both public and private international law. This paper departs only after taking these fundamental

questions into account.

What this paper asks is this: Even if these doubts are justified, why do judicial elites in various countries so systematically, and so selectively, evade responding to something within this coordinate space? What does it mean for evasion to be selective? Dissecting this is the task of this paper.

## Notes to Section 2

[2] The doubts presented in this section are formulated as fundamental questions that can be raised from the perspectives of both public and private international law. For concrete demonstrations, see Hiroshi Taki, "International Law and Coordination Theory," *Hogaku Shimpō* [The Chuo Law Review], Vol. 124, No. 5-6 (The Chuo University Law Association, 2017). This article meticulously analyzes the views of Fitzmaurice, Yamamoto, and Teraya, demonstrating that coordination theory does not substantially differ from dualism; it is positioned here as the most sincere preceding critique that this paper must confront.

[3] Gerald Fitzmaurice, "General Principles of International Law Considered from the Standpoint of the Rule of Law," *Recueil des Cours*, vol. 92 (1957), p. 79. Soji Yamamoto, *Kokusaiho* (Shinpan) [International Law (New Edition)] (Yuhikaku, 1994), p. 86.

[4] See Taki, *supra* note [2], pp. 34-36. For the demonstration that the substance of the "legal obligation to coordinate conflicting obligations" is "nothing other than the content of a positive international legal norm intended for domestic implementation," see the same article.

[5] Regarding the Wang Jingxiang divorce petition case, see *Hanrei Kokusaiho* (Dai 3 Han) [Cases on International Law (3rd Edition)], pp. 54-57 (commentary by Yoshiaki Sakurada).

[6] Regarding the Berne Convention case, see *Kokusaiho Hanrei Hyakusen* (Dai 3 Han) [100 Selected Cases on International Law (3rd Edition)], pp. 58–60 (commentary by Yumi Nishimura) and *Hanrei Kokusaiho* (Dai 3 Han) [Cases on International Law (3rd Edition)], pp. 58–60 (commentary by Akira Kato). For the North Korea Repatriation Project damages case, see Chapter 2, Section 4 *infra*.

[7] Regarding the ODECO Nihon S.A. case (Tokyo District Court, April 22, 1982; Tokyo High Court, March 14, 1984), see *Hanrei Kokusaiho* (Dai 3 Han), pp. 199–201 (commentary by Mamoru Koga and Shigeki Sakamoto).

### **Section 3: Coordinate Theory and the "Dialectical Link"—Presentation as an Auxiliary Line**

While maintaining the fundamental doubts demonstrated in the preceding section, this section presents the contours of the coordinate theory to be employed as an auxiliary line for analysis. The term "auxiliary line" is used deliberately—while honestly admitting that its philosophical grounding remains unresolved, it is utilized as a set of coordinates for observing the behavioral patterns of judicial elites in various countries.

In his 1957 article, Gerald Fitzmaurice positioned international law and domestic law as "two different legal systems, each supreme in its own field." [9] Rejecting both variants of monism (the primacy of international law or the primacy of domestic law), he established a theoretical coordinate system in which both legal orders coexist in a coordinate relationship. Fitzmaurice himself pointed out the existence of a "general obligation to harmonize the domestic law of a State with its international obligations" regarding how a coordinative obligation is derived from these coordinates, yet he did not delve deeply into its philosophical foundations. [10]

In the *Encyclopedia of Public International Law* (EPIL, Vol. 10, 1987), Karl Josef Partsch inherited Fitzmaurice's coordinate framing while naming the tension arising from the fact that both legal orders share the same addressee as a "dialectical link." [11]

Soji Yamamoto substantiated this dialectical link as a practical proposition in his 1994 treatise. [12] In his actual lectures, he was known to remark, "What is required is a fierce, unrelenting clash of swords (*tsubazeriai*) in which the three branches of government exchange blows without quarter," and "You must not run away; exhaust your wisdom." Yamamoto likewise did not explicitly state the philosophical grounding for this practical command—the basis of the coordinative obligation as to why one "must not run away." As confirmed in the preceding section, criticisms directed at the uniqueness of this obligation remain as valid questions.

The substance of the "coordinative obligation" required by coordinate theory must be determined through a step-by-step dialectic of questions and answers.

The First Question: Is the "coordination" in coordinate theory not merely monism with the primacy of international law? If the coordination carried out through the fierce clashing of the three branches is understood as being based merely on the consciousness of obeying international law because it mandates domestic implementation, then it is nothing other than monism with the primacy of international law. However, this is not the case. The ratification of a treaty may be rejected by a referendum. The nationalism of Karlsruhe (the Federal Constitutional Court of Germany) is also permissible—the coordinate structure of "two legal orders, each supreme on its own plane" makes this possible. Coordination is not subordination.

The Second Question: If so, is it not merely the de facto adjustment found in dualism? Even under dualism, the state processes conflicts between international law and domestic law "de facto." Is the coordination in coordinate theory not identical to this? It is not. The coordination required by coordinate theory differs in the quality of the practice of "attempting"—it is a substantive attempt to raise questions, recognize tensions, and respond legally.

The Third Question: Is that, too, not merely a de facto political adjustment? Is the coordination of international and domestic law performed by political branches—treaty negotiation, legislation, and administrative implementation—not a matter of political discretion rather than a legal obligation? It is not. What coordinate theory requires is to attempt legal coordination to the absolute limit. It is not a matter of political discretion, but an obligation required by the conceptual structure of law—though its philosophical grounding exceeds the scope of this paper. [12]

The Fourth Question: What if international law is erroneous? If the coordinative obligation in coordinate theory implies obedience to international law, does the coordinative obligation dissolve when international law is wrong? The opposite is true. When international law contains an error, one must lodge a protest on the side of international law without fearing state responsibility. Even if it is a binding decision under Article 25 of the UN Charter possessing supremacy over other agreements under Article 103 of the Charter, a legal response to that error is required as a form of the coordinative obligation. Silent submission is not an attempt at coordination.

The Fifth Question: But is that coordination not failing to function? States did lodge protests against the erroneous individual listing by the UN Security Council Sanctions Committee—yet if that constitutes the fulfillment of a coordinative obligation, the reality was that most countries remained silent. Can an unfunctioning obligation be called a "legal obligation"? Look at it from the converse perspective. Precisely because the number of states lodging protests increased, the de-listing and Ombudsperson procedures were established, and international law was amended. The accumulation of "attempts at coordination" through protests against the errors of the Security Council Sanctions Committee moved international law—this, too, is positioned as a practice of the coordinative obligation.

The Sixth Question: But is that protest not a matter of political discretion? Whether a state lodges a protest against a Security Council resolution is a political judgment of foreign policy, and cannot it be said to be a legal obligation? It is not. What coordinate theory requires is a legal obligation. As an "obligation of attempt"—not as political discretion, but as an obligation of practice required by the conceptual structure of law to raise questions and attempt to respond.

Only when we articulate it up to this point does it become the coordinative obligation of coordinate theory.

The "coordinative obligation" of coordinate theory is established as a bundle of the following propositions: It is not monism with the primacy of international law, as it permits divergence, deadlock, and rejection after attempts have been exhausted. It is not the de facto processing of mere dualism, but functions as a substantive attempt to raise questions and recognize tensions. It operates as a legal obligation rather than political discretion—even if it is not an obligation to achieve a completed synthesis. When international law contains an error, it demands protest rather than obedience. Furthermore, the accumulation of such protests involves itself in the dynamic process of amending international law.

Once the substance of this coordinative obligation is determined, it becomes possible for the first time to precisely describe "what it is that the judicial elites of various countries are evading"—the comparative typology of this paper is developed on the premise of this determination. Even if the grounding for the coordinative obligation remains unresolved, the behavioral patterns exhibited by judicial elites within this coordinate space can be observed and described from the perspective of the comparative sociology of law.

Notes to Section 3

[9] Fitzmaurice, *supra* note [3], p. 72.

[10] *Id.*, p. 89.

[11] Karl Josef Partsch, "International Law and Municipal Law," in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 10 (1987), pp. 238–257, at pp. 241, 245, 255.

[12] The answer to the question regarding the philosophical grounding of the coordinative obligation—why this is a "legal obligation" and not "political discretion"—is designated as the theme of the subsequent paper, "The Philosophical Foundations of Coordinate Theory." This concerns the locus that Fitzmaurice reserved as "extra-legal methods and non-juristic terms and sources," and the normative foundation of the practical command that Soji Yamamoto addressed in his lectures: "You must not run away; exhaust your wisdom."

#### **Section 4: Analytical Perspective—Counter-Constructivism and the Judicial Habitus**

In their norm life cycle theory, Martha Finnemore and Kathryn Sikkink theorized the process through which international human rights and justice norms become established within domestic systems, proceeding through the stages of "norm emergence  $\rightarrow$  tipping point

\$\rightarrow\$ norm cascade \$\rightarrow\$ internalization." [13] As an empirical culmination of this framework, Sikkink's *The Justice Cascade* (2011) illustrated the process by which international criminal norms were internalized into domestic judiciaries, focusing primarily on Latin America. [14]

The central question of this paper points in the opposite direction: Why are international legal norms so fiercely repelled by domestic judiciaries? Why is the tipping point never reached? To dissect the mechanism behind this "active blocking of norms," this paper formulates "counter-constructivism" as its analytical framework.

The blocking of norms does not arise solely from conscious resistance. Pierre Bourdieu's sociological conceptual apparatus—field (*champ*), capital, and habitus—functions crucially here. [15] The domestic judicial space is not an empty vessel. It is a "field" in which judicial elites struggle over their own "juridical capital"—the monopolistic authority to interpret the law and exercise power. International legal norms attempting to flow in from the outside are recognized prereflexively not as harbingers of universal justice, but as an "alien body" that threatens the juridical capital accumulated by these judicial elites. The historically structured bodily dispositions (*habitus*) of these elites automatically trigger a powerful immune function against this alien body. This constitutes the socio-legal reality of "judicial sovereignty nationalism," which hollows out international law while utilizing sophisticated legal techniques.

In their concept of "international judicial habitus" (2024), Mikael Rask Madsen and Salvatore Caserta applied Bourdieu to the study of international courts. [16] Rather than focusing on international courts, this paper targets domestic courts, providing a comparative dissection of how the "habitus of the primacy of domestic law" is formed, maintained, and reproduced.

Georges Scelle's theory of "functional *dédoublement*" (*dédoublement fonctionnel*) is also integrated here. [17] According to Scelle, state organs (judges and administrators) bear a dual role as both "domestic organs" and "international agents." Because domestic judges operate on what Fitzmaurice calls the "plane of the domestic legal order," they cannot directly invalidate domestic law using international law. However, as international agents, they bear the role of making the dialectical link function by incorporating international obligations as factors to be weighed within the interpretive process of domestic law.

The phenomenon that this paper terms "judicial sovereignty nationalism" is descriptively formulated, in light of the proposition that domestic organs should fulfill the role of "international agents," as a systemic abandonment of this international agency function. Crucially, nationalism itself does not inherently obstruct the dialectical link. The issue is not the presence or intensity of nationalism, but whether the habitus of judicial elites in each typology generates an attempt at dialogue with international law. Germany, the United Kingdom, and



France, while possessing their respective forms of nationalism, engaged in attempts at dialogue to varying degrees. The evaluative axis in coordinate theory is not "which nationalism" but "whether dialogue was attempted."

#### Notes to Section 4

[13] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization*, vol. 52, no. 4 (1998), pp. 887–917.

[14] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W.W. Norton, 2011).

[15] Pierre Bourdieu, *The Logic of Practice* (Stanford University Press, 1990); id., "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal*, vol. 38 (1987), pp. 805–853.

[16] Salvatore Caserta and Mikael Rask Madsen, "International Judicial Habitus," *iCourts Working Paper Series*, University of Copenhagen (2024).

[17] Georges Scelle, *Précis de droit des gens: principes et systématique* (Sirey, 1932–1934).

#### **Section 5: Analytical Axes—"Genuine Coordination," "Pseudo-Coordination," and "Selective Non-Application"**

This section presents the analytical axes employed as evaluative criteria for each typology in this paper. These are descriptive criteria and do not presuppose the philosophical grounding of the coordinative obligation.

"Genuine coordination" refers to a situation where a court squarely recognizes a conflict or tension between an international legal obligation and a domestic legal obligation, and makes a substantive attempt to respond to that tension. The attempt does not necessarily have to succeed. What is at stake is not the outcome, but the quality of the process. An attempt at coordination does not imply submission to the international legal obligation. Because coordinate theory is not monism with the primacy of international law, if the substance of international law contains an error, a state lodging a protest against that error is evaluated as a form of coordinate-theoretical coordination. Neither silent submission nor silent rejection constitutes an attempt at coordination. [18]

"Pseudo-coordination" refers to an operation where, in scenarios where a conflict or tension with international law could exist, a court avoids the very recognition of the conflict by substituting

the question with an entirely different one, despite appearing to have raised the issue. [19]

"Selective non-application" refers to an asymmetrical structure wherein the application of customary international law or treaty obligations is actively pursued in directions that expand state authority or serve governmental interests, but is evaded in directions that constrain the executive branch or conflict with the government's foreign policy. [20]

These three descriptive categories serve as the axes for evaluating groups of judicial precedents across various countries in our comparative typology.

## Notes to Section 5

[18] For cases involving errors in fact-finding by the UN Security Council Sanctions Committee, see *Kadi and Al Barakaat International Foundation v. Council and Commission* (CJEU, 2008 and 2013), *Sayadi and Vinck v. Belgium* (Human Rights Committee, CCPR/C/94/D/1472/2006, 2008), and *Al-Dulimi and Montana Management Inc. v. Switzerland* (ECtHR Grand Chamber, Application No. 5809/08, 2016). These stand as the most vivid empirical examples of the proposition that "international law can sometimes be erroneous." In the *Kadi* case (CJEU, 2008 and 2013), a substantive link to *Kadi*, who had been placed on the Al-Qaeda sanctions list, was ultimately never proven. In the *Sayadi* case (Human Rights Committee, 2008), the listing requested by the Belgian government itself turned out to be erroneous; although Belgium requested its removal, the Sanctions Committee refused, leading the Human Rights Committee to find a violation of the Covenant by Belgium. In the *Al-Dulimi* case (ECtHR Grand Chamber, 2016), *Al-Dulimi*, asserted to be associated with the former Iraqi regime, contested the erroneous listing, and a violation of Article 6 of the ECHR was found. When an enforcement organ of international law, such as the UN Security Council Sanctions Committee, commits an error in fact-finding, the right of domestic courts and treaty bodies to review that error and diverge from it is permissible under coordinate theory.

[19] For typical examples, see Chapter 2, Sections 3 and 4 *infra*.

[20] The details of the *ODECO* case (Tokyo District Court and High Court), the *Berne Convention* case (Supreme Court, First Petty Bench, March 2, 2011), and the *North Korea Repatriation Project damages* case (Tokyo District Court, March 23, 2022) will be analyzed in Chapter 2, Section 4.

## **Part II: Comparative Typology**

### **Introduction: An Overview of the Six Typologies**

Premised on the analytical axes established in Part I—'genuine coordination,' 'pseudo-coordination,' and 'selective non-application'—and the precise substance of the coordinative obligation, this paper dissects the behavioral patterns of judicial elites across seven legal spheres, categorized into six typologies.

In establishing these typologies, this paper employs three analytical axes.

The first axis is 'whether a question is raised.' The most fundamental evaluative axis is whether a substantive attempt is made to squarely recognize and legally respond to the conflict or tension between international and domestic legal obligations.

The second axis is the 'existence of actors.' This examines whether autonomous judicial elites capable of attempting coordination exist institutionally—with Typology III positioned as a situation where this very prerequisite has been destroyed.

The third axis is the 'quality of the attempt and the mode of setting limits.' When a question is raised, this axis looks at how far the actors struggle and in what manner they set limits; it is here that the differences among Typologies Ib, Ic, and Id emerge.

Through these axes, six typologies are delineated.

Typology Ia: The Habitus of Identifying Questions That Must Not Be Raised (Japan and India)"

Although categorized under the same typology as judicial elite-driven models, their inner realities are polar opposites. Japan represents a bureaucratic passivity that prereflexively evades the question, whereas India represents a judicial activist dynamism that consumes the question into its constitutional interior—yet their coordinate-theoretical outcomes are isomorphic, erasing the arena of dialectical tension within the coordinate space.

Typology Ib: Genuine Coordination Overridden (United Kingdom)

While possessing a system (the Human Rights Act) that embeds the mechanism of coordinative obligation within the formal institutional framework of the transformation doctrine, the outcomes of coordination are legally overridden by the supreme dogma of parliamentary sovereignty. This represents a paradoxical typology where the institutional realization of the dialectical link and the attempts at its institutional deconstruction proceed simultaneously.

### Typology Ic: The Paradox of Institutional Tension and Democratic Attempts (France)

This is a complex typology in which aspects to be criticized (fourteen years of resistance by the Conseil d'État and the Sarran judgment) coexist with aspects to be positively evaluated (the institutional tension among the three courts, the Constitutional Council's declaration of unconstitutionality regarding the Maastricht Treaty, and the subsequent referendum). The Maastricht Treaty referendum, where the entire populace took upon themselves the question including the possibility of rejection, is positioned as the most democratic form of the attempt at coordination.

### Typology Id: Managed Openness (Germany)

Possessing multilayered, international-law-friendly mechanisms (Article 25 of the Basic Law, Völkerrechtsfreundlichkeit, and the abstract judicial review system), the German judiciary has formulated the 'obligation to consider' and the 'permissibility of exceptional divergence' through precise dogmatic struggles. This falls within the scope of coordinate theory as a faithful setting of limits after exhausting all attempts. The nationalism of Karlsruhe is thus permissible.

### Typology II: Active Rejection and the Imperial Habitus (United States and Israel)

Upon recognizing the question, they actively declare, 'We bear no obligation to comply with it.' Unlike Japan's prereflexive evasion, this rejection is transparent as an expression of intent. The formal severance of the United States and the 'interceptive lawfare' of Israel differ in their style.

### Typology III: The Institutional Death of the Coordinate Space (Hungary, Orban Model)

The final destination of the comparative typology. The autonomous judicial elites themselves, capable of attempting coordination, were politically eliminated. However, with the establishment of the Magyar administration on April 12, 2026, attempts to restore these actors have commenced—marking a new phase as the 'resuscitation from the death of the coordinate space.

In comparing the six typologies, the Japan model of Typology Ia and the Hungary-Orban model of Typology III stand at opposite poles of the evaluative axis.

The Japan Model: Lacking even a conscious sovereign pride verbalized as nationalism, a prereflexive bodily disposition (habitus) that views attempting dialogue with international law as a depletion of juridical capital is institutionally reproduced. The very existence of the question is not recognized—manifesting as an unconscious absence.

The Hungary-Orban Model: Having verbalized the refusal of dialogue as nationalism, it physically eliminated the autonomy of the judiciary, which serves as the actor responsible for dialogue—manifesting as a conscious destruction.

While both sit at the same pole of the 'worst-case' scenario, their modes are entirely antithetical. Crucially, what is decisive on the evaluative axis of coordinate theory is not the presence or intensity of nationalism, but 'whether dialogue was attempted.' Germany, the United Kingdom, and France engaged in attempts at dialogue while maintaining their respective forms of nationalism.

The comparative typology is developed as a descriptive analysis. What the judicial elites of each country are evading, attempting, or eliminating can be described from the perspective of the comparative sociology of law.

The more precise the evasion, the more it suggests the existence of something being evaded. The question regarding the true nature of that 'something' accumulates toward the conclusion of Part IV as the final question this paper hands over to the reader.

Part II unfolds in the following order:

Chapter 2 (Japan: Typology Ia) →Chapter 3 (India: The Twin of Typology Ia) →Chapter 4 (United Kingdom: Typology Ib) →Chapter 5 (France: Typology Ic) →Chapter 6 (Germany: Typology Id) →Chapter 7 (United States and Israel: Typology II) →Chapter 8 (Hungary: Typology III)

This order follows a logical progression: from typologies with a sparse attempt at coordination to richer ones, and finally to the destination of the elimination of actors. However, placing the twins of Typology Ia (Japan and India) in succession sharpens the contrast of 'polar opposite modes within the same typology.'

## **Chapter 2: Typology Ia (Japan)—The Habitus of Identifying Questions That Must Not Be Raised**

### **Section 1: Historical Formation and the Legal Structure of the Reception of International Law**

#### **(1) Distinction Between "Domestic Validity" and "Domestic Application"**

Regarding the reception of international law in Japan, we must first confirm a distinction of fundamental importance to this paper.

Article 98, Paragraph 2 of the Constitution of Japan stipulates: "The treaties concluded by Japan and established laws of nations shall be faithfully observed." This provision is understood to adopt a general adoption method. Treaties, upon the moment of ratification, and customary international law, upon the moment of its formation, acquire "domestic validity" and become part of Japanese law through Article 98, Paragraph 2, without requiring transformation procedures. [1]

However, "domestic validity" and "domestic application" must be distinguished. Application involves applying a rule to concrete facts. "Domestic application" is further subject to a two-tier filter: (1) whether the treaty provision in question possesses direct applicability (self-executing nature). If it does, it functions directly as a judicial or administrative norm. (2) If it lacks direct applicability, it is filtered by the presence or absence of domestic implementing legislation. If existing implementing legislation is present, implementation occurs through cabinet orders and the like; if absent, new legislation or amendments by the Diet are required. [2]

The precise locus of the problem in Japan, as revealed by this structure, is not that "international law does not enter Japanese law." International law exists as part of Japanese law. The problem lies in the "weak consciousness of the coordinative obligation on the part of the judiciary."

## (2) Institutional Comparison—The Absence of Institutional Apparatuses for Fierce Clashing

In his 1996 lectures at Sophia University, Soji Yamamoto discussed the distinction between the Anglo-American model and the German-French model regarding the methods of "fierce clashing" (tsubazeriai) among the three branches of government in the domestic implementation of international legal obligations. [3]

In the Anglo-American model, the legislature and the executive systematically engage in a fierce clash over the methods of implementing international legal obligations—the system of the United Nations Act and Orders in Council in the UK, and the UN Participation Act and Executive Orders in the US, are typical examples. In the German-French model, the accumulation of constitutional practice through abstract judicial review by constitutional courts establishes the conditions for softly landing the strong obligations from international law as matters of legal doctrine.

Neither model exists in Japan. Constitutional debates do not mature into routine legal doctrine, remaining mere clashes of values. There is a lack of institutional apparatuses to organize a fierce clash against the impact of international legal obligations (obligations of result, obligations to prevent specific events, and obligations regarding methods of implementation).

However, a "third typology" exists in Japan—a pseudo-clash confined within the executive branch. The Cabinet Legislation Bureau, a part of the Cabinet, conducts prior reviews of bills and accumulates practices of constitutional interpretation; thus, while constitutional debate formally appears to be taking place, its reality is nothing more than a simulated clash concluded entirely within the executive. [3a]

In comparison with the abstract judicial review by German and French constitutional courts, the institutional characteristics of this third typology can be summarized in three points. First, the appointment of the Director-General of the Cabinet Legislation Bureau is an exclusive prerogative of the Cabinet and does not require Diet approval. This fundamentally differs from the French Constitutional Council (*Conseil constitutionnel*), which ensures neutrality through the appointment of three members each by the President, the National Assembly, and the Senate, and the German Federal Constitutional Court (*Bundesverfassungsgericht*), which ensures neutrality by having half its members elected by the Bundestag and half by the Bundesrat; in Japan, it can be arbitrarily manipulated depending on the policies of the administration in power. Second, the review is concluded within the executive, and the judiciary merely endorses it. The courts restrain constitutional review related to treaties and national security through the political question doctrine, failing to function as a substantive check on the Cabinet Legislation Bureau's interpretations. Third, as a consequence, the Cabinet Legislation Bureau has the paradoxical effect of "conferring high authority upon and strengthening the Cabinet's policies." Even if opposition parties attempt a clash in Diet debates by summoning constitutional scholars as unsworn witnesses, these efforts are rendered hollow before this authority.

The "Lie of Article 81" refers to the totality of this structure. Article 81 of the Constitution vests the power of constitutional review in the courts, envisioning checks and balances against the legislative and executive branches. However, the triple structure of the *de facto* abstract review by the Cabinet Legislation Bureau, the Cabinet's exclusive prerogative in appointing its Director-General, and the judiciary's self-restraint through the political question doctrine betrays the promise of Article 81 through institutional reality. In contrast to the Orban model (the conscious and visible destruction of actors), the Japanese model demonstrates the possibility of a more deeply rooted pathology in the sense that it involves an invisible and voluntary abandonment. [3b]

### (3) Historical Formation—From the Emperor's Prerogative to the General Secretariat of the Supreme Court

Under the Meiji constitutional system, judicial power was structured as part of the Emperor's prerogative. The power to conclude treaties belonged exclusively to the Emperor (Article 13 of the Meiji Constitution), and the domestic application of international law was left to the discretion of the executive. The judicial system, apexed by the Great Court of Judicature

(Daishin'in), was placed under the administrative supervision of the Ministry of Justice, and judges were positioned as bureaucrats. In this structure, international law was not an object that the judiciary autonomously engaged with. [4]

Although the independence of the judiciary was formally established with the enactment of the Constitution of Japan in 1947, organizational continuity was not severed. The General Secretariat of the Supreme Court continued to function as a bureaucratic apparatus effectively controlling the personnel affairs, placement, and education of judges. In this field, the accumulation of "juridical capital" is achieved not through struggling with international law, but through the capacity to adhere to the precise interpretation of the domestic legal system, obedience to precedent, and the logic of appellate review. [5]

The characteristics of the legal apprenticeship system also reinforce this structure. International law is merely an elective subject during the apprenticeship period. The critique that the pastoral, complacent attitude directed at the entire international legal practice community in Japan is its greatest flaw applies in a much more severe form to judicial practice.

#### Notes to Section 1

[1] Soji Yamamoto, *Kokusaiho* (Shinpan) [International Law (New Edition)] (Yuhikaku), pp. 92, 99, 104; Masahiko Asada (ed.), *Kokusaiho* (Dai 6 Han) [International Law (6th Edition)] (Toshindo), p. 33; Nobuyuki Kato et al. (eds.), *Gaisetsu Kokusaiho* [Outline of International Law] (Yuhikaku), pp. 24–25, etc.

[2] Examples include the direct application of the Montreal Convention for the Unification of Certain Rules for International Carriage by Air by the Ministry of Land, Infrastructure, Transport and Tourism, and the direct application of customary international law in the ODECO case.

[3] Yamamoto, *supra* note [1], pp. 101–102; Soji Yamamoto, "Kokusaiho no Kokunaiteki Datosei o Meguru Ronri to Ho-seidoka" [The Logic and Legal Institutionalization Surrounding the Domestic Validity of International Law], *Kokusaiho Gaiko Zasshi* [The Journal of International Law and Diplomacy], Vol. 96, No. 4/5.

[3a] The legal bases for the Cabinet Legislation Bureau are the Act for Establishment of the Cabinet Legislation Bureau (Act No. 252 of 1952) and Article 12 of the Cabinet Act. The Bureau is placed within the Cabinet (Article 1 of the Establishment Act) and reviews bills, draft cabinet orders, and draft treaties to be submitted to cabinet meetings (Article 4, Item 1). The appointment of the Director-General is the exclusive prerogative of the Cabinet and does not require Diet approval, fundamentally differing from the French Constitutional Council (appointed 3 each by the President, the President of the National Assembly, and the President of the Senate) and the



German Federal Constitutional Court (elected half each by the Bundestag and the Bundesrat). The 2013 appointment of Director-General Ichiro Komatsu by the Abe administration stands as a classic case of the political exercise of personnel power to alter the Bureau's traditional interpretations.

[3b] For the formulation of the "Lie of Article 81," see Chapter 2, Section 6 of "The Transformation of the Problem Domain in Coordinate Theory." For the institutional characteristics of the Cabinet Legislation Bureau model and its coordinate-theoretical evaluation, see Section 1(2) of this chapter. For the typological contrast with the Orban model, see Chapter 8.

[4] Regarding the relationship between treaties and the judiciary under the Meiji Constitution, see Yuichi Takano, *Kenpo to Joyaku [The Constitution and Treaties]* (University of Tokyo Press, 1960).

[5] Regarding the autonomy of the judicial field and the functions of the General Secretariat of the Supreme Court, see Muneyuki Shindo, Shiho Kanryo: *Saibansho no Kenryokusha-tachi [Judicial Bureaucrats: The Power-Holders of the Courts]* (Iwanami Shinsho, 2009).

## **Section 2: "Not Raising the Question"—Dissecting the Three-Tiered Blocking Mechanism**

The most fundamental reaction the Japanese judiciary exhibits toward tensions with international law is an operation that evades the very act of raising the question. The problem is not that international law is "absent"—international law "exists" as Japanese law. The problem is that "the judiciary does not raise the question that a certain international legal obligation exists and that a tension has arisen between it and domestic law." This blocking assumes a three-tiered structure.

### **(1) The First Tier—Denial of Self-Executing Nature (Deprivation of Judicial Normativity)**

While acknowledging the domestic validity of treaties and customary international law, the first tier is an operation that strips them of their function as judicial norms through the logic that they are "not directly applicable," "lack clarity and detail," or are "merely programmatic provisions." Through this operation, the question of conflict between treaty obligations and domestic law is erased.

In the *Shiomi* case (Supreme Court Grand Bench, March 2, 1989), in response to the claim that excluding eligibility for disability welfare pensions based on nationality clauses violated the ICCPR and the ICESCR, the Supreme Court ruled that the treaty provisions did not create directly applicable rights, relying on the "progressive realization" clause in Article 2, Paragraph 1

of the ICESCR. The treaty exists and binds Japan—yet its provisions are merely programmatic and do not function as judicial norms. [8]

In the *Siberian Internment Compensation Claim* case (Tokyo District Court, April 18, 1989; Tokyo High Court, March 5, 1993; Supreme Court, March 13, 1997), the courts denied that the principle of compensation for domestic prisoners of war had crystallized into customary international law. Furthermore, even assuming it had, the District Court ruled, "If customary international law is to grant individual and concretely specified claims to private persons, the requirements for the emergence of the right and its effects must be clear and detailed as the content of a legal norm." The High Court imposed the requirement that "in cases where a certain obligation of action is imposed on the state involving the expenditure of national funds, the content must be sufficiently clear and unambiguous." [9] This will be discussed in Section 4 below as an asymmetry: requirements strictly imposed on compensatory obligations involving state expenditure were not imposed in the *ODECO* case (an expansion of state authority concerning the right of taxation based on sovereign rights over the continental shelf under customary international law). The Supreme Court "made absolutely no reference" to the merits of the *Siberian* case—silence toward the question is the most complete form of first-tier blocking.

## (2) The Second Tier—The Political Question Doctrine (Substantive Blocking)

In the *Sunagawa* case (Supreme Court Grand Bench, December 16, 1959), responding to the question of whether the Japan-US Security Treaty violated Article 9 of the Constitution, the Court adopted the political question doctrine (*tochi koi ron*), stating that "acts of state of a highly political nature are not subject to judicial review unless they are manifestly and obviously unconstitutional and void."

The tension arising between the treaty obligations that Article 98, Paragraph 2 dictates "shall be faithfully observed" and Article 9 of the Constitution was placed outside of judicial review via the concept of a "highly political nature." [10] The first-instance *Date* judgment (Tokyo District Court, March 30, 1959) rejected the political question doctrine, stepped into substantive review, and found the treaty unconstitutional—this could be evaluated as an "attempt at coordination," to be discussed later, but it was quashed by the Supreme Court. This reversal between instances is also positioned as a manifestation of the "restorative force of the field."

## (3) The Third Tier—Flight to *Obiter Dictum*

In its 2008 judgment (April 17, 2008), the Nagoya High Court indicated in *obiter dictum* that the dispatch of the Self-Defense Forces (SDF) to Iraq constituted the use of force and violated Article 9, Paragraph 1 of the Constitution. However, the main text of the judgment dismissed the

plaintiffs' claims. This judgment must be accurately evaluated from the perspective of the struggle that the court ought to have undertaken.

The task the court should have performed as a dialectical link would have been a four-tiered struggle: (1) To examine, regarding the concept of the "use of force" in Article 9, Paragraph 1, which classifications of military activities under international law fall within its scope. (2) To examine how the obligations imposed by UN Security Council Resolution 1483 as a binding decision under Chapter VII of the UN Charter are to be processed in relation to the Constitution. (3) To evaluate, in light of the standards of international humanitarian law, whether SDF activities could be substantively limited to logistical support activities distinct from the use of force. (4) To examine whether, even if permitted as logistical support, those activities complied with the obligations required by international humanitarian law. [11]

However, what the Nagoya High Court actually did was merely state vaguely in obiter dictum that "the SDF's activities correspond to the use of force and violate Article 9, Paragraph 1," without squarely answering any of the above questions. The relationship with UN Security Council Resolution 1483, Chapter VII of the UN Charter, and consistency with international humanitarian law—these are entirely missing from the judgment. The main text dismissed the plaintiffs' claims.

From the perspective of the practice of the dialectical link, the Nagoya High Court judgment is a classic example of third-tier blocking that "appears to have raised the question but completely evades its core." Both the discourse praising this judgment as a "courageous constitutional decision" and the discourse criticizing it as the "politicization of the judiciary" stood on the same plane at the level of coordinate-theoretical inquiry—in the sense that neither asked what was required as a struggle spanning Resolution 1483, international humanitarian law, and Article 9, Paragraph 1. [12]

These three tiers of blocking function cumulatively. In every tier, the opportunity to "squarely take on and struggle with the question of the conflict between international and domestic legal obligations" is systematically eliminated.

## Notes to Section 2

[8] Shiomi Case (Supreme Court Grand Bench, March 2, 1989, Minshu Vol. 43, No. 2, p. 89).

[9] Siberian Internment Prisoner of War Compensation Claim Case (Tokyo District Court, April 18, 1989, Shomu Geppo Vol. 36, No. 11, p. 1973; Tokyo High Court, March 5, 1993, Hanrei Jiho No. 1466, p. 40; Supreme Court, March 13, 1997, Minshu Vol. 51, No. 3, p. 1233). Hanrei Kokusaiho (Dai 3 Han) [Cases on International Law (3rd Edition)] (Toshindo), pp. 703–707

(commentary by Masayuki Takemoto, Norio Tanaka, and Masahiko Asada).

[10] See Sunagawa Case, Supreme Court Grand Bench, December 16, 1959, Keishu Vol. 13, No. 13, p. 3225.

[11] Regarding the classification of military activities in the ICJ Nicaragua judgment (Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986, p. 14), see especially paras. 191–195. On the legal character of UN Security Council Resolution 1483 (adopted May 22, 2003), see Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (2004). On the criteria for direct participation in hostilities under international humanitarian law, see ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009).

[12] See Nagoya High Court Judgment, April 17, 2008 (Hanrei Jiho No. 2056, p. 74)

### **Section 3: "Attempts at Genuine Coordination" and the "Resilience of the Field"—Isolated Manifestations and Their Erasure**

If the three-tiered blocking of "not raising the question" is dominant within the Japanese judiciary, why does the description remain merely "dominant"? Because exceptions do exist. Judges who raised the question were real. However, the task of this section is to demonstrate how those attempts are erased.

(1) The Fingerprint Refusal State Compensation Case (Osaka High Court, October 28, 1994)—Explicit Acknowledgment of Self-Executing Nature In a case disputing the illegality of the request for and issuance of an arrest warrant on the grounds that a second-generation Korean resident in Japan refused to be fingerprinted, the Osaka High Court explicitly ruled regarding the International Covenant on Civil and Political Rights (ICCPR) that "in principle, it possesses a 'self-executing nature' and can be directly applied domestically; therefore, domestic laws conflicting with the Covenant are invalid." While many prior judicial precedents did not explicitly state the direct applicability of the Covenant, this judgment occupies a prominent position in that it clearly affirmed that possibility alongside the illegality of domestic legal provisions conflicting with the treaty. [13] Furthermore, this judgment actively referenced the treaty interpretations of the European Court of Human Rights and treaty monitoring bodies. Its stance of undertaking the interpretations of treaty bodies as "supplementary means of interpretation" can be evaluated as a manifestation of Georges Scelle's function of international agency. However, the failure to provide criteria for determining the presence or absence of direct applicability remained an unresolved issue. [14] This judgment is also highly suggestive in relation to the Ohkawara Kakohki case. Premised on the proposition that the ICCPR possesses a "self-executing nature" and is directly applicable—a proposition acknowledged by this

judgment—the rights of detainees to access medical care (Articles 7, 9, and 10 of the ICCPR) should have functioned as judicial norms. Yet, in that case, not a single one of the 37 judges raised that question. Thirty years after this judgment, the exact same type of question regarding the exact same treaty vanished completely into silence.

(2) Takamatsu High Court (November 25, 1997)—Direct Application as a Rule of Adjudication and State Compensation In a case where state compensation was sought on the grounds that a prison regulation restricting inmates' meetings with defense counsel to 30 minutes violated Article 14, Paragraph 1 of the ICCPR, the Takamatsu High Court applied the said provision directly as a judicial norm and granted state compensation. It remains one of the few precedents that granted compensation by directly applying a treaty. [15] The fact that this judgment was not subjected to revision by the restorative force of the field can be understood on a continuum with the "selective non-application pattern" discussed later—namely, because it was an individual, specific case concerning visitation restrictions in a penal institution, the degree of direct confrontation with the executive branch's policies was limited.

(3) Otaru Bathhouse Refusal Case (Sapporo District Court, November 11, 2002)—Minimal Acknowledgment of Judicial Normativity In a case seeking damages claiming that a public bathhouse's refusal of entry to foreign residents violated the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Sapporo District Court ruled that "although the Convention is not directly applicable between private parties, it can serve as one of the standards in interpreting various provisions of private law such as the Civil Code." This is positioned as a minimal acknowledgment of judicial normativity, allowing the treaty to function as an interpretive standard for torts under the Civil Code, but it did not step into acknowledging the normative force of conduct (*ko-i kihan-sei*) of the treaty. [16]

(4) Kyoto District Court (October 7, 2013)—The Exception of Declaring the Normative Force of Conduct In a case where a corporation repeatedly engaged in street propaganda activities around a Korean school in Japan, the Kyoto District Court presented a two-tier judgment regarding the ICERD. In the first tier, it undertook the treaty as a judicial norm. In determining the establishment of a tort under Article 709 of the Civil Code, it judged the applicability of "racial discrimination" in accordance with the definition in Article 1, Paragraph 1 of the Convention—an indirect application as a judicial norm. In the second tier, it declared the normative force of conduct. The court explicitly declared that it itself, as a part of the state apparatus, bears an obligation to provide effective judicial remedies under the treaty—this was an almost unprecedented event in Japanese judicial history where Scelle's theory of functional *dédoublement* was self-consciously verbalized in a Japanese courtroom. [17]

(5) Osaka High Court (July 8, 2014)—The Surgery of "Deletion" and the Resilience of the Field While maintaining the conclusion of granting damages, the Osaka High Court completely

deleted the District Court's declaration of the normative force of conduct from its reasoning. It maintained the indirect application as a judicial norm (a treaty-consistent interpretation through Article 709 of the Civil Code). There is a doctrinal conflict regarding the legal significance of this deletion. The view evaluating the deletion as "basically appropriate" is based on the legal theory that "international obligations belong to the state as a whole and do not arise exclusively for specific domestic organs." The critical view is based on the position that the declaration of the normative force of conduct is the core practice of the effective implementation of a treaty. The point of contention between the two is the "legal significance of declaring the normative force of conduct," not "direct application versus indirect application." [18] This paper does not seek to settle this doctrinal conflict. However, the phenomenon wherein "a judge who raises a question is corrected by the hierarchy" can be described as a socio-legal fact independent of normative evaluation. The restorative force of the field—the mechanism by which the judicial hierarchy corrects deviations occurring at the level of individual judges—is visibly operating here. The inter-instance reversal in the Yun Su-gil case (where the first instance recognized the customary legal nature of the non-extradition of political offenders and the appellate court denied it), the Supreme Court's quashing of the Date judgment, and the Osaka High Court's deletion of the Kyoto District Court's declaration of the normative force of conduct—these can all be described as isomorphic structures. At the level of individual judges, raising a question can occur. However, the logic of the field rectifies it.

(6) Tokyo Institute of Technology Case—A Refined Form of "Pseudo-Coordination" In a case where an Iranian exchange student was refused admission to the Tokyo Institute of Technology in the context of implementing nuclear non-proliferation sanctions under UN Security Council Resolution 1737 (2006) via the Ministry of Economy, Trade and Industry and the Ministry of Education, Culture, Sports, Science and Technology, the Tokyo District Court (March 28, 2013) reduced the conflict between Security Council Resolution 1737 and Article 14 of the Constitution—a core issue of coordinate theory—to a problem of procedural flaws in the university's individual admission review. In contrast, the Grand Chamber of the European Court of Human Rights (2016) squarely took on the question of the conflict between UN Security Council sanctions and the European Convention on Human Rights, developing the legal doctrine of "presumptive harmony." [19] Faced with the exact same issue of Security Council sanctions, the Japanese court substituted the question, whereas the European court raised it. Whether or not the question is raised is what separates an "attempt at genuine coordination" from "pseudo-coordination." Even in the settlement during the appellate instance, the interpretation of the scope of Security Council Resolution 1737 was left to an agreement between the parties, and the court ultimately evaded answering the question.

Notes to Section 3

[13] Fingerprint Refusal State Compensation Case (Osaka High Court, October 28, 1994, Hanrei

Jiho No. 1513, p. 71). See Masanao Murakami, "Fingerprint Refusal State Compensation Case," *Kokusaiho Hanrei Hyakusen* (Dai 3 Han) [100 Selected Cases on International Law (3rd Edition)], pp. 362–364.

[14] See Point 4 in *Kokusaiho Hanrei Hyakusen* (Dai 3 Han), pp. 362–364 (commentary by Masanao Murakami).

[15] Takamatsu High Court Judgment, November 25, 1997 (Hanrei Jiho No. 1653, p. 117). See Hae-bong Shin, "Domestic Application of the ICCPR: State Compensation Claim Case for Interference with Inmates' Meetings," *Kokusaiho Hanrei Hyakusen* (Dai 3 Han), pp. 110–111.

[16] See *Otaru Bathhouse Refusal Case* (Sapporo District Court, November 11, 2002, Hanrei Jiho No. 1806, p. 84).

[17] Kyoto District Court Judgment, October 7, 2013 (Hanrei Jiho No. 2208, p. 74). Regarding the legal significance of the declaration of the normative force of conduct, see Tamito Saito, "Hate Speech and the Implementation of International Norms," *Ronkyu Jurist* No. 19 (Autumn 2016), pp. 91–98. Saito evaluated the significance of the declaration of the normative force of conduct—the declaration that the court itself, as an international agent, undertakes treaty obligations toward itself.

[18] Osaka High Court Judgment, July 8, 2014 (Hanrei Jiho No. 2232, p. 34). For the view evaluating the deletion as appropriate, see Hiroshi Teraya, "Global Public Space and Law," *Ronkyu Jurist* No. 23 (Autumn 2017), pp. 33–35.

[19] See *Al-Dulimi and Montana Management Inc. v. Switzerland*, ECtHR Grand Chamber, Application No. 5809/08 (2016).

#### **Section 4: "Selective Non-Application"—The Asymmetrical Operation of Customary International Law and Treaty Obligations**

In addition to the blocking forms of "not raising the question" and "pseudo-coordination" demonstrated in the previous section, the operation of customary international law and treaty obligations in the Japanese judiciary exhibits a third structural characteristic: "selective non-application"—an asymmetrical distribution of scenarios where they are applied versus where they are evaded. From a perspective that cross-sectionally observes the actual state of judicial precedents in both public and private international law, this very "inconsistency" would appear as the most powerful counter-evidence to the proposition that "the unified norm of a coordinative obligation functions in reality." This section dissects the internal structure of that "inconsistency."

(1) The ODECO Case—Proactive Direct Application in the Direction of Expanding State Authority In the ODECO Nihon S.A. case (Tokyo District Court, April 22, 1982; Tokyo High Court, March 14, 1984), the sovereign right over the continental shelf under customary international law was directly applied without domestic implementing legislation, serving as the basis for the interpretation that the enforcement area of the Corporation Tax Act extends to the continental shelf outside Japan's territorial waters. The direct application of customary international law in the direction of granting the state the authority to tax was permitted without special legislation. [20]

(2) The Yun Su-gil Case—Finding of Customary Law Constraining the Executive Branch Denied on Appeal In the Yun Su-gil case (Tokyo District Court, January 25, 1969), the Tokyo District Court found that "the principle of non-extradition of political offenders is established as customary international law" and ruled a deportation order illegal. Even though only a minority of scholars today deny that the non-extradition of political offenders constitutes a principle under customary international law, [21] it was erased through a systemic denial by the appellate courts (Tokyo High Court, April 19, 1972; Supreme Court, January 26, 1976).

(3) Siberian Internment Compensation Claim Case—Strict Requirements Imposed on State Compensation Obligations The "clarity and detail" requirement in the Siberian case, discussed in Section 2, exhibits an asymmetry when contrasted with the ODECO case. Requirements that were not imposed on customary law conducive to expanding state authority (the right to tax the continental shelf) were strictly imposed on recognizing the customary legal nature of compensation obligations entailing state expenditure. The first-tier criterion of "direct applicability" itself is being selectively operated. [22]

(4) The Berne Convention Case—Denial of Treaty Obligations in the Direction of Conformity with Government Foreign Policy In the Berne Convention case (Supreme Court, First Petty Bench, December 8, 2011), the Supreme Court denied the obligation to protect copyrights based on a multilateral treaty using the logic that "a state can choose whether or not to generate rights and obligations vis-à-vis an unrecognized state," yet the grounds for possessing that freedom of choice were not presented. [23] International consensus points in the direction of affirming the obligation to apply treaties in relations with unrecognized states.

(5) The North Korea Repatriation Project Damages Case—Separation of Two Issues From a coordinate-theoretical perspective, the North Korea Repatriation Project damages case (Tokyo District Court, March 23, 2022; Tokyo High Court, October 30, 2023; Remand Trial, Tokyo District Court, January 26, 2026) contains two distinct issues. The first issue is the problem of damages for the plaintiffs' human rights violations. In the remand trial (January 26, 2026), the Tokyo District Court acknowledged the liability of the North Korean government for damages



and ordered the payment of 22 million yen to each plaintiff. [24] While the right was declared, execution is not easy—the problem of a lack of enforcement law manifests here as well. The second issue is the processing of sovereign immunity. Both the District Court and the High Court denied North Korea's sovereign immunity through an interpretation that an unrecognized state is not included in the definition of a "state" under Article 2, Item 1 of the Act on the Civil Jurisdiction of Japan with respect to a Foreign State. This interpretation is a debatable issue, [25] and it is problematic that the question of whether an unrecognized state, as an entity meeting the requirements of statehood, can receive the protection of sovereign immunity under customary international law was processed strictly through the textual interpretation of domestic legislation without arguing the reasons under international law. The relationship with obligations under international human rights law on the merits was also processed within the framework of domestic tort law without being addressed head-on. [26]

(6) Establishing the Selective Pattern The pattern observed cross-sectionally across the above body of precedents is clear: Customary international law and treaty obligations are proactively and directly applied in directions that contribute to the expansion of state authority and government interests (ODECO). In directions that constrain the dispositions of the executive branch, a systemic denial by appellate courts operates (Yun Su-gil). In directions that impose financial obligations on the state, strict requirements are applied (Siberia). In directions that conflict with the government's foreign policy, evasion logic with unclear grounds is employed (Berne). The internal structure of the phenomenon that has been observed as "inconsistency" lies here. It is not a random inconsistency, but a consistent asymmetry created by a habitus that prereflexively identifies the direction of government interests.

#### Notes to Section 4

[20] ODECO Nihon S.A. Case (Tokyo District Court, April 22, 1982, Gyoshu Vol. 33, No. 4, p. 838; Tokyo High Court, March 14, 1984, Gyoshu Vol. 35, No. 3, p. 231). Hanrei Kokusaiho (Dai 3 Han) [Cases on International Law (3rd Edition)], pp. 199–201 (commentary by Mamoru Koga and Shigeki Sakamoto). There is also the critique that this raises "the question of whether the state is merely selecting and applying convenient portions of the Convention on the Continental Shelf without ratifying it."

[21] Siberian Internment Prisoner of War Compensation Claim Case (Tokyo District Court, April 18, 1989, Shomu Geppo Vol. 36, No. 11, p. 1973; Tokyo High Court, March 5, 1993, Hanrei Jiho No. 1466, p. 40; Supreme Court, March 13, 1997, Minshu Vol. 51, No. 3, p. 1233).

[22] Yun Su-gil Case (Tokyo District Court, January 25, 1969, Gyoshu Vol. 20, No. 1, p. 28; Tokyo High Court, April 19, 1972, Hanrei Jiho No. 664, p. 3; Supreme Court, January 26, 1976, Hanrei Times No. 334, p. 105). See Hanrei Kokusaiho (Dai 3 Han), pp. 270–274 (commentary

by Goro Toda), Point 1.

[23] Berne Convention Case, Kokusaiho Hanrei Hyakusen (Dai 3 Han), pp. 58–60 (commentary by Yumi Nishimura), Point 2. The view of the UN Committee on the Elimination of Racial Discrimination referenced in the same commentary (CERD/C/7100/5, para. 30) points toward affirming the obligation to apply treaties in relations with unrecognized states, suggesting that the logic of the Supreme Court of Japan may deviate from international consensus. Hanrei Kokusaiho (Dai 3 Han), p. 58 (commentary by Akira Kato). While the Tokyo District Court and the Intellectual Property High Court relied on the constitutive effect theory, the Supreme Court deployed a more ambiguous "choosability" theory—the ambiguity of its grounds is inherently problematic.

[24] See Human Rights Watch, "Remand Trial Judgment: North Korea is Not a 'Paradise on Earth'," dated January 26, 2026.

[25] See Kaori Nakamoto, "International Adjudicatory Jurisdiction in Claims for Damages Against Unrecognized States," Shin Hanrei Kaisetsu Watch [New Case Law Commentary Watch], Civil Procedure Law No. 167 (2025).

[26] See Juyo Hanrei Kaisetsu [Important Case Law Commentary], Jurist No. 1583 (2024), pp. 251–255 (commentary by Nishimura and Okada). In this case, not only the international law issue of sovereign immunity but also the relationship with obligations under international human rights law on the merits—such as customary legal norms concerning the ICCPR, freedom of movement, and enforced disappearances—were processed within the framework of domestic tort law without being addressed head-on. While the granting of damages in the remand trial ultimately works toward victim relief, careful scrutiny of the judgment text is required to determine whether a "genuine coordination" in the sense of a frontal undertaking of international legal obligations was actually achieved.

## **Section 5: The Controversy Surrounding Direct Applicability (Self-Executing Nature)**

To elucidate the logical vacuum that enables the "selective non-application" of judicial precedents observed in the preceding section, it is necessary to explicitly examine the doctrinal controversy within Japanese legal scholarship surrounding the criteria for determining direct applicability.

On one side is the position that places the intent of the contracting states as the central criterion for determination. This view recognizes direct applicability if either (1) self-execution is mandated by the intent of the treaty framers (the Jurisdiction of the Courts of Danzig case [PCIJ Advisory Opinion, 1928] regarding the Danzig Railway Officials agreement, or the EC Treaty

serve as examples, though such treaties are extremely rare), or (2) the treaty provisions possess clarity and completeness (the criterion that generally functions in practice). In most cases under this position, it is criterion (2) that substantially functions in practice. [1]

On the other side is the position that strictly distinguishes among "direct applicability," "domestic validity," and "domestic hierarchy," and proposes an inverse structure of presumption wherein direct applicability is "presumed in principle, after which exclusionary criteria are examined." [2] This position determines the presence or absence of exclusion based on subjective exclusionary criteria (the explicit exclusionary intent of the contracting states or the intent of the domestic legislature) and objective exclusionary criteria (the clarity of the provision, the subject matter, or the character of political dispute settlement procedures). Furthermore, it adopts a relative approach wherein "the exact same rule may not be directly applicable as a basis for a claim against the state, but can be directly applicable as a basis for defensive exclusion against state infringement."

The core of the conflict between the two theories lies in the direction of the presumption: the former possesses a structure that recognizes direct applicability only in "exceptional cases proven by the intent of the contracting states, etc.," whereas the latter maintains an inverse presumptive structure that "presumes direct applicability in principle and then examines exclusionary criteria." Furthermore, the latter attempts to untangle the conceptual confusion itself by rejecting the term "self-executing"—a concept derived from US jurisprudence—and instead proposing the concept of "direct applicability." Chronologically, it is noteworthy that the latter's major treatise (1985) predates by a decade the study by Vázquez [3] (1995), which untangled the confusion surrounding the concept of self-execution in the United States. Both scholars were independently confronting the same problematic domain.

What the comparative socio-legal observation of this paper establishes is the fact that neither of these refined doctrinal developments possesses any binding force to actually move judicial precedents. Japanese precedents adopt neither presumptive structure, do not unify terminology, and merely present conclusions without demonstrating any criteria for determination—failing to adopt even the "relative approach." The asymmetry between the Siberian case (a claim for compensation against the state  $\rightarrow$  denial of direct application) and the ODECO case (an expansion of the state's taxation authority  $\rightarrow$  affirmation of direct application) is consistent neither with the proposition that "direct applicability is presumed in principle" nor with the proposition that "it is recognized when proven by the intent of the contracting states."

This opacity of precedents enables selective non-application in accordance with the logic of the field in each respective country, in a manner unpredictable by either doctrinal position. Precisely because criteria are not clarified in judicial precedents, room is created for the intervention of a habitus that prereflexively identifies the direction of government interests.

Why does the refinement of doctrine spin its wheels in judicial practice? We must re-examine the confusion of conceptual definitions that lies at its root.

In the distinction between "domestic validity" and "domestic application" employed by this paper, "application" refers to the operation of applying a rule to concrete facts. This definition is independent as a fundamental operational concept in jurisprudence and is logically separated from "validity." There are numerous legal norms that possess validity but cannot be applied—examples include provisions that are abstract and polysemous, such as Article 1 common to the International Covenants (the right of peoples to self-determination), for which it cannot be said that domestic implementing legislation is immediately required, and the "progressive realization" clause of the ICESCR.

The normative direction of the proposal to "presume direct applicability in principle and then examine exclusionary criteria"—namely, that "the domestic implementation of international law should be promoted"—is understandable. However, the proposition that "direct applicability is presumed in principle based on the fact that domestic validity has been conferred" blurs the operational distinction between validity and application. What a presumption can resolve is a "matter of intent," not the "structural problem of the abstractness and polysemy of a provision."

The fact that this conceptual problem remains unresolved explains in part why judicial precedents do not follow doctrinal proposals; unless the substantive question of "what constitutes a provision in an applicable form" is answered prior to the question of "what is to be presumed," the presumptive structure will spin its wheels. That Japanese precedents have merely presented conclusions without explicitly stating criteria is also a consequence of continuously evading an answer to this substantive question.

#### Notes to Section 5

[1] See Chapter 5 of Akira Kotera, *Paradigm Kokusaiho* [Paradigm of International Law] (Yuhikaku). See *Jurisdiction of the Courts of Danzig*, PCIJ Advisory Opinion, Series B, No. 15 (1928).

[2] Yuji Iwasawa (Member of the Human Rights Committee 2007–2014, including Chairperson; Judge of the International Court of Justice 2018–; President of the ICJ 2025–), *Joyaku no Kokunai Tekiyō Kanousei: Iwayuru "self-executing" na Joyaku ni kansuru Ichikōsatsu* [Domestic Applicability of Treaties: A Study on So-called "Self-Executing" Treaties] (Yuhikaku, 1985); *id.*, *Kokusaiho [Dai 2 Han] [International Law (2nd Edition)]* (University of Tokyo Press, 2023), Chapter 14. For contemporary developments of Iwasawa's theory, see *Kokusaiho no Riron to Jitsugen: Iwasawa Yuji Sensei Kōki Kinen* [Theory and Realization of

International Law: Commemorating the 70th Birthday of Professor Yuji Iwasawa] (Shinzansha). The successor to the membership of the Human Rights Committee is Hiroshi Teraya (2023–). Regarding Iwasawa's evaluation of coordinate theory ("substantively close to a moderate dualism," "the controversy has fulfilled its historical mission"), see Chapter 1, Sections 1–5 of Paper C ("The Philosophical Foundations of Coordinate Theory").

[3] See Carlos Manuel Vázquez, "The Four Doctrines of Self-Executing Treaties," *American Journal of International Law*, vol. 89 (1995), pp. 695–723. Regarding the independent awareness of problems in Japan and the US, and the point that the third issue of political dispute settlement procedures can be structurally analogized to Japan's political question doctrine, see Chapter 2, Section 2. For the conceptual separation between "direct effect" and "direct applicability" in EU law, see Case 26/62, *Van Gend en Loos* [1963] ECR 1.

## **Section 6: Summary—"The Habitus of Identifying Questions That Must Not Be Raised"**

It is not that the question "cannot be raised." The Osaka High Court in the fingerprint refusal case explicitly acknowledged the self-executing character. The Takamatsu High Court directly applied a treaty. The first instance of the Yun Su-gil case recognized the customary legal nature of the non-extradition of political offenders. The Kyoto District Court declared the normative force of conduct. The Date judgment rejected the political question doctrine and stepped into substantive review. Judges who raised the question did exist.

However, "a habitus that prereflexively identifies questions that must not be raised functions as the logic of the field"—this is the precise description of Typology Ia.

As the ODECO case demonstrates, the direct application of customary international law itself does not run counter to the habitus. In a direction advantageous to the executive branch—namely, the expansion of the taxation authority—the question was raised and affirmatively resolved. "Which question to raise, and which question not to raise"—this rule of identification constitutes the very core of the habitus of the Japanese judiciary.

The rule is uncoded and never explicitly taught. However, the entire structure of the field, spanning from legal apprenticeship to career management by the General Secretariat, functions as a mechanism that embodies this rule. The Osaka High Court corrected the deviation of the Kyoto District Court, the appellate courts denied the deviation of the first instance in the Yun Su-gil case, and the Supreme Court quashed the Date judgment—the restorative force of the field operates visibly as systemic corrections through the hierarchy.

Furthermore, the phenomenon that appears as "inconsistency" from the empirical observation of both public and private international law is, in fact, not random. It possesses a consistent pattern:

it functions in directions that expand state authority or serve government interests, but fails to function in directions that constrain the executive branch, conflict with government policy, or impose financial obligations on the state. The dissection of this pattern constitutes the core of the comparative socio-legal answer to the counter-constructivist question: "Why does the tipping point never arrive?"

### **Chapter 3: Typology Ia Twin (India)—The Devouring of "Constitutional Self-Sufficiency"**

#### **Section 1: The Contrast Between "Escape" and "Devouring"**

In the comparative typology of this paper, India is classified under the same "Typology Ia (Judicial Elite-Driven Model)" as Japan. While the Supreme Court of Japan is sedimented in extreme judicial passivism—a thorough inaction of not raising questions—the Supreme Court of India stands as the world's most powerful stronghold of judicial activism, utilizing Public Interest Litigation (PIL) to boundlessly expand Article 21 of the Constitution and actively intervene in government policies.

However, when the auxiliary line of coordinate theory is drawn, these polar opposite judiciaries converge on the same outcome: "completely erasing the tension with the external authority of international law from the domestic judicial space."

If Japan evades tension by repelling the intrusion of international law with a shield of three-tiered blocking (escaping), India extinguishes the very tension posed from the outside by international law before it even arises, by completely digesting and absorbing (devouring) international law into the interior of its own constitutional order. From a coordinate-theoretical perspective, both operations lead to the exact same consequence of eliminating the arena of the "dialectical link." [1]

Notes to Section 1

[1] Regarding the judicial activism of the Supreme Court of India, see Upendra Baxi, "The Avatars of Indian Judicial Activism," in S.K. Verma and Kusum (eds.), *Fifty Years of the Supreme Court of India* (2000).

#### **Section 2: Formation of the Habitus—The Sovereign Pride of Decolonization**

For India, the Indian Constitution, drafted by its own hands as a testament to independence, is not merely a legal code but the "ultimate symbol of nation-building." Indian judicial elites embody a fierce prereflexive allergy toward the colonial-era "imposition of law from the outside (the British Empire)." [2]

Therefore, for them, accepting international legal norms as they are, in the form of "superior external norms," squarely conflicts with their judicial sovereignty nationalism. In order to maintain their juridical capital, international law must constantly be subsumed within the "Constitutional Self-Sufficiency" (the self-sufficient universe of the Indian Constitution) and "translated" by the hands of Indian judges.

The "Basic Structure Doctrine" established in the *Kesavananda Bharati* judgment (1973) further fortifies this structure. The proposition that even a constitutional amendment by Parliament cannot infringe upon the "basic structure"—democratic republicanism, secularism, federalism, judicial review, and the core of fundamental rights—elevated the Supreme Court of India to a supreme position as the "guardian of the basic structure." This can be structurally analogized to the theory of limits on constitutional amendment in Japanese constitutional scholarship, yet there is a decisive difference: while the Japanese limitation theory remains primarily a doctrinal proposition, India's Basic Structure Doctrine is positive case law established by a Grand Bench decision of the Supreme Court, complete with a track record of actually being used to strike down a constitutional amendment that attempted to exclude judicial review of election disputes in *Indira Nehru Gandhi v. Raj Narain* (1975). [3]

Although India ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979, it has not ratified the First Optional Protocol, which establishes the individual communication procedure. It receives concluding observations and recommendations from the Human Rights Committee through the reporting system (Article 40) but does not recognize their legal binding force. In the practice of the Supreme Court of India, the views of the Human Rights Committee are evaluated against the criterion of "consistency with the Indian Constitution"—a structure wherein they are selectively referenced not against an external standard but against the internal standards of the domestic constitution. This is continuous with the logic of "devouring" discussed below.

## Notes to Section 2

[2] On the history of the framing of the Indian Constitution, see Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (1966).

[3] *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461. See Granville Austin, *Working a Democratic Constitution: The Indian Experience* (1999).

## Section 3: The Vishaka Judgment (1997)—A Demonstration of "Devouring"

Structure of the Case In this case, where there was no domestic law regulating sexual harassment

in the workplace, the Supreme Court of India referenced the provisions and general recommendations of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and independently enacted legally binding guidelines (the Vishaka Guidelines) to remain in effect until Parliament enacted relevant legislation. [4]

Decisive Difference from "International Law-Conformable Interpretation of Domestic Law" The operation in the Vishaka judgment must not be confused with the "international law-conformable interpretation of domestic law."

In an "international law-conformable interpretation," international law exists as an independent normative system "external" to domestic law. The court, while undertaking international law as an "external reference standard," selects the direction consistent with international law from among multiple possibilities of domestic legal interpretation. The alterity and independence of international law are preserved. International law-conformable interpretation has a limit: it must remain "within the range of possible meanings of the wording of domestic law"—interpretation is not a creation that exceeds the possible meaning of the text. [5]

In the Vishaka judgment, CEDAW lost its form of existence as an "external independent normative system" through the operation of being "incorporated into the Constitution as an element for deciphering the meaning and content" of Articles 14, 19, and 21 of the Indian Constitution. CEDAW was transformed into one of the interpretive elements of the Indian Constitution.

The concrete consequences of this difference manifest in two respects. First, the disappearance of the critical function: under "devouring," because CEDAW was reduced to an interpretive element of the Indian Constitution, if the Supreme Court of India asserts that "the spirit of the Indian Constitution permits this," it takes precedence over CEDAW. The critical externality of international law has vanished. Second, the response to recommendations of the Human Rights Committee: under the logic of "devouring," if the Supreme Court of India judges that "the fundamental rights of the Indian Constitution are sufficient in this regard," the recommendations of the Human Rights Committee are selectively "dissolved" in light of the internal standards of the Indian Constitution. They cannot function as external standards.

From the perspective of coordinate theory: in "international law-conformable interpretation," the two legal orders face each other "mutually as others," thereby generating tension and coordination. In "devouring," one absorbs the other, making tension structurally impossible (the dismantling of the coordinate space). [6]

Notes to Section 3



[4] Vishaka and others v. State of Rajasthan and others, AIR 1997 SC 3011, (1997) 6 SCC 241.

[5] On the foundational theories and limits of international law-conformable interpretation, see Satoshi Yamada, "Globalization and the Domestic Legal Order: The Significance of International Law-Conformable Interpretation of Domestic Law," Ronkyu Jurist No. 23 (Autumn 2017), pp. 20–25. For a comparison with the German obligation to consider (Berücksichtigungspflicht), see the same article.

[6] For an international legal evaluation of the Vishaka judgment, see Farida Deif, "Vetoing Violence: India's Supreme Court and International Human Rights," in Fiona Beveridge (ed.), *Feminist Perspectives on Employment Law* (1999).

#### **Section 4: The Institutional Structure of "Devouring"**

The fact that Article 51(c) of the Indian Constitution dictates to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another" (Note: translating the author's paraphrasing as "strive to maintain international peace and security and foster just and honorable relations between nations") as a Directive Principle of State Policy functions as the institutional basis for the Supreme Court of India to reference international law. However, "Directive Principles of State Policy" are distinct from the "Fundamental Rights" in Part III of the Constitution and do not serve as direct judicial norms. [7]

As a consequence of this institutional design, a structure has been established whereby the Supreme Court of India possesses institutional legitimacy to reference international law as "auxiliary material for constitutional interpretation," but is under no obligation to recognize the proposition that "international law takes precedence over domestic law." The direction of interpretation is strictly one-way: the Supreme Court of India "reads" CEDAW, while the reverse authoritative relationship—where the CEDAW Committee "evaluates" the judgments of the Supreme Court of India—is not institutionally situated.

In the dialectical link envisioned by coordinate theory, tension is generated because both legal orders face each other "mutually as others." Without this bidirectionality of "mutually," dialectics cannot hold. India's "devouring" dismantles the coordinate space by making this bidirectionality unilateral.

Notes to Section 4

[7] On the interpretation of Article 51 of the Indian Constitution, see H.M. Seervai, *Constitutional Law of India* (4th ed., 1991).

## **Section 5: Summary—The Consequence of "Digesting" the Coordinate Space**

In Japan (Chapter 2), the coordinate space is sterilized into a clean room through "three-tiered blocking." In India (this chapter), the coordinate space is digested through "constitutional devouring." While the direction of the operation is polar opposite, the coordinate-theoretical consequence is isomorphic: the arena where "two legal orders dialectically generate tension with each other while maintaining their respective authorities" does not exist in the courtrooms of either country.

There is an important difference in the comparison with Japan. Japanese practice fundamentally ignores the recommendations of international human rights bodies on the grounds that they "lack legal binding force." India "transforms and absorbs" the recommendations of the Human Rights Committee, referencing them selectively against the internal standards of the Indian Constitution. Both share the same consequence in that "the recommendations of international human rights bodies hold no effective critical function," but their mechanisms differ. Japan "ignores the outside," whereas India "internalizes and neutralizes the outside"—this is the difference between Japan's bureaucratic passivity and India's judicial activist dynamism.

## **Chapter 4: Typology Ib (United Kingdom)—Genuine Coordination Overridden**

### **Section 1: Institutional Premises—The HRA System and the Institutionalization of the Dialectical Link**

From the perspective of coordinate theory, the United Kingdom possesses a unique structure distinct from any other typology. It is a paradoxical system in which "the dialectical link is institutionalized most precisely, while simultaneously being capable of being legally overridden by parliamentary sovereignty."

The UK is a country of the thoroughgoing transformation doctrine (dualism)—treaties do not possess domestic legal validity without being incorporated into domestic law by Parliament. This is a formal institutional contrast to Japan's general adoption method. However, rather than the difference in formal reception methods, the difference in the "consciousness and institutionalization of the coordinative obligation after reception" is of decisive importance for our comparative typology.

Soji Yamamoto discussed the distinction between the Anglo-American model and the German-French model regarding the methods of "fierce clashing" (*tsubazeriai*) among the three branches of government in the domestic implementation of international legal obligations. [1] In the Anglo-American model, the legislature and the executive systematically engage in a fierce clash over the methods of implementing international legal obligations—the UK's system of the

United Nations Act and Orders in Council is a typical example. Neither model exists in Japan, and constitutional debates do not mature into routine legal doctrine, remaining mere clashes of values; this serves as the institutional cause for the "weak consciousness of the coordinative obligation on the part of the judiciary."

The Human Rights Act 1998 (HRA) can be read as the institutionalization of this Anglo-American model of fierce clashing—not merely as transformative legislation, but as a system that embeds the mechanism of coordinate-theoretical coordinative obligation within the transformation doctrine itself. Dualism in form, coordinate theory in substance: this combination can be understood to mean that the conceptual structure of coordinate theory—which discussed the "coordinate coordination of two legal orders, each supreme on its own plane"—is embodied in the design of the HRA. [2]

The HRA system possesses a two-tier structure. The first tier (Section 3) is the obligation of conformable interpretation: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." The courts bear an obligation to interpret legislation in a manner compatible with the European Convention on Human Rights (ECHR). This is the most institutionalized form of international law-conformable interpretation. [3] The second tier (Section 4) is the Declaration of Incompatibility. If an incompatibility cannot be resolved even through interpretation under Section 3, a court may declare that a provision of primary legislation is incompatible with a Convention right. However, this declaration is not legally binding.

This two-tiered operational process is the closest institutional realization of the coordinate-theoretical fierce clash where "the three branches of government exchange fierce blows."

The habitus of senior UK judges has a fundamentally different formation process from that of Japan. In the UK, which lacks a bureaucratic apparatus like the General Secretariat of the Supreme Court, the "juridical capital" of judges is constituted by their intellectual pride and independent judgmental capacity as "guardians of the rule of law." In this field, "confronting international legal obligations" does not deplete juridical capital but rather augments it—this is the most fundamental contrast with Japan's Typology Ia. [4]

#### Notes to Section 1

[1] Yamamoto, *supra* note [1], pp. 101–102; Soji Yamamoto, "Kokusaiho no Kokunaiteki Datosei o Meguru Ronri to Ho-seidoka" [The Logic and Legal Institutionalization Surrounding the Domestic Validity of International Law], *Kokusaiho Gaiko Zasshi*, Vol. 96, No. 4/5.

[2] For an institutional analysis of the HRA, see A.W. Bradley, K.D. Ewing and C.J.S. Knight,

Constitutional and Administrative Law (17th ed., 2018).

[3] On the foundational theories and limits of international law-conformable interpretation (within the range of possible meanings of the wording), see Satoshi Yamada, "Globalization and the Domestic Legal Order," *Ronkyu Jurist* No. 23 (Autumn 2017), pp. 20–25.

[4] Regarding the selection system for senior UK judges, see the Supreme Court justice appointment system subsequent to the Crime and Courts Act 2013.

## **Section 2: The Ahmed Judgment (2010)—The Declaration of Ultra Vires as the Pinnacle of Genuine Coordination**

As the first major case heard by the newly established UK Supreme Court, *Ahmed and others v. Her Majesty's Treasury* [2010] UKSC 2 and 5 presents the starkest contrast to the Japan chapter from the perspective of coordinate theory. [5]

Structure of the Case Based on UN Security Council Resolutions 1267 (Al-Qaeda and Taliban sanctions) and 1373 (general anti-terrorism measures), HM Treasury enacted two Orders in Council relying on Section 1 of the United Nations Act 1946. The Orders were enacted without parliamentary scrutiny and indefinitely froze the assets of UK citizens "suspected" of involvement in terrorism. Section 1 of the United Nations Act 1946 grants the executive the authority to implement measures via Orders in Council when the Security Council calls upon the UK to apply measures under Article 41 of the UN Charter. [6]

Logic of the Judgment The UK Supreme Court unanimously ruled that the Terrorism Order exceeded the powers granted under Section 1 of the United Nations Act 1946. The core logic of the judgment is the "principle of legality." In light of constitutional rights under the common law—specifically, the right to peaceful enjoyment of property and the right of access to a court—the Court held that Section 1 of the 1946 Act contains an "implied limitation," meaning there is no explicit authorization for the executive to restrict these rights without judicial scrutiny. [7]

Coordinate-Theoretical Evaluation Thesis (international legal obligation): Security Council resolutions constitute a legal obligation for member states under Articles 25 and 41 of the UN Charter. Antithesis (autonomy of domestic law): The rights to property and access to a court under UK common law are constitutional rights that cannot be restricted by the executive without explicit parliamentary authorization. Synthesis (coordination by the court): As a matter of interpreting Section 1 of the United Nations Act 1946, the opportunity for judicial review cannot be excluded. Therefore, the Order in Council is ultra vires. This is a case where the proposition concerning the dialectical link—that "thesis and antithesis clash and move toward coordination"—was literally realized in a UK court.

Contrast with Japan In the Tokyo Institute of Technology case (Tokyo District Court, March 28, 2013), a Japanese court reduced the conflict between Security Council Resolution 1737 and Article 14 of the Constitution to a problem of procedural flaws in administrative acts. In the Ahmed judgment, the UK Supreme Court squarely took on the question of the conflict between Security Council Resolutions 1267 and 1373 and rights under UK common law, and provided the answer of ultra vires. "Whether or not to raise the question"—this is what separates "genuine coordination" from "pseudo-coordination." [8]

Errors in the Security Council Sanctions List and "Genuine Coordination" While the Ahmed judgment took issue with the method of domestic implementation of Security Council resolutions, the related body of cases demonstrates "genuine coordination when international law contains errors." The Kadi, Sayadi, and Al-Dulimi cases represent instances where states ought to lodge protests against errors in fact-finding by the Security Council Sanctions Committee. Such actions constitute a form of attempting coordination not as "obedience to international law," but as a "legal response to errors in international law." Neither silent submission nor silent rejection constitutes an attempt at coordination. [9]

## Notes to Section 2

[5] Ahmed and others v. Her Majesty's Treasury [2010] UKSC 2 and UKSC 5. See Devika Hovell, "Due Process in the United Nations," American Journal of International Law, vol. 110 (2016).

[6] See Section 1 of the United Nations Act 1946 (9 & 10 Geo.6, c.45).

[7] See R v Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115. Given that individuals have no means to challenge a listing decision by the UN Sanctions Committee, the Order in question denied the constitutional right to an effective remedy.

[8] In Al-Dulimi and Montana Management Inc. v. Switzerland (ECtHR Grand Chamber, 2016, Application No. 5809/08), the ECtHR developed the legal doctrine of "presumptive harmony." The declaration of ultra vires in the Ahmed judgment and the presumptive harmony in Al-Dulimi can be contrasted as different modes of coordination against the conflict between Security Council sanctions and individual rights. However, Judge Nussberger's dissenting opinion in the ECtHR criticized this as a "false harmonious interpretation."

[9] See Kadi and Al Barakaat International Foundation v. Council and Commission (CJEU 2008 and 2013), Sayadi and Vinck v. Belgium (Human Rights Committee, CCPR/C/94/D/1472/2006, 2008), and Al-Dulimi, supra note [8].

### **Section 3: The Rwanda Judgment (2023) and the Safety of Rwanda Act 2024—The Structural Limit of "Overriding"**

In *R (AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42, the UK Supreme Court unanimously ruled the government's policy of relocating refugees to Rwanda unlawful. The Court confirmed the principle of non-refoulement not only under the ECHR but also as multiple independent international legal obligations under the Refugee Convention, the ICCPR, and the Convention Against Torture. [10]

The Sunak administration responded to the Rwanda judgment by enacting the Safety of Rwanda (Asylum and Immigration) Act 2024. This Act disapplied key provisions of the HRA in the specific context of relocation to Rwanda. However, the Act did not remove the Supreme Court's power to issue a Section 4 Declaration of Incompatibility—it left the "power to record" while denying the "power to alter." [11]

Even if Parliament disapplies an obligation under domestic law, the record of illegality under international law is not erased. The "record of illegality" within the international legal order is not extinguished even by the Safety of Rwanda Act. This can be read as a UK manifestation of karmic legal doctrine.

The continuity from the Ahmed judgment to the Rwanda judgment and the Safety of Rwanda Act substantiates the typological characteristic of Typology Ib: "genuine coordination overridden." UK judges perform "genuine coordination"—they raise the question, squarely undertake the conflict between international legal obligations and domestic law, and provide an answer. However, the supreme dogma of the UK constitution, "parliamentary sovereignty," legally overrides the outcome of that coordination. In Bourdieu's conceptual apparatus, the juridical capital of UK judges is accumulated through their function as "guardians of the rule of law." Yet, the political capital of "parliamentary sovereignty" exists structurally at a higher level, overpowering juridical capital. Caserta & Madsen's "asymmetry between juridical capital and political capital" manifests in the UK in the form that "juridical capital is institutionalized, but political capital (parliamentary sovereignty) stands structurally supreme." [12]

Notes to Section 3

[10] See *R (AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42.

[11] See the Safety of Rwanda (Asylum and Immigration) Act 2024.

[12] See Caserta and Madsen, *supra* chapter 1, note [14].

#### **Section 4: BREXIT and the Uproar over Withdrawing from the ECHR—Rebellion by the Architect of Coordinate Theory**

A Coordinate-Theoretical Reading of BREXIT BREXIT removed "one layer of coordinate theory" in the UK. EU law directly constrained UK parliamentary sovereignty, and the judgments of the Court of Justice of the European Union (CJEU) had direct effect within the UK. BREXIT eliminated the CJEU as an "external enforcement apparatus of coordinate theory."

However, an important paradox remains. The EU-UK Trade and Cooperation Agreement (TCA) conditions security and judicial cooperation upon explicit commitments to the ECHR, meaning that if the UK withdraws from the ECHR, the EU can terminate those portions of the TCA. In other words, BREXIT did not liberate the UK from ECHR obligations; rather, it structurally maintained its binding to the ECHR through the TCA. [13]

The Uproar over ECHR Withdrawal—A Pure Form of Counter-Constructivism Between 2022 and 2023, Cabinet ministers of the Conservative government openly discussed withdrawing from the ECHR. The logic behind the arguments for withdrawal is that "a foreign court (the ECtHR) invalidating legislation by the UK Parliament is an infringement of sovereignty."

Yet, a profound paradox lies here. The UK was a co-drafter of the ECHR system and has been deeply involved in the selection of ECtHR judges. Furthermore, it has been deeply involved in the development of the "margin of appreciation" doctrine—the legal doctrine that each state possesses a certain discretion regarding specific measures for human rights protection. The country that most deeply institutionalized coordinate-theoretical coordination is now attempting to discard that very institution.

This phenomenon provides the strongest counter-evidence to Finnemore and Sikkink's norm life cycle theory: "The more deeply an international norm is internalized, and when it begins to effectively constrain government policy, counter-internalization is triggered." This dynamic—where the more effectively a norm functions, the stronger the resistance to it becomes—is manifesting in the UK as a pure form of counter-constructivism. [14]

The Ambivalence of the Dogma of Parliamentary Sovereignty Here we see the structural ambivalence of Typology Ib. On the one hand, "parliamentary sovereignty" is precisely the basis that enables the UK judiciary to practice "genuine coordination"—judges can declare executive restriction of rights *ultra vires* in the absence of explicit parliamentary authorization. On the other hand, "parliamentary sovereignty" is also the apparatus that overrides the results of "genuine coordination"—as seen in the Safety of Rwanda Act, Parliament can legally overturn

international legal judgments established by the judiciary. In this triangulation, "genuine coordination" is possible, but it does not equate to "ultimate institutional guarantee."

#### Notes to Section 4

[13] See the EU-UK Trade and Cooperation Agreement (December 24, 2020). Regarding references to the ECHR, see Chatham House, "Britain and the European Convention on Human Rights" (2022).

[14] On the political context of the ECHR withdrawal uproar, see Brill, "The United Kingdom and International Human Rights Law" (2023). On the development of the margin of appreciation doctrine, see Dean Spielmann, "Allowing the Right Margin," CELS Working Paper (2012).

#### Section 5: Summary—The Tragedy of "Genuine Coordination Overridden"

The comparative legal positioning of the UK (Typology Ib) can thus be established.

The declaration of ultra vires in the Ahmed judgment, and the cumulative confirmation of multiple treaty obligations in the Rwanda judgment—these are positioned at the highest rank within our comparative typology as "attempts at genuine coordination." Scelle's function of international agency is manifested most self-consciously among UK judges.

However, the outcomes of such faithful coordination are destined to be legally overridden by the supreme dogma of the UK constitution, parliamentary sovereignty. The Safety of Rwanda Act stands as its clearest contemporary empirical proof. The more "genuine coordination" is institutionalized, the more it induces collisions with the "more fundamental institution" of parliamentary sovereignty, triggering counter-constructivism. The more the "fierce clash" functions, the more the "arena of the clash itself" becomes the target of attack. To answer why this happens, one must turn to the philosophical foundations of coordinate theory.

### **Chapter 5: Typology Ic (France)—The Paradox of Institutional Tension and Democratic Attempts in the Birthplace of Scelle**

#### **Section 1: The Multi-Faceted Starting Point of the Paradox—The Dual Axes of Criticism and Evaluation**

In the comparative typology of this paper, France represents a typology that demands the most multi-faceted evaluation.

Georges Scelle developed the theory of "functional *dédoublement*" (*dédoublement fonctionnel*)



within the tradition of French public law scholarship. The proposition that domestic organs bear a dual role as both "domestic organs" and "international agents" serves as the most concrete theory of actors regarding the coordinative obligation under coordinate theory, thereby supporting the entire analytical framework of this paper. Its ideological birthplace is France. [1]

Article 55 of the Constitution of the Fifth French Republic explicitly stipulates: "Treaties or agreements duly ratified or approved shall, upon publication, have an authority superior to that of laws." This provision stands as the most direct textual basis in a constitution for the practice of coordinate-theoretical coordination. According to Finnemore and Sikkink's norm life cycle theory, this explicit provision should have enabled international legal norms to promptly permeate the domestic sphere.

However, reality was not so simple. French judicial practice provides the richest comparative material for coordinate theory, exhibiting both aspects that warrant criticism and aspects that merit positive evaluation.

Aspects warranting criticism: The fourteen-year resistance by the Conseil d'État. Despite the existence of the explicit provision in Article 55 of the Constitution, the habitus of the Conseil d'État hollowed it out for fourteen years. It was precisely in the birthplace of Scelle that counter-constructivism operated in its most vivid form.

Aspects meriting positive evaluation: The persistence of institutional tension among the three courts, the declaration of unconstitutionality by the Constitutional Council (Conseil constitutionnel), subsequent constitutional amendments, and the undertaking of the attempt at coordination by the entire populace through the referendum process. Including the rejection of the Treaty establishing a Constitution for Europe in the 2005 referendum, France "raised the question, exhausted all attempts, and provided the answer of rejection"—a faithful setting of limits that falls well within the scope of coordinate theory.

Notes to Section 1

[1] See Georges Scelle, *Précis de droit des gens: principes et systématique* (Sirey, 1932-1934).

## **Section 2: Institutional Structure—The Complex Field of Tension in the Parallel Existence of Three Supreme Courts**

The French judicial system features a structure in which three supreme courts—the Constitutional Council (Conseil constitutionnel), the Council of State (Conseil d'État), and the Court of Cassation (Cour de cassation)—exist in parallel without any hierarchical subordination.

Since its establishment in 1958, the primary authority of the Constitutional Council had been a priori abstract review. Following the 2008 constitutional amendment, a posteriori review (question prioritaire de constitutionnalité, QPC) was introduced, allowing litigants to challenge the constitutionality of a law applicable in pending litigation (entering into force on March 1, 2010).

Crucially, in the 1975 IVG decision, the Constitutional Council excluded treaty review from its own jurisdiction, stating that "reviewing the conformity of laws with treaties (conventionality review) is not within its own authority but within the authority of ordinary courts." This decision structurally enabled the subsequent fourteen years of institutional divergence. [3]

The Court of Cassation presides as the supreme court of the private law system, exercising jurisdiction over civil and criminal cases.

The Conseil d'État stands at the apex of France's unique administrative justice system as a group of judges possessing a fierce elite consciousness as "robed administrators" who have passed through the Grandes Écoles system, topped by the ENA.

This parallel structure of three supreme courts complicated the manifestation of the dialectical link. The issue of allocation of authority—namely, "who bears the responsibility of coordination with international law"—dispersed the manifestation of coordinate-theoretical clashes. Yet, at the same time, the institutional tension generated by the three supreme courts taking different positions on the relationship between treaties and domestic law kept the question alive. The fourteen-year divergence can be read not as the "absence of dialogue," but as a "fragmented form of dialogue." [4]

Notes to Section 2

[3] See Constitutional Council Decision No. 74-54 DC of 15 January 1975 (IVG). Regarding the significance of this decision, see Louis Favoreu and Loïc Philip, *Les grandes décisions du Conseil constitutionnel* (18e éd., 2016).

[4] On the parallel structure of the three courts in France, see L. Neville Brown and John Bell, *French Administrative Law* (5th ed., 1998). On the elite habitus of the Conseil d'État, see Pierre Bourdieu, *The State Nobility: Elite Schools in the Field of Power* (Stanford University Press, 1996).

### **Section 3: Fourteen Years of Resistance—The Habitus of the Conseil d'État and the Persistence of Institutional Tension**

## The Fourteen-Year Divergence Between the Jacques Vabre Judgment (Court of Cassation, 1975) and the Nicolo Judgment (Conseil d'État, 1989)

In 1975, immediately after the Constitutional Council declared that conventionality review fell outside its authority, the Court of Cassation, in the Jacques Vabre judgment, promptly recognized the primacy of treaties (EC law) over domestic statutes, putting Article 55 of the Constitution into practice. [5]

However, the Conseil d'État, reigning at the apex of administrative litigation, fiercely rejected this. It steadfastly adhered to the doctrine of the "statutory screen" (*loi écran*), asserting that "where a statute has been enacted subsequent to a treaty, a judge cannot review the treaty behind that statute."

When read through Bourdieu's concept of juridical capital, the true nature of this fourteen-year resistance becomes clear. For the elite judges of the Conseil d'État, obedience to parliamentary statutes—conceived in the Rousseauian tradition as the "expression of the general will"—was the very source of their authority (*doxa*). Invalidation of domestic law on the grounds of international law was prereflexively recognized as a threat to their embodied *habitus*.

However, the Divergence of the Three Courts Constituted the Persistence of the Question

One must not simplify the evaluation here. The Court of Cassation recognized treaty primacy in the Jacques Vabre judgment, while the Conseil d'État continued to resist through the "statutory screen"—this fourteen-year divergence does not mean that "France as a whole failed to raise the question."

The fact that two supreme courts continuously provided different answers to the exact same question indicates that the question remained alive within the institution. In a manner distinct from the Anglo-American model of clashing discussed by Soji Yamamoto, a fierce clash in the form of "institutional tension among the three courts" persisted in France for fourteen years. With the explicit provision of Article 55 of the Constitution present, the Court of Cassation practicing it, and the Conseil d'État resisting it, this tension represents not an "absence of inquiry," but the "continuation of an institutional struggle over the question."

The Nicolo Judgment (Conseil d'État, 1989)—The Commencement of Dialogue as a Capitulation

In the 1989 Nicolo judgment, the Conseil d'État finally abandoned the doctrine of the statutory screen and recognized the primacy of treaties over statutes. [6] It was a capitulation after fourteen years of resistance.

Crucially, the habitus of the Conseil d'État did not "transform"; rather, it "shifted toward constructing a more sophisticated defensive line"—this manifested as the Sarran judgment discussed below. [7]

### Notes to Section 3

[5] Cass. ch. mixte, 24 mai 1975, *Administration des douanes c/ Société Cafés Jacques Vabre*, D. 1975 p. 497. This case concerned a coffee importer challenging the conflict between a French domestic tax regulation and Article 95 of the EEC Treaty (prohibition of discriminatory internal taxation). The Mixed Chamber of the Court of Cassation established the principle that treaties, by their very nature, take precedence over domestic statutes even if the latter are subsequent, positioning this judgment as the first practical application of Article 55 of the Constitution by a judicial organ.

[6] CE Ass., 20 octobre 1989, *Nicolo*, Rec. p. 190. This case, concerning the validity of European Parliament elections, disputed whether the provisions of the 1977 Electoral Act conflicted with the EC Treaty. The Conseil d'État abandoned its traditional doctrine of the statutory screen (*loi écran*)—which held that subsequent domestic statutes block the review of treaties—and, like the Court of Cassation, acknowledged the supremacy of treaties over statutes. It is evaluated as a turning point in French administrative law.

[7] See Ronny Abraham, *Droit international, droit communautaire et droit français* (1989).

### **Section 4: The Sarran Judgment (1998)—A New Defensive Line of "Pseudo-Coordination"**

Having accepted the principle of "treaty  $\$>\$$  statute" in the *Nicolo* judgment, the Conseil d'État immediately constructed a new defensive line. In the Sarran judgment (1998), it declared that "while Article 55 of the Constitution stipulates that treaties take precedence over 'laws' [statutes], it does not stipulate that treaties take precedence over the 'Constitution.' Within the domestic legal order, the Constitution reigns supreme." [8]

Deconstructing the sophistication of this operation from a coordinate-theoretical perspective: while appearing to have opened a primary coordinative circuit of "treaty  $\$>\$$  statute" via the *Nicolo* judgment, it established a secondary defensive line of "Constitution  $\$>\$$  treaty" through the Sarran judgment. International law is superior to statutes but inferior to the Constitution within the domestic legal order—this structure of "relative primacy" functions as an apparatus to prevent international law from threatening the juridical capital of the Conseil d'État by placing treaties under the control of the "Constitution as the supreme law."

This represents a subtle form of "pseudo-coordination." While posing as having "undertaken the coordinative obligation," it placed the ultimate authority of international law under the management of the supreme norm of the domestic legal order.

A contrast with the "managed openness" in the German *Görgülü* judgment is instructive. Germany's "managed openness" is a form of "management" arrived at after a faithful struggle with international law—a setting of limits after exhausting all attempts. France's *Sarran* judgment can be read as an operation that attempts to secure management alone while minimizing the struggle itself. [9]

#### Notes to Section 4

[8] See CE Ass., 30 octobre 1998, *Sarran, Levacher et autres*, Rec. p. 368. A case seeking the annulment of a decree concerning a referendum in New Caledonia (based on the Constitution) on the grounds that it violated the "equality of voting rights" under the ICCPR and the ECHR. The Conseil d'État dismissed the claim, stating that while Article 55 of the Constitution establishes that treaties take precedence over statutes, this does not imply that treaties are superior to the Constitution.

[9] See Ronny Abraham, "Droit international et droit constitutionnel," *Revue française de droit administratif*, vol. 15 (1999).

### **Section 5: Response to the Maastricht Treaty—The Climax of the Attempt at Coordination**

The Constitutional Council's Inconstitutionality Ruling (1992)—The Moment the Question Was Raised

In its decision of April 9, 1992 (*Maastricht I*), the French Constitutional Council judged that multiple provisions of the Maastricht Treaty conflicted with the French Constitution, declaring that a constitutional amendment was required for ratification. [10]

Deconstructing this judgment from a coordinate-theoretical perspective: the Constitutional Council squarely raised the question of "conflict between treaty and constitution." It did not evade it. In stark contrast to the Conseil d'État, which had continuously substituted the question with the "statutory screen" for fourteen years, the Constitutional Council undertook the inquiry.

This judgment is positioned as a higher-order form of the attempt at coordination in scenarios that exceed the "limits of international law-conformable interpretation"—namely, the constraint of being "within the range of possible meanings of the wording." It relegated a conflict that could not be resolved through "interpretation" to an "institutional procedure." [11]

## There Is No Obligation to Ratify—The Referendum as a Mode of Attempting Coordination

A proposition of decisive importance to coordinate theory is derived here: the ratification of an international treaty is based on the free will of the state. There is no obligation to ratify.

Consequently, France possessed three options: (1) to amend the Constitution and ratify, (2) to abandon ratification without amending the Constitution, or (3) to put the question to the populace through a referendum.

France executed a referendum (September 20, 1992). It passed by a narrow margin (51.05% to 48.95%), and ratification was subsequently achieved following a constitutional amendment.

This referendum process itself is positively evaluated as "one of the attempts at coordination." It relegated the question of how to process the tension between international treaty obligations and the domestic constitutional order not only to the judiciary but to the arena of the political decision-making of the populace.

## It Is Permissible to Reject—The Honest Form of Coordinate Theory

Rejection in a referendum does not equate to a failure of coordinate theory. There is no obligation to ratify, and rejection is an exercise of sovereign liberty. However, as long as that rejection is the product of a process of "raising the question, exhausting all attempts, and providing the answer of rejection," the coordinate-theoretical "obligation of attempt" has been fulfilled.

This stands as the decisive contrast to the "evasion of the question" via the political question doctrine in Japan. Japan did not raise the question. France raised the question, the entire populace took it upon themselves, and they provided an answer—even if that answer had been a rejection.

Rejection born of nationalism and rejection following an attempt at coordination are fundamentally different in coordinate-theoretical evaluation. The former fails to raise the question. The latter provides an answer after having raised the question. [12]

## Contrast with the German Brunner Judgment (1993)

While the French Constitutional Council judged that "ratification requires a constitutional amendment" (finding a conflict between the treaty and the constitution), the German Federal Constitutional Court delivered the Brunner judgment, which ruled it "constitutional but conditional"—affirming constitutionality while attaching a reservation that any expansion of

authority by EU institutions remains subject to review by the Federal Constitutional Court.

France "identifies a conflict between treaty and constitution and leaves it to an amendment procedure," whereas Germany "affirms constitutionality while establishing a defensive line by reserving review authority." Both diverge entirely in dimension from Japan's three-tiered blocking, standing as "attempts at genuine coordination" that squarely raise the question. [13]

#### Rejection in the 2005 Referendum on the EU Constitution Treaty—A Case of a Completed Attempt

In the 2005 referendum on the Treaty establishing a Constitution for Europe, the French populace rejected it (54.67% to 45.33%).

This rejection is positively evaluated from a coordinate-theoretical perspective. Raising the question, the entire populace rendering a judgment, and providing the answer of rejection—this series of processes constitutes the most democratic form of practicing the "obligation of attempt." Rejection is an exercise of sovereign liberty that bears no obligation to ratify, manifesting nationalism as a form of state sovereignty. Yet, at the same time, as an event where the entire populace squarely undertook the tension between international treaty obligations and the domestic constitutional order, it is recorded as the most sincere completion of the attempt at coordination.

Because coordinate theory is not monism with the primacy of international law, the outcome of rejection does not imply a failure of coordinate theory. It represents a faithful setting of limits after exhausting all attempts—a precise practice of the obligation of attempt. [14]

#### Notes to Section 5

[10] Constitutional Council Decision No. 92-308 DC of 9 April 1992 (Maastricht I). In the second decision of October 23 of the same year (Maastricht II), conformity with the amended Constitution was confirmed.

[11] See Satoshi Yamada, "Globalization and the Domestic Legal Order," *Ronkyu Jurist* No. 23 (Autumn 2017), pp. 20–25. This positions constitutional amendment as a methodological option for coordination in "conflicts exceeding the range of possible meanings of the wording."

[12] Regarding the French Maastricht Treaty referendum (September 20, 1992), see Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (1998). The proposition that "there is no obligation to ratify" is demonstrated by Article 11 of the Vienna Convention on the Law of Treaties (means of expressing consent to be bound by a

treaty)—consent to be bound by a treaty is based on the free will of the state.

[13] Regarding the German Federal Constitutional Court judgment of October 12, 1993 (Brunner, BVerfGE 89, 155), see Chapter 6.

[14] Regarding the French referendum on the Treaty establishing a Constitution for Europe (May 29, 2005, rejected), see Andrew Glencross and Alexander Trechsel (eds.), *EU Federalism and Constitutionalism: The Legacy of Altiero Spinelli* (2011).

## **Section 6: Summary—A Multi-Faceted Evaluation of Institutional Tension and Democratic Attempts**

France (Typology Ic) is not a simple "pure culture of counter-constructivism."

Aspects evaluated critically: The fourteen-year refusal of dialogue by the Conseil d'État via the "statutory screen" represents a classic manifestation of counter-constructivism where habitus overpowered the explicit provisions of the Constitution. The reconstruction of the "defensive line of constitutional primacy" by the Sarran judgment is criticized as a subtle form of "pseudo-coordination."

Aspects evaluated positively: The institutional tension among the three courts preserved the question within the institution for fourteen years. The path from the Court of Cassation's Jacques Vabre judgment to the Nicolo judgment can be evaluated as a "fragmented form of dialogue." The response to the Maastricht Treaty—comprising the declaration of unconstitutionality by the Constitutional Council, constitutional amendments, and the referendum—is positively evaluated as the "highest form of the attempt at coordination." The 2005 rejection of the EU Constitutional Treaty falls within the scope of coordinate theory as a "faithful setting of limits after exhausting all attempts."

France's Typology Ic is thus positioned as a complex typology in which "forms to be criticized" (the refusal of dialogue driven by the habitus of the Conseil d'État) and "permissible forms" (the democratic attempts through the Constitutional Council and referendums) coexist.

Furthermore, connecting with the cross-sectional propositions of Chapter 9: "Nationalism and the attempt at coordination can coexist." France provided cases surrounding the Maastricht Treaty and the EU Constitutional Treaty where nationalism in the form of exercising state sovereignty functioned simultaneously as a coordinate-theoretical attempt at coordination. It raised the question while encapsulating the possibility of rejection—in this respect, the French model differs fundamentally from both the Japanese model, which evades without raising the question, and the Orban model, which eliminates the actors.



While being the intellectual birthplace of the theory of the dual function of the state, the home of Scelle exhibited the most complex paradox in its institutional practice—the habitus of judicial elites betrayed the theory, yet constitutional systems and democratic procedures partially compensated for that betrayal. This paradox itself simultaneously substantiates both the proposition that "ideology, institutional stipulations, and academic traditions alone do not alter habitus" and the proposition that "nevertheless, institutional apparatuses can preserve the question."

## **Chapter 6: Typology Id (Germany)—The Intellectual Fortress of "Managed Openness"**

### **Section 1: Institutional Premises—Multilayered International Law-Friendly Apparatuses**

The aspect that decisively distinguishes Germany's Typology Id from all other typologies is that the Basic Law institutionalizes coordination with international law through multiple independent apparatuses.

#### **Multilayered Apparatuses of the Basic Law**

Article 25 of the Basic Law stipulates: "The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory." General international law (customary international law and general principles of law) occupies a unique intermediate status: superior to statutory laws but inferior to the Constitution. [1]

Article 24 of the Basic Law stipulates: "The Federation may by a law transfer sovereign powers to international organizations," providing the legal foundation for European integration. Although Article 59, Paragraph 2 of the Basic Law regulates the procedure for the domestic incorporation of treaties, treaties that have undergone this procedure remain coordinate with ordinary federal statutes and are placed below the general international law under Article 25—a structure where treaties are coordinate with statutes and do not take precedence over them. In this respect, it differs from Article 55 of the French Constitution (where treaties take precedence over statutes).

#### **Völkerrechtsfreundlichkeit (The Principle of Friendliness to International Law)**

The interpretive principle of Völkerrechtsfreundlichkeit developed by the Federal Constitutional Court functions as an interpretive attitude demanding harmony with international law throughout the entirety of the Basic Law. Rather than operating as a specific provision, it functions as an interpretive disposition derived from the spirit of the Basic Law. In Germany, "international law-

conformable interpretation" (völkerrechtskonforme Auslegung) is derived from this Völkerrechtsfreundlichkeit and functions as an operation that gives priority to interpretations consistent with international law within the range of possible meanings of the wording of domestic law. This possesses a limit: it merely requires the avoidance of conflict, and does not demand active conformity with international law. [2]

### Abstract Judicial Review as an Institutional Apparatus

The most important institutional characteristic of Germany is that the Federal Constitutional Court can review the constitutionality of a law abstractly (Abstrakte Normenkontrolle) without a concrete dispute. This serves as the institutional foundation for the German-French model of clashing—the soft landing of international legal obligations through the accumulation of constitutional practice. [3] In contrast to the French Constitutional Council, which excluded conventionality review from its own authority (the 1975 IVG decision), the German Federal Constitutional Court possesses both the authority and the willingness to squarely adjudicate the relationship between international legal obligations and the Basic Law.

### Notes to Section 1

[1] On the interpretation of Article 25 of the Basic Law, see Jochen Abr. Frowein, "Germany," in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009). On the intermediate status of general international law, see BVerfGE 6, 309 (1957).

[2] See Satoshi Yamada, "Globalization and the Domestic Legal Order," *Ronkyu Jurist* No. 23 (Autumn 2017), pp. 20–25. On the development of Völkerrechtsfreundlichkeit, see Jochen Abr. Frowein, "Federal Republic of Germany," in Francis Jacobs and Shelley Roberts (eds.), *The Effect of Treaties in Domestic Law* (1987).

[3] On Abstrakte Normenkontrolle, see Article 93, Paragraph 1, Item 2 of the Basic Law.

## **Section 2: Formation of the Habitus—Doctrinal Scholarship (Dogmatik) as Juridical Capital**

The habitus of judges on the German Federal Constitutional Court has a formation process fundamentally different from that of judicial elites in all other typologies.

Many judges of the Federal Constitutional Court possess backgrounds as law professors. In the German law professorship system, authority is accumulated through the capacity to construct academic doctrinal scholarship (Dogmatik)—that is, the theoretical ability to systematically organize legal problems and resolve them through precise logical chains. This "doctrinal

capacity" constitutes the core of their "juridical capital."

In terms of Caserta & Madsen's concept of "juridical capital," the accumulation of juridical capital in the German Federal Constitutional Court is neither the capacity to evade questions (the Japanese model), the capacity to protect parliamentary sovereignty (the UK model), nor the capacity to protect the general will (the French model)—it is the capacity to present a precise doctrinal solution to any difficult question.

As a consequence, the habitus of German Federal Constitutional Court judges does not shun the act of raising questions itself; rather, it possesses a disposition to augment juridical capital by undertaking difficult questions and presenting precise answers to them. Herein lies the most fundamental difference from Japan's habitus of "not raising the question."

At the same time, however, this habitus is grounded in the identity of being the "guardian of the value system of the Basic Law." This identity, born out of poignant reflection on Nazi totalitarianism, positions the Basic Law—particularly its eternity clause (Ewigkeitsklausel, Article 79, Paragraph 3 of the Basic Law)—as the ultimate normative authority. No matter how precise the doctrinal dialogue performed, that "ultimate authority" remains in Karlsruhe (the seat of the Federal Constitutional Court). [4]

Notes to Section 2

[4] On the institutional status of the German Federal Constitutional Court, see Donald Kommers and Russell Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed., 2012). On the Ewigkeitsklausel (eternity clause), see Article 79, Paragraph 3 of the Basic Law.

### **Section 3: NATO Out-of-Area Deployments and the Accumulation of Constitutional Practice—Demonstration of the German-French Model of Clashing**

The 1994 judgment of the Federal Constitutional Court (BVerfGE 90, 286) stands as one of the most important cases for understanding Germany's Typology Id.

Structure of the Case

Following the end of the Cold War, the out-of-area deployment of the German military became an issue in conflicts such as those in Somalia and Yugoslavia. The question was whether participation in international peace activities based on UN Security Council resolutions was permissible under the Basic Law. Article 87a of the Basic Law stipulates that "The Federation shall establish Armed Forces for purposes of defence," and Article 26 stipulates the prohibition

of acts tending to disrupt peaceful relations (acts of aggression). Article 24, Paragraph 2 stipulates: "The Federation may enter into a system of mutual collective security for the preservation of peace..." Since direct text explicitly permitting military deployment out-of-area (as a regulation for the employment of the armed forces) was not clearly stated, there was a fierce constitutional controversy as to whether this clause could serve as the basis for permitting military deployments out-of-area.

- Opponents: Argued on the basis of Article 87a (Armed Forces for purposes of defence) that the mission of the German military must be restricted to territorial defence, and that Article 24, Paragraph 2 did not envision military participation.

- The 1994 Judgment: The Court established Article 24, Paragraph 2 as a foundational provision that can include military participation.

#### Logic of the Judgment—Establishment of the Constitutional Practice of Prior Parliamentary Approval

The Federal Constitutional Court ruled that the out-of-area deployment of the German military within the framework of a collective security system (such as the UN or NATO) is permissible under the Basic Law—provided that it requires the prior approval of the Federal Diet (konstitutiver Parlamentsvorbehalt). [4]

This judgment holds multiple coordinate-theoretical implications.

First, the Federal Constitutional Court squarely adjudicated the relationship between the international legal obligation of a Security Council resolution and the Basic Law. This can be evaluated as an "attempt at genuine coordination" in the sense that it raised the question. The contrast with the escape via the political question doctrine in Japan and the obiter dictum reference by the Nagoya High Court is stark.

Second, the setting of the condition of prior parliamentary approval can be read as the institutionalization of the Anglo-American model of clashing. Through a procedure wherein the legislature priorly approves the out-of-area deployment decision made by the executive (the government), a circuit was designed to ensure democratic legitimacy in the domestic implementation of international legal obligations.

Third, subsequent to this judgment, the practice of prior parliamentary approval was accumulated across various German out-of-area deployments (such as in Kosovo, Afghanistan, and Mali). The "accumulation of constitutional practice" in the sense of forming constitutional case law was achieved.

In comparison with Japan: during the process of enacting the Legislation for Peace and Security, the Japanese government resolved the constitutional issue through internal processing within the executive branch—namely, the alteration of constitutional interpretation by the Cabinet Legislation Bureau. [5] In Germany, the Federal Constitutional Court undertook the question in the form of a conditional constitutionality requiring prior parliamentary approval, and an accumulation of practice was built up in subsequent implementations. This is the concrete manifestation of the German-French model of clashing.

#### Connection to the Maastricht Treaty Judgment (1993)

In contrast to the French Constitutional Council's unconstitutionality ruling on the Maastricht Treaty (1992) discussed in the preceding chapter, we examine the Brunner judgment of the German Federal Constitutional Court (BVerfGE 89, 155, 1993).

The Federal Constitutional Court delivered a judgment of conditional constitutionality, stating that the Maastricht Treaty is constitutional, but if EU institutions act beyond the authority conferred upon them by the treaty, such actions will be subject to review by the Federal Constitutional Court.

The contrast between France (finding of unconstitutionality  $\rightarrow$  constitutional amendment  $\rightarrow$  ratification) and Germany (conditional constitutionality  $\rightarrow$  ratification) illustrates the difference in the habitus of the judicial elites of the two nations. The French Constitutional Council identifies a conflict between the constitution and the treaty and leaves it to an institutional procedure, whereas the German Federal Constitutional Court manages the conflict through precise doctrinal processing while providing the answer of constitutionality—both are attempts at coordination that raise the question, but their modes differ. [6]

#### Notes to Section 3

[4] Federal Constitutional Court Judgment of July 12, 1994 (BVerfGE 90, 286). On the development of Parlamentsvorbehalt in Germany, see Dieter Wiefelspütz, *Das Parlamentssheer* (2005).

[5] Regarding the institutional characteristics of the Cabinet Legislation Bureau model (the triple structure of a simulated clash concluded entirely within the executive, the Cabinet's exclusive prerogative in appointing the Director-General, and the restraint of review through the judiciary's political question doctrine) and its coordinate-theoretical evaluation, see Chapter 2, Section 1(2). For the formulation of the "Lie of Article 81," see the same section and Chapter 2, Section 6 of

"The Transformation of the Problem Domain in Coordinate Theory."

[6] Brunner Judgment (BVerfGE 89, 155, October 12, 1993). On the relationship between EU law and the German Basic Law, see Christian Tomuschat, "The Ruling of the German Constitutional Court on the Maastricht Treaty," German Yearbook of International Law, vol. 36 (1993).

#### **Section 4: The Görgülü Judgment (2004)—Anatomy of "Managed Openness"**

The Görgülü judgment (BVerfGE 111, 307, October 14, 2004) is positioned as the judicial precedent that most precisely demonstrates the core characteristics of Typology Id. [7]

##### **Structure of the Case**

Faced with a biological father seeking custody of and visitation rights with his child born out of wedlock, a German higher regional court denied the request on the grounds of the child's welfare (the stability of the relationship with the foster parents). The biological father filed an application with the European Court of Human Rights (ECtHR), and the ECtHR ruled that Germany's response violated Article 8 of the European Convention on Human Rights (the right to respect for private and family life). However, confronted with the ECtHR judgment, the German higher regional court prioritized the standards of domestic family law concerning the welfare of the child and refused to subordinate itself to the ECtHR judgment. In response, the biological father filed a constitutional complaint with the Federal Constitutional Court.

##### **Logic of the Federal Constitutional Court—Formulation of the Obligation to Consider (Berücksichtigungspflicht)**

The Federal Constitutional Court ruled that German courts bear an obligation to consider (Berücksichtigungspflicht) the judgments of the ECtHR in rendering decisions in domestic proceedings.

At the same time, however, it established a decisive reservation. The obligation to consider is not an obligation of absolute obedience. It argued that if applying an ECtHR judgment as it stands decisively infringes upon the fundamental values of the Basic Law—in this case, the child's own fundamental rights or the balance among multi-polar fundamental rights—German courts are permitted to diverge from the ECtHR judgment exceptionally.

Contrasting the precise doctrinal structure of this logic with the limits of international law-conformable interpretation: the limit of being "within the range of possible meanings of the wording" is progressively formulated in this judgment as a standard of infringement upon the

fundamental values of the Basic Law. While the limit of interpretation is elevated from wording to values, they share the common structure wherein the ultimate authority remains domestic. [8]

#### Coordinate-Theoretical Evaluation of "Managed Openness"

This combination of the obligation to consider and the permissibility of exceptional divergence constitutes managed openness (Kontrollierte Öffnung).

Evaluating this from a coordinate-theoretical perspective: this judgment can be evaluated as an attempt at genuine coordination. Frontally undertaking the international legal obligation of the ECtHR judgment, it performed a faithful setting of limits through the permissibility of exceptional divergence after undergoing a precise doctrinal struggle. It is fundamentally different from Japan's habitus of "not raising the question."

Coordinate theory dictates an obligation of attempt, not an obligation to achieve a completed synthesis. Permitting exceptional divergence—the right of Karlsruhe to state "in this case we diverge"—is permissible under coordinate theory. Because international law can sometimes contain errors, the setting of limits after a faithful struggle does not imply a failure of coordinate theory.

However, it also demonstrates that an uncoordinable residue (deadlock) remains. A deadlock following a faithful struggle carries the most important implication for our comparative typology: even in Germany, where the system is most developed, it was necessary to institutionalize deadlock. [9]

#### Notes to Section 4

[7] BVerfGE 111, 307 (October 14, 2004). Görgülü v. Germany, Application No. 74969/01, ECtHR (February 26, 2004). For a detailed analysis of the judgment, see Christoph Möllers, "German Federal Constitutional Court: Görgülü Case," *International Journal of Constitutional Law*, vol. 4 (2006).

[8] See Satoshi Yamada, "Globalization and the Domestic Legal Order," *Ronkyu Jurist* No. 23 (Autumn 2017), pp. 20–25. On the doctrinal structure of Berücksichtigungspflicht, see Jan-Henrik Dietrich, "Das Verhältnis des Bundesverfassungsgerichts zur Europäischen Menschenrechtskonvention," *Deutsches Verwaltungsblatt* (2005).

[9] On the definition of an "attempt at genuine coordination," see Chapter 1, Section 5. The evaluation of a "faithful setting of limits" is structurally analogous to the operation that Fitzmaurice reserved as "extra-legal methods."

## **Section 5: Summary—As a "Faithful Setting of Limits After Exhausting Attempts"**

Through this chapter, it is necessary to confirm a precise understanding of coordinate theory. Coordinate theory is not monism with the primacy of international law. Treaties do not need to take precedence over domestic statutes, nor do the two legal orders need to be unified. The obligation of coordination is an obligation of attempt, not an obligation to achieve a completed synthesis—the remaining of deadlock, the permissibility of exceptional divergence, and rejection in a referendum do not imply a failure of coordinate theory; rather, they fall within the scope of coordinate theory as a faithful setting of limits after exhausting all attempts. Because international law can sometimes be erroneous, the right of Karlsruhe to state "in this case we diverge" is permissible under coordinate theory.

Germany is not a model embodying the completion of coordinate-theoretical coordination—yet it can be evaluated as the most precise practice of the obligation of attempt. The accumulation of constitutional practice in the form of prior parliamentary approval in NATO out-of-area deployments represents a concrete realization of the German-French model of clashing. The formulation of the obligation to consider in the Görgülü judgment raised the question, squarely undertook the international legal obligation of the ECtHR judgment, and performed a faithful setting of limits via the permissibility of exceptional divergence after undergoing a precise doctrinal struggle.

On the evaluative axis of our comparative typology, Germany is positioned as the most precise form of a faithful setting of limits after exhausting all attempts. What is worst is a nationalism-without-attempt, and the nationalism of Karlsruhe is permissible.

## **Chapter 7: Typology II (United States and Israel)—"Active Rejection" and the Imperial Habitus**

### **Section 1: Definition of Typology II—"The Declaration of Intent to Reject the Attempt"**

Typology II represents "the declaration of intent to reject the attempt"—it does not mean failing to attempt coordination (which corresponds to Japan in Typology Ia), but rather rejecting dialogue with international law as an active statement of position that "does not acknowledge the very existence of a coordinative obligation."

Japan (Typology Ia) prereflexively evades without raising the question—representing the worst form as a "nationalism that attempts nothing." The United States and Israel (Typology II) recognize the question and actively declare, "We bear no obligation to comply with it"—positioned on a completely different dimension from Japan in coordinate-theoretical evaluation



as a "declaration of intent to reject the attempt."

However, one point of supplementation is required regarding the United States. The analytical target of this paper is the behavioral patterns of judicial elites, and the US judiciary is accurately classified as Typology II. Yet, in the US, instead of active rejection by the judiciary, Congress and the executive branch became the primary battleground for coordinate-theoretical struggles—examples being the three-tiered clash over the authorization for the use of military force in the Gulf War, and the invocation of Section 5(c) of the War Powers Resolution in Somalia. The record of these struggles at the level of Congress and the executive branch is deferred to the subsequent paper in this series, "The Transformation of the Problem Domain in Coordinate Theory." [1]

Nevertheless, Typology II must also be evaluated from the perspective of the "obligation of attempt." Active rejection differs from a faithful setting of limits—it is not an "exceptional divergence" after having attempted coordination (Germany), but rather the prior construction of a "logic of rejection" without attempting coordination. [1]

Notes to Section 1

[1a] Regarding the difference between Typology Ia and II, see the analytical framework of counter-constructivism defined in Chapter 1, Section 4.

## **Section 2: The United States—The Dual Blocking of the "Political Question Doctrine" and "Self-Executing Nature"**

(1) Decisive Difference from Japan's Typology Ia The inaction in the United States is structurally different from that in Japan. The immense political powers of the executive branch and Congress clash fiercely over war powers and foreign affairs powers. [2] US courts position themselves outside of this struggle via the "Political Question Doctrine." However, the courts "close the doors in the face of a blazing political struggle"—the judiciary self-consciously remains outside the fierce clashing between the legislative and executive branches. [3]

(2) *Medellín v. Texas* (2008)—Active Blocking via "Self-Executing Nature" *Medellín v. Texas*, 552 U.S. 491 (2008), is the judgment that most vividly demonstrates the core of Typology II from a coordinate-theoretical perspective. [4]

José Ernesto Medellín, a Mexican national on death row, claimed that his right to consular notification under Article 36 of the Vienna Convention on Consular Relations was violated at the time of his arrest. In the *Avena* judgment (2004), the ICJ ordered the United States to provide review and reconsideration. President Bush issued a Presidential Memorandum directing the

Texas state courts to provide this review—meaning that international law (the ICJ judgment) and the executive branch (the President) acted in concert to bind the local judiciary.

The judgment of the US Supreme Court: While acknowledging the international legal obligation based on the ICJ judgment, the Court ruled that the UN Charter, the ICJ Statute, and the relevant treaties are not "self-executing treaties" with direct domestic legal effect. Therefore, absent implementing legislation by Congress, not even the President can compel Texas state courts to comply with the ICJ judgment.

Reading the structure of this logic precisely: it is an operation that acknowledges "an international legal obligation exists," while asserting "but because it lacks self-executing nature, it does not function as a domestic judicial norm." While formally similar to Japan's first-tier blocking (denial of direct applicability), it is fundamentally different. Japan's operation is a prereflexive evasion, whereas the US operation is an active blocking following the conscious construction of the precise legal category of "the presence or absence of a self-executing nature."

From a coordinate-theoretical perspective, the logic demonstrated in the Medellín judgment—"acknowledging the existence of the coordinative obligation while rejecting its domestic implementation"—is positioned as the most sophisticated legal formulation of a "declaration of intent to reject the attempt." [5]

(3) Abrogation of ICJ Jurisdiction (2005) In 2005, the United States withdrew from the Optional Protocol to the Vienna Convention on Consular Relations (which establishes the compulsory jurisdiction of the ICJ). To prevent a recurrence of issues like the Avena judgment that precipitated the Medellín case, the US removed the very legal basis of the ICJ's jurisdiction. This institutionalized the "rejection of the attempt" in a more fundamental form—rather than merely rejecting domestic implementation, it severed the very circuit that generates international legal obligations. It is positioned as the most thorough form of active rejection. [6]

(4) Exceptions within the "Rejection of the Attempt"—Two Cases of International Law-Conformable Interpretation Even within the US judiciary, classified as Typology II for its "active rejection," there are exceptional precedents that can be evaluated as "attempts at coordination."

In *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988), the federal district court ruled that "Congress, in enacting the Anti-Terrorism Act, did not intend to legislate against the international treaty obligations of the UN Headquarters Agreement," thereby denying the application of the Act to the PLO Observer Mission to the UN. The Department of Justice did not appeal, and the ruling became final. [7] This can be read as a practice of international law-conformable interpretation applying the clear statement rule: "unless Congress exhibits an intent explicitly contradicting a treaty obligation, it is presumed to have the intent to

comply with the treaty obligation."

In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court referenced Common Article 3 of the Geneva Conventions in interpreting Article 21 of the Uniform Code of Military Justice (UCMJ) and ruled that the establishment of military commissions violated the Conventions. [8] The Court did not "directly apply" the treaty, but avoided conflict with international law by referencing the international treaty in its interpretation of domestic law (the UCMJ)—this can be read as a US manifestation of international law-conformable interpretation. However, following the *Hamdan* judgment, Congress enacted the Military Commissions Act of 2006, limiting the application of Common Article 3 of the Geneva Conventions—a structure analogous to the UK's Safety of Rwanda Act, where Congress overrides the judiciary's "attempt at coordination." [9]

These exceptions prevent an oversimplification of Typology II. Yet, the reality that "attempts occur only exceptionally" does not alter the fundamental classification of Typology II as the "declaration of intent to reject the attempt."

(5) Formation of the "Imperial Habitus" What forms the habitus of US Supreme Court justices is the doxa of "American Exceptionalism." The US Constitution and its founding traditions are perceived as the highest legal authority in the world, and the automatic inflow of judgments from an "external international court" like the ICJ into the domestic legal order without implementing legislation by Congress is perceived as an infringement upon the democratic process.

Whereas Japanese judges "prereflexively flee because they lack the confidence to confront international law," US judges "actively demote international law precisely because they are convinced of the superiority of their own legal order"—this constitutes the qualitative difference in habitus between Typologies Ia and II. [10]

## Notes to Section 2

[2] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). For Justice Jackson's three-part typology (the relationship between presidential power and congressional authorization), see his concurring opinion in the same judgment. On the conflict between the President and Congress regarding the War Powers Resolution (50 U.S.C. §1541 et seq., 1973), see Louis Fisher, *Presidential War Power* (3rd ed., 2013).

[3] On the Anglo-American model of clashing, see Soji Yamamoto, "The Logic and Legal Institutionalization Surrounding the Domestic Validity of International Law," *The Journal of International Law and Diplomacy*, Vol. 96, No. 4/5.

[4] *Medellín v. Texas*, 552 U.S. 491 (2008). See Case concerning *Avena and Other Mexican*

Nationals (Mexico v. United States of America), ICJ Reports 2004, p. 12.

[5] On the legal category of the presence or absence of a "self-executing nature," see Carlos Manuel Vázquez, "The Four Doctrines of Self-Executing Treaties," *American Journal of International Law*, vol. 89 (1995).

[6] On the US withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations (March 7, 2005), see the US Department of State Notice.

[7] *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456 (S.D.N.Y. 1988). Regarding the relationship with the UN Headquarters Agreement (Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, 1947), see the same judgment. On the clear statement rule, see William Eskridge and Philip Frickey, "Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking," *Vanderbilt Law Review*, vol. 45 (1992).

[8] See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[9] See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

[10] On the relationship between "American Exceptionalism" and international law, see Harold Hongju Koh, "On American Exceptionalism," *Stanford Law Review*, vol. 55 (2003).

### **Section 3: Israel—The Active Transformation of "Intercepting Lawfare"**

(1) A Variant of Typology II—The Habitus of "Interception" While the United States engages in active rejection in the form of "banishing international law to the political space," Israel exhibits a different form of active rejection. Israeli judicial elites perfectly manipulate the vocabulary of international law while simultaneously defanging its normative teeth via the "logic of state survival"—a form of "intercepting lawfare" (the strategic deployment of international legal vocabulary to neutralize its normative force). During the tenure of former President Aharon Barak (1995-2006), the Supreme Court of Israel (High Court of Justice) established a stance of active judicialism: "Every issue is subject to judicial review (Justiciability)." In this sense, the Israeli judiciary fundamentally differs from Japan, which "does not raise the question"—Israel does raise the question. However, the manner in which it raises the question fundamentally differs from what coordinate theory requires. [10]

(2) The Targeted Killing Case (2006) and the Gaza Barrier Case (2004) In *Public Committee Against Torture in Israel v. Government of Israel* (2006, the Targeted Killing case), the Supreme Court of Israel proactively employed the vocabulary of international humanitarian law (the

principles of distinction, proportionality, and military necessity) while judging the IDF's targeted killing policy to be fundamentally lawful. [11] While the ICJ's Advisory Opinion on the Separation Wall (2004) judged Israel's construction of the barrier to be a violation of international law, the Supreme Court of Israel, in the Maqabein case, limited its response to "altering the route of the wall." Rather than completely submitting to the normative judgment of the ICJ, it processed the issue as a "consideration" within the bounds of its own security discretion. [12]

In these judgments, the vocabulary of international humanitarian law is used not for "dialogue with international law" but as an "instrument for legalizing its own military actions"—an operation that does not "undertake international law as an external independent authority" but "uses it as material serving the logic of its own nation."

(3) Response to the ICJ Provisional Measures Orders (Post-2024) In the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v. Israel) brought by South Africa, the ICJ has issued multiple provisional measures orders since January 2024.

Israel has deployed the logic that "the military is already sufficiently controlled by our own judicial system (military courts and the independent review of the Supreme Court), rendering direct intervention by international law unnecessary." This constitutes active rejection in the form of stating: "Because we are undertaking the attempt within our own judicial system, there is no need to obey orders from the outside." [13]

The difference between a "faithful setting of limits after exhausting attempts" (Germany) and the "rejection of the attempt" (Israel) is positioned as the difference between an "exceptional divergence following a faithful struggle" and the "construction of a logic for comprehensive rejection."

(4) Differences within Typology II Between the United States and Israel The US judiciary banishes international law to the political space via formal, techno-legal categories such as "no self-executing nature" and the "political question doctrine"—a relatively clean form of logical severance. Israel internalizes the vocabulary of international law and then defangs it normatively—the form of "intercepting lawfare." The operation of invoking the principle of proportionality from international humanitarian law while substantially hollowing it out shares an analogous structure with India's "devouring," but differs in its motivation: it stems not from the "sovereign pride of decolonization" but from the "urgency of national security." In coordinate-theoretical evaluation, the formal severance by the United States is, at the very least, logically honest. Israel's "intercepting lawfare" possesses a structure of appearing to attempt coordination while substantially rejecting it, rendering it more problematic.

### Notes to Section 3

[10] On the judicial philosophy of former President Aharon Barak, see Aharon Barak, *The Judge in a Democracy* (2006).

[11] See *Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 (2006). On targeted killing and international humanitarian law, see Gabriella Blum and Philip Heymann, "Law and Policy of Targeted Killing," *Harvard National Security Journal*, vol. 1 (2010).

[12] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136. On the relationship with the Maqabein case (HCJ 2056/04, 2004), see Yuval Shany, "Capacities and Inadequacies: A Look at the Two Separation Barrier Cases," *Israel Law Review*, vol. 38 (2005).

[13] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (South Africa v. Israel)*, Provisional Measures, ICJ (January 26, 2024).

### **Section 4: Summary—What the "Rejection of the Attempt" Leaves as an Aporia**

Typology II is positioned as the "declaration of intent to reject the attempt."

Attention should be drawn to the fact that the "rejection of the attempt" is transparent. The US declaring a "lack of self-executing nature" and withdrawing from the Optional Protocol to the ICJ jurisdiction, and Israel refusing to obey the ICJ provisional measures orders—these, at the very least, explicitly state their position of "not attempting." Japan's *habitus* of "attempting nothing" fails to even explicitly state that position.

As a response to cases "where enforcement organs of international law commit errors"—as demonstrated by Kadi, Sayadi, and Al-Dulimi—there is room for the "active rejection" of Typology II to be partially justified. However, such justification must be constructed as an "exceptional divergence in specific cases," and does not serve as grounds for comprehensive rejection. "Exceptional divergence as a faithful setting of limits" versus "the construction of a logic for comprehensive rejection"—this distinction functions as the evaluative axis separating Typology Id from Typology II.

## **Chapter 8: Typology III (Hungary)—"The Institutional Death of the Coordinate Space"**

### **Section 1: The Final Destination of the Comparative Typology—The Polar Extreme of "The Elimination of Actors"**

What is occurring in Typology III is fundamentally different from every other typology examined thus far. The actors have been eliminated—"the autonomous judiciary as the agent of struggle within the coordinate space" itself has been physically and institutionally dismantled. When the "bearer of dialectical tension" presupposed by coordinate theory ceases to exist, the coordinate space itself meets its death. [1]

Notes to Section 1

[1] Regarding the concept of the elimination of actors, see Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal*, vol. 38 (1987), pp. 805–853.

### **Section 2: The Destruction of Habitus—Institutional Dismantlement Since the 2010s**

In Hungary under the government of Viktor Orbán from 2010 onward, the premises of judicial autonomy were systematically destroyed.

The forced retirement through lowering of the mandatory retirement age—with the entry into force of the Fundamental Law of 2011, the mandatory retirement age of judges and others was lowered from 70 to 62. This measure was confirmed by the Court of Justice of the European Union (CJEU) to be contrary to EU law, but the *fait accompli* could not be reversed. [2] The mass appointment of pro-majority judges to the Constitutional Court—utilizing the two-thirds parliamentary supermajority, the number of members of the Constitutional Court was increased and judges aligned with the Fidesz party were appointed en masse.

Read through Bourdieu's concept of the "field": this constitutes a "physical destruction of the autonomy of the judicial field." Judges as holders of juridical capital were excluded from the field and replaced by new "judges" subservient to the will of the holders of political capital. No "struggle for juridical capital" any longer exists there. [3]

Notes to Section 2

[2] See CJEU, Case C-286/12, *Commission v. Hungary* [2012].

[3] See Paul Blokker, *New Democracies in Crisis?* (2014).

### **Section 3: The Abuse of the "Constitutional Identity" Doctrine—A Hollowed Imitation of German-Style Dogmatics**

#### **(1) Borrowing and Distortion**

The most intellectually problematic aspect is that the Hungarian Constitutional Court borrowed the "constitutional identity" (Verfassungsidentität) doctrine that the German Federal Constitutional Court had precisely developed, and then hollowed it out.

In Germany, "constitutional identity" is a proposition that the independent judiciary formulated as the product of an agonized struggle. In the context of deepening integration with the European Union and dialogue with the European Court of Human Rights, it is a proposition that an independent judiciary formulated, at the end of a precise dogmatic reasoning process, as a limit-setting to the effect that "the core values protected by the eternity clause (Ewigkeitsklausel) of the Basic Law cannot be violated even by the primacy of EU law."

The Hungarian Constitutional Court employed this term "constitutional identity" while invoking it—under the formula of "the defense of Hungary's historical constitutional identity and Christian culture"—as the legal basis for rejecting the CJEU's judgments on refugee quotas and the standards of the European Court of Human Rights. [4]

There exists a fundamental difference between the two "constitutional identities." Germany's "constitutional identity" is a concept established by an independent judiciary through precise dogmatic argumentation, and falls within the scope of coordinate theory as a "sincere limit-setting after exhausting all attempts." Hungary's "constitutional identity" functions as a "hollowed rubber stamp" for a politically co-opted Constitutional Court to ratify the policy agenda of the administration. It is not a "limit-setting at the end of a sincere struggle" but a "legal decoration of a political command." The conclusion of rejection exists first, independent of the "obligation of attempt" that coordinate theory requires, and "constitutional identity" is then mobilized as a post-hoc justification. [5]

#### **(2) The Sovereignty Protection Act (2023)—The Institutional Completion of Counter-Constructivism**

The Sovereignty Protection Act, enacted in 2023, established a Sovereignty Protection Office charged with monitoring and sanctioning NGOs, media, and research institutions receiving foreign funding as "threats to state sovereignty." It functions as a device that legally punishes the "norm entrepreneurs"—the actors of civil society who seek to introduce international norms into the domestic sphere—whom Finnemore and Sikkink's norm life cycle theory had described. [6]



### Notes to Section 3

[4] See Hungarian Constitutional Court Decision 22/2016 (XII. 5.) AB. See Gábor Halmai, "The Application of European Constitutional Values in EU Member States," *European Journal of Law Reform*, vol. 20 (2018).

[5] See Armin von Bogdandy and Paloma Villaverde Menéndez, "Betrifft: Die Identität der Verfassung," *Kritische Justiz*, vol. 50 (2017).

[6] See Sovereignty Protection Act (Act LXXXVIII of 2023, Hungary).

### **Section 4: Recent Developments—The Political Change of April 12, 2026**

Hungary's political situation subsequently underwent a dramatic reversal. On April 12, 2026, the Tisza Party led by Péter Magyar obtained more than two-thirds of the seats in Parliament, putting an end to sixteen years of the Orbán administration. The new Magyar government (invested on May 9, 2026) declared as policy the reintegration into the EU judicial system, the restoration of judicial independence, and the abolition of the Sovereignty Protection Office. [7]

This political change adds an important implication to the analysis of Typology III. It has been demonstrated that the "elimination of actors" is not necessarily irreversible. Institutional destruction can be overturned by elections—the political conditions that give rise to the autonomous judiciary bearing coordinate theory can be restored through a democratic process.

However, a new aporia arises here. Fidesz is deeply rooted in regional networks, institutions, and media, and there exists a temporal and structural gap between the "restoration of the political will of the actors" and the "institutional resurrection of the coordinate space." The description that "actors were eliminated" is confirmed in the past tense, but the analysis of this paper remains valid in this new phase of the "attempt at resurrection from death"—because the evaluative axis of the "obligation of attempt" can be directly applied to the question of how the new government will restore judicial independence and institutionalize coordination with international law.

### Notes to Section 4

[7] On the Hungarian parliamentary elections of April 12, 2026, see Chatham House, "Hungary Election: Orbán Has Been Defeated – Will Orbánism Survive?" (April 2026); Human Rights Watch, "Hungary: New Government Needs to Restore Rule of Law" (April 14, 2026). The date of Prime Minister Magyar's investiture is May 9, 2026.

### **Section 5: Summary—The Aporia Revealed by the "Death of the Coordinate Space"**

The comparative legal positioning of Hungary (Typology III) can be established.

Typology III is positioned as the "final destination" of the comparative typology—as a final destination in the sense that the very condition presupposed by coordinate theory (the existence of an autonomous judiciary) has been destroyed.

When coordinate theory demands the "obligation of attempt," what it presupposes as the bearer of that obligation is the "autonomous judicial elite." However, in Hungary, the bearers themselves were politically co-opted—the conditions necessary for coordinate theory to function were destroyed.

The situation in which "a state subject to international treaty obligations (the EU Fundamental Treaty) subsists while the actors of the coordinate space are eliminated"—the aporia revealed by this "destruction of conditions" raises a question that points toward the exterior of coordinate theory. Coordinate theory implicitly presupposes "autonomous state organs" as the answer to the question of "who assumes the coordination," but when that implicit premise collapses, something exterior to coordinate theory becomes necessary.

"What is worst is a nationalism-without-attempt"—this is the proposition confirmed as the evaluative axis of this paper. However, Typology III interrogates further: "when the subject of the attempt ceases to exist, what response does coordinate theory possess?"

### **Part III: Cross-Cutting Analysis**

#### **Chapter 9: Cross-Cutting Analysis—The Genesis of Habitus and the Dynamics of the "Field"**

##### **Section 1: A Question Across Six Typologies—Why the Tipping Point Never Comes**

From Chapter 2 through Chapter 8, we have dissected how judicial elites across six typologies avoid, limit, reject, or destroy the adjustment to the dialectical link through differing modalities. The task of this cross-cutting analysis is to extract the structural logic common to these diverse manifestations.

As a starting point, this chapter is positioned as a direct interrogation of Finnemore and Sikkink's "norm life cycle" theory. In their framework, international norms permeate nations through the activities of norm entrepreneurs, the crossing of a "tipping point," and subsequent cascading and internalization. Why, then, has the normative proposition of the dialectical link—formulated by

Fitzmaurice, Partsch, and Yamamoto—failed to cross this tipping point even after seventy years?  
[1]

The answer suggested by the comparison from Chapters 2 through 8 is not that the "tipping point never arrives," but rather that "every time a tipping point approaches, the restorative force of the field is activated." The declaration of behavioral normativity by the Kyoto District Court was excised by the Osaka High Court. The recognition of customary law in the first instance of the Yoon Soo-gil case was denied by the appellate court. The Date judgment was overturned by the Supreme Court. The UK's Ahmed judgment was overridden by the Safety of Rwanda Act. In Hungary, the very agents of the tipping point were politically co-opted.

These are not "accidental retreats." The structure of the field operates as a mechanism that systematically reproduces blocking—this is the conclusion of our comparative law-sociological analysis of counter-constructivism. [2]

Notes to Section 1

[1] See Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization*, vol. 52 (1998), pp. 887–917.

[2] Regarding the concept of the "restorative force of the field," see Pierre Bourdieu, *The Logic of Practice* (Stanford University Press, 1990). The cases of appellate reversal, legislative overriding, and institutional co-optation presented in each chapter are specific manifestations of this power.

## **Section 2: Comparison of the Modes of Accumulation of Juridical Capital**

Comparing the "modes of accumulation of juridical capital" across the six typologies explains the differences in habitus most precisely.

(1) Fields Where "Raising the Question" is Valued—UK and Germany For senior British judges, juridical capital is accumulated as "the capacity to squarely undertake any difficult question and resolve it through the logic of common law." The judge who declared the government *ultra vires* in the Ahmed judgment maximized their juridical capital within this logic. "Squarely undertaking the conflict between international legal obligations and domestic law" leads directly to the increase of juridical capital.

For German Federal Constitutional Court judges, juridical capital is accumulated as the "capacity to construct precise doctrinal scholarship (Dogmatik)." The judge who formulated the sophisticated legal concept of the "obligation to consider" in the Görgülü judgment maximized

their juridical capital within this logic. "Raising the question and answering it systematically" is the core of juridical capital. [3]

(2) Fields Where "Not Raising the Question" is Valued—Japan For Japanese judges, juridical capital is accumulated as "avoiding friction, adhering to precedent, and following the logic of appellate courts." The situation criticized as a pastoral, tranquil attitude is reproduced as a product of institutional design. The "structure of the field"—specifically, the career management of judges by the General Secretariat of the Supreme Court—maintains this definition of juridical capital. "Raising the question of the conflict between a Security Council resolution and the Constitution" is prereflexively avoided as a career risk (a depletion of juridical capital). The reason the Nagoya High Court stopped at obiter dicta without engaging in a four-layered struggle involving Security Council resolutions, the UN Charter, international humanitarian law, and Article 9 of the Constitution can be explained by the logic of this field. [4]

(3) Fields Where "Transforming the Question" is Valued—India and France For India, juridical capital is accumulated as the "capacity to develop a unique interpretation of the Indian Constitution." The voracious operation of "absorbing international law as nourishment for constitutional interpretation" is rational within the logic of this field. For the French Council of State (Conseil d'État), juridical capital was accumulated as the authority of the "guardian of the general will (the law) of the Republic." Invalidating domestic law on the grounds of international law was perceived as a threat to this juridical capital—this serves as the law-sociological explanation for the fourteen-year resistance. [5]

(4) Fields Where "Rejecting the Question" is Valued—United States and Israel For US Supreme Court justices, juridical capital is accumulated as the authority of the "guardian of the US Constitution." The justice who declared a "lack of self-executing nature" in the Medellín judgment maximized their juridical capital within this logic. [6] For Israel, juridical capital is accumulated as the authority of the "guardian of national survival." Processing ICJ provisional measures as "intercepting lawfare" directly leads to the increase of juridical capital.

(5) Spaces Where the Field Itself is Destroyed—Hungary In Typology III, the "autonomy of the field" disappeared entirely. As a result of the judicial field being politically co-opted as a space for struggle over juridical capital, the option of "exercising an international agency function" ceased to exist institutionally. [7]

## Notes to Section 2

[3] Salvatore Caserta and Mikael Rask Madsen, "International Judicial Habitus," iCourts Working Paper Series, no. 342 (2024). This is an application of Caserta and Madsen's "dispositions correlate with positions" proposition to each typology.

[4] Regarding the problems of the 2008 Nagoya High Court judgment, see Chapter 2, Section 2.

[5] For the fourteen-year resistance leading up to the Nicolo judgment (Conseil d'État, 1989), see Chapter 5, Section 3.

[6] Regarding *Medellín v. Texas*, 552 U.S. 491 (2008), see Chapter 7, Section 2.

[7] Regarding the destruction of the autonomy of the Hungarian judicial field, see Chapter 8, Section 2. Attempts at restoration by the new Magyar administration (inaugurated in May 2026) will be an object of future observation as an attempt to "restore the autonomy of the field."

### **Section 3: As a "Refusal of Entry into the International Legal Field"**

Caserta and Madsen's theory of "international judicial habitus" (2024) demonstrates that international judges possess a habitus formed through "double structuration"—involving both social and psychological processes—within the international legal field. This paper reverses that question: Why do domestic judges refuse to enter the international legal field?

The "schizophrenic agents" theory pointed out by Caserta and Madsen—arguing that international elites circulate across multiple fields while pursuing both international and domestic careers—can be read as a Bourdieusian verification of Zell's theory of dual functionality. Yet, there is a paradox here. This "duality" does not necessarily bring about the "full exercise of international agency" that Zell idealized; rather, because agents circulate across two fields, it results in a "schizophrenic" state where neither norm can be fully internalized.

The habitus of Japanese judges can be understood as a mechanism that seeks to avoid the pain of this "schizophrenia" at all costs. For the pure-bred career judges of Japan, "entry into the international legal field"—that is, squarely raising the question of the conflict between international legal obligations and constitutional obligations and attempting coordination—is a dangerous act that renders their accumulated "domestic juridical capital" meaningless and creates intense friction with the field's dominant political capital (their relationship with the executive branch and personnel logic). Their habitus, formed and internalized within the sterile domestic legal field for many years, prereflexively senses and avoids this attrition of capital and friction.

Caserta and Madsen analyze "elites who were forced into schizophrenia as a result of already entering the international legal field" (ECtHR and CJEU judges). This paper asks: "Why do domestic legal elites not enter the international legal field?"—focusing on the mechanism of refusal and blocking. The comparative law-sociological answer to this question is the typology-specific "mode of blocking" presented in each chapter. [8]

[8] Caserta and Madsen, *supra* note [3]. See that paper for the concept of "schizophrenic agents." For the logic by which this paper uses Caserta and Madsen "reversely," see Chapter 1, Section 4.

#### **Section 4: Cross-Cutting Confirmation of the "Pattern of Selective Inaction"**

We confirm whether the "pattern of selective inaction" extracted in Chapter 2 (Japan)—an asymmetrical structure where international customary law and treaty obligations are actively invoked in the direction of expanding state power or government interests, but avoided when constraining the executive or colliding with government foreign policy—is observed in other typologies in different forms.

**Selective Pattern in the UK (Typology Ib)** In the Ahmed judgment (conflict between Security Council sanctions and domestic rights), the UK accepted it as a "genuine coordination." In the Rwanda judgment (conflict between refugee policy and international human rights law), it also accepted it as "genuine coordination." The Safety of Rwanda Act was a subsequent legislative override. In the UK, the structure is not "selective inaction" but "genuine coordination by the judiciary and political overriding by Parliament." Selectivity occurs at the political level rather than the judicial level—the judiciary raises the question, but politics overrides it. [9]

**Selective Pattern in Germany (Typology Id)** In the Brunner judgment (conflict between EU integration and the Basic Law), the Court struggled with "conditional constitutionality." In the Görgülü judgment (conflict between ECtHR and the Basic Law), it struggled with the "obligation to consider" before permitting "exceptional divergence." In the NATO out-of-area deployment case, it ruled constitutionality contingent on "prior parliamentary approval." German selectivity manifests as selectivity in the depth of adjustment—not in whether to raise the question, but in "how much struggle to perform." [10]

**Selective Pattern in the US (Typology II)** In the Hamdan judgment (conflict between Geneva Conventions and the Military Commissions Act), the Court accepted it in a limited capacity as "international law-conformable interpretation." In the Medellín judgment (domestic effect of ICJ judgment), it blocked it due to a "lack of self-executing nature." US selectivity manifests as: "not rejecting international law wholesale, but blocking it only when it directly threatens domestic control over security." [11]

**Conclusion of Cross-Cutting Confirmation** The selective pattern exists in each typology while changing form. In Japan, it appears as asymmetry in the application of customary law. In the UK, as selectivity between institutions (judiciary vs. parliament). In Germany, as selectivity in the

depth of struggle. In the US, as blocking only when security control is threatened. This cross-cutting confirmation shows that in the comparative law-sociology of coordinate theory, "selective inaction" is not a phenomenon unique to Japan, but a structure universally observed in forms corresponding to the logic of the field in each country. The internal structure of the non-unified phenomenon is positioned not as an issue of Japan alone, but as a structural characteristic of the entire comparative typology.

#### Notes to Section 4

[9] Regarding the Ahmed judgment and the Safety of Rwanda Act, see Chapter 4, Sections 2 and 3. [10] Regarding the Görgülü, Brunner, and NATO deployment judgments, see Chapter 6, Sections 3 and 4. [11] Regarding Hamdan v. Rumsfeld, 548 U.S. 557 (2006) and Medellín v. Texas, 552 U.S. 491 (2008), see Chapter 7.

### **Section 5: Establishing the Mechanism of Counter-Constructivism**

Through the analysis from Section 1 to Section 4, the mechanism of counter-constructivism can be established.

Proposition 1: The restorative force of the field is institutionally guaranteed. The "attempt" of the Kyoto District Court was corrected by the Osaka High Court. The "attempt" of the first instance in the Yoon Soo-gil case was denied by the appellate court. The "attempt" of the Hamdan judgment was overridden by the Military Commissions Act. The reason the tipping point does not arrive is not because "there are few supporters," but because "the structure of the field systematically corrects deviations." Bourdieu's "reproduction of the field" is at work here.

Proposition 2: "Schizophrenic agents" do not exercise international agency. The "duality" described by Caserta and Madsen does not function as a condition for the international agency Zell expected, but rather as an obstacle. Elites who circulate across domestic and international fields carry a habitus that conforms to the dominant logic of whichever field they occupy at a given moment—in the domestic legal field, "dialogue with international legal obligations" is avoided as "depletion of juridical capital." [12]

Proposition 3: Blocking that "looks like it raised the question" is most effective. Japan's third-tier blocking (flight to obiter dicta), India's "devouring," France's Sarran judgment, and Israel's "intercepting lawfare"—these did not "fail to raise the question," but rather "looked like they raised the question while substantially blocking it." Finnemore and Sikkink's norm life cycle theory lacks the theoretical apparatus to distinguish between the "appearance of internalization" and the "substance of internalization"—this is why an analytical framework of counter-constructivism is required.

Proposition 4: The form of the review system defines the mode of blocking, but not its existence. Incidental review systems (Japan/US), abstract review systems (France/Germany), and the UK's HRA system—the form of the review system defines the mode of "how the question is processed." However, "whether to raise the question" is not determined by the form of the review system, but by the logic of the field—the definition of juridical capital, asymmetry with political capital, and the history of habitus formation. This explains why the US and Japan, despite both having incidental review systems, possess fundamentally different modes of response. [13]

Proposition 5: Counter-constructivism as an evaluative axis for the "obligation of attempt." The evaluative axis established by the cross-cutting observation of the six typologies is: in coordinate theory, the question is not "whether the synthesis was completed," but "whether adjustment was attempted" (Chapter 6, Section 5). In this axis, the analysis of counter-constructivism provides a comparative law-sociological answer to the question of "why attempts do not emerge"—attempts do not emerge when the logic of the field "prereflexively positions the attempt as a depletion of juridical capital."

Notes to Section 5

[12] Caserta and Madsen, *supra* note [3]. See that paper for the concept of "schizophrenic agents." [13] Regarding the difference between the US (incidental review, active rejection) and Japan (incidental review, prereflexive evasion), see Chapter 2, Section 1 (Absence of Anglo-American type clashing) and Chapter 7, Section 2(1).

## **Section 6: Summary—Anatomy of the "Ununified" Internal Structure Completed**

Through this cross-cutting analysis, the propositions to be achieved by comparative typology have been established. The internal structure of the phenomenon that appears as "non-unified," when viewed from a perspective that cross-cuts both international public and private law, is not random disunity but a consistent structure with selective patterns corresponding to the logic of each country's field. What is common to each typology is the structure wherein the logic of the field prereflexively positions the "exercise of international agency" as a depletion of juridical capital. The reason the tipping point never comes is not due to a "lack of supporters," but because "the restorative force of the field systematically corrects deviations."

Finally, the aporia left by the cross-cutting analysis—"Why is the logic of the field in each country structured in this way?" and "Why is attempting coordination prereflexively positioned as a depletion of juridical capital?"—these answers exceed the scope of comparative law-sociology. They lead toward the philosophical question of "why the obligation of coordination is required at all."



## **Part IV: Conclusion**

### **Chapter 10: The Achievements of Comparative Typology and the Presentation of Aporias**

#### **Section 1: The Propositions Reached by Comparative Typology—Three Determinations**

We summarize the propositions established by the comparative typology developed from Chapter 2 through Chapter 9.

Proposition 1: The issue is not the presence or absence of nationalism, but the presence or absence of attempts at dialogue. The comparison of the six typologies demonstrates that nationalism per se is not what obstructs the dialectical link. Germany, the UK, and France each carried their own nationalism while attempting dialogue through the modes of their respective typologies. The German Federal Constitutional Court exhausted such attempts as "controlled openness." The UK Supreme Court declared the government ultra vires in the Ahmed judgment. France, in its response to the Maastricht Treaty, had the entire citizenry take up the question in the form of a referendum—including the possibility of rejection. The axis of evaluation in coordinate theory is not "which nationalism," but "whether or not dialogue was attempted."

Proposition 2: There are two forms of the "worst" case. The first is the Japanese model—a form where even the self-aware sovereign pride articulated as nationalism is absent, and a prereflexive bodily propensity that views attempting dialogue with international law as a depletion of juridical capital is institutionally reproduced. Here, it is not even recognized that a question exists. The second is the Hungarian (Orbán) model—a form where the refusal of dialogue is articulated as nationalism, and the autonomy of the judiciary, the agent of dialogue, is physically erased. However, with the establishment of the Magyar administration on April 12, 2026, attempts to restore these agents have commenced. While both occupy the pole of the "worst," their modes are at opposite extremes: the Japanese model as an unconscious lack, and the Hungarian (Orbán) model as a conscious destruction.

Proposition 3: The internal structure of "disunity" can be dissected as selective patterns. The cross-cutting analysis in Chapter 9 confirmed that behind the phenomenon appearing as "disunity" in the observation of both international public and private law, there exists a consistent selective pattern corresponding to the logic of each nation's field. This selective pattern could be read as "evidence that the unified norm of the obligation of coordination is not functioning." To that reading, however, this paper poses a counter-question: the more precise the avoidance, the more strongly it suggests the existence of something being avoided. [1]

Notes to Section 1 [1] See Chapter 9, Sections 5 and 6, regarding the establishment of these three

propositions.

## **Section 2: The Accurate Positioning of Coordinate Theory—What This Paper Has Demonstrated**

What this paper has demonstrated: First, the behavioral modes that judicial elites across nations show in response to the demands of the dialectical link can be described as six typologies—the product of selective habitus following the logic of the field, rather than "ignorance or lack of ability." Second, the phenomenon observed as "disunity" actually possesses a consistent selective pattern: "functioning in the direction of expanding state power or government interests, but avoiding it in the direction of constraint." This pattern is not unique to Japan but is a structure observed cross-cuttingly in forms corresponding to each field's logic. Third, coordinate theory is not a monism of international law supremacy; the obligation of coordination is an "obligation of attempt," not an obligation to complete a synthesis. With this understanding, Karlsruhe's "permission of exceptional divergence" and France's possibility of rejection via referendum can both be evaluated as faithful limit-setting within the scope of coordinate theory. Fourth, when international law contains errors—as in the factual errors by the Security Council Sanctions Committee revealed in the Kadi, Sayadi, and Al-Dulimi cases—a national organ raising objections to such errors can also be evaluated as a form of the attempt at coordination. Remaining silently obedient or silently rejecting does not constitute an attempt at coordination.

What this paper has not demonstrated: This paper has not provided the philosophical basis for "why the obligation of coordination is required." This is an intentional reservation—that question will be addressed head-on in the forthcoming paper, "The Philosophical Foundations of Coordinate Theory." The fact that, while the basis for the obligation of coordination remains unresolved, judicial elites across nations avoid responding to something so precisely and so selectively—this fact requires an explanation independent of the presence or absence of a basis for the norm. [2]

Notes to Section 2 [2] See Chapter 1, Section 3, regarding the fact that the philosophical basis of the obligation of coordination exceeds the scope of this paper.

## **Section 3: Three Remaining Questions**

We precisely formulate the aporias left by this comparative typology.

First Question: Why are attempts born, and why are they not? The cross-cutting analysis in Chapter 9 explained the "reason the tipping point does not arrive" as the restorative force of the field. Yet, there is a counter-question: Why did the Takamatsu High Court directly apply a treaty? Why did the Kyoto District Court declare behavioral normativity? Why did the first

instance of Yoon Soo-gil recognize customary law? Why does the German Federal Constitutional Court raise the question? The logic of the field was explained as "prereflexively positioning the attempt as a depletion of juridical capital." Yet attempts are born—in the instant before the restorative force of the field corrects them. The question "why are attempts born" exceeds the scope of comparative law-sociology. In the moment an attempt is born, something is pulling the judge. What is its identity?

Second Question: Coordinate theory as the limit of selective patterns. The selective pattern shown by national judiciaries—"responding to functional interests while resisting normative constraints"—can be read as evidence that coordinate theory is "useless." Yet there is another reading: the fact that even if selective, it "functions in the direction of functional interests" also shows that the obligation of coordination has not completely disappeared. Why does it function only selectively? Does the "obligation of attempt" essentially permit selective modes of manifestation? [3]

Third Question: Judicial autonomy as a condition for coordinate theory. As Typology III (Hungary) demonstrated, for coordinate theory to operate as an "obligation of attempt," the institutional condition of "the existence of an autonomous judiciary" is necessary. However, coordinate theory does not provide a basis for this condition from within—it has no answer to the question of why judicial autonomy is necessary. Institutional reversibility has been shown (the restoration attempts by the Magyar administration). But the question of the basis—"why are autonomous agents necessary"—points outside comparative law-sociology toward the dimension of the conceptual structure of law. The philosophical answer to these three questions is the mission of Paper C ("The Philosophical Foundations of Coordinate Theory—What Soji Yamamoto Did Not Show").

Notes to Section 3 [3] Regarding the question of the positive legal basis for the obligation of coordination, see Taki, *supra* note [1.2].

#### **Section 4: As a Record of the "Obligation of Attempt"**

This paper is positioned as a comparative law-sociological answer to the question, "Why is coordinate theory not realized?" The answer is in two stages.

Stage One: The behavioral modes shown by judicial elites across nations can be described as the products of selective habitus according to the logic of the field. We have dissected why questions are not raised, why they are erased if raised, and why they are replaced while being raised—analyzing these as six typologies. Stage Two: Yet, this dissection simultaneously revealed that attempts at coordination do exist. The Takamatsu High Court attempted it. The Osaka High Court fingerprint judgment attempted it. The Kyoto District Court attempted it. The UK Supreme

Court attempted it. The German Federal Constitutional Court attempted it. France, through the institutions of the Constitutional Council and referendums, had the entire citizenry take up the question. These attempts were corrected by the restorative force of the field and overridden by parliamentary sovereignty. However, the attempts were recorded.

In international law, "an unlawful act may, while remaining unlawful, form the basis for a new legal situation." [4] A similar proposition holds for attempts at coordination: "attempts are recorded, even if they are erased." Lacuna Executionis—a defect in execution law—is not a defect in the attempt at coordination. The attempt existed. But the execution mechanism is deficient. And that deficiency is not accidental, but structurally produced by the logic of the field. The dissection of this mechanism of structural production is this paper's unique contribution.

Notes to Section 4 [4] Fitzmaurice, "General Principles of International Law Considered from the Standpoint of the Rule of Law," *Recueil des Cours*, vol. 92 (1957), §69: "Ex injuria non oritur jus."

## **Section 5: The Final Question—To the Reader**

The comparative typology of this paper has dissected the diverse modes of response shown by the judicial elites of the six typologies. What remains at the end of this dissection is a single question.

Why did the judges of the Takamatsu High Court apply a treaty directly? Why did the Osaka High Court in the Fingerprint Case explicitly acknowledge a self-executing character? Why did the judge of the Kyoto District Court declare behavioral normativity? Why did the judge of the Yoon Soo-gil first instance recognize customary law? Why did the UK Supreme Court justices write the Ahmed judgment? Why did the German Federal Constitutional Court judges write the Görgülü judgment? The logic of the field commanded: "Pre-reflexively avoid the attempt as a depletion of juridical capital." Yet, these judges attempted it.

Something was pulling them.

What is its identity? This is the question I pass to the reader. The philosophical inquiry into that identity is deferred to "The Philosophical Foundations of Coordinate Theory." And the record of what form the problem domain of coordinate theory will take amid the transformations of the era will continue as "The Transformation of the Problem Domain in Coordinate Theory." Within the chain of diagnosis (this paper) → basis ("The Philosophical Foundations") → record ("Transformation of the Problem Domain"), this paper bears the role of raising the initial question.