

# Washington International Law Journal

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Volume 17 | Number 3

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6-1-2008

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### Recommended Citation

Amelia S. Kegan, Comment, *As a Negative Right, Article 25 Can Have a Positive Effect Combating Japan's Poverty*, 17 Pac. Rim L & Pol'y J. 735 (2008).

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## AS A NEGATIVE RIGHT, ARTICLE 25 CAN HAVE A POSITIVE EFFECT COMBATING JAPAN'S POVERTY

Amelia S. Kegan<sup>†</sup>

*Abstract:* Article 25 of the Showa Constitution guarantees everyone in Japan a minimum standard of “wholesome and cultured living.” Contrary to the force originally envisioned by the Constitution’s framers, the Supreme Court of Japan has interpreted the provision as merely a programmatic declaration that guides the legislature rather than as an enforceable right under which an individual may sue. As a result, individuals cannot seek relief from the judiciary for Article 25 violations. The Supreme Court should recognize Article 25 also as a negative, concrete right, allowing individuals to seek judicial relief when the government fails to appropriately apply laws intended to promote the public’s ability to maintain a “minimum standard of living.”

### I. INTRODUCTION

An impoverished man is sick, unable to work, and in desperate need of a doctor. Although a Japanese law mandates that everyone carry health insurance, the man cannot afford the government premiums, and the public official who operates the insurance program refuses to reduce or exempt the premium levels for anyone in a constant state of poverty. The man’s indigence and the official’s actions prevent the man from complying with the law; he looks to the Constitution for help. A provision guarantees everyone the right to a minimum standard of living, yet the judiciary denies such claims even when the State actively prevents individuals from obtaining that constitutionally guaranteed right.

Article 25 of the Showa Constitution, Japan’s constitution since 1946, states, “(1) All people shall have the right to maintain the minimum standards of wholesome and cultured living [“Minimum Standards Clause”]. (2) In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health [“Promotions Clause”].”<sup>1</sup> Despite this constitutional protection, the State prevents people from maintaining a minimum standard of living, and individuals are left without recourse.

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<sup>†</sup> The author would like to thank Ron Hjorth for his advice and guidance, Rob Britt for his assistance locating Japanese materials, and Dan Foote for his early review and suggestions for further research. The author especially would like to thank Bradley Bashaw, Luke Campbell, Ray Liaw, and in particular Karen Clevering for the countless hours they spent editing drafts and their strong support throughout the writing process. Any errors or omissions are the author’s own.

<sup>1</sup> KENPŌ, art. 25, available at <http://www.ndl.go.jp/constitution/e/etc/c01.html#s3> (alterations added).

Constitutional scholars have found it useful to divide rights into negative rights and positive rights.<sup>2</sup> Negative rights usually prohibit the government from interfering with a freedom<sup>3</sup> and are more common in liberal, pre-World War II constitutions.<sup>4</sup> Negative rights are almost always concrete because if the State violates the right, the courts will grant individual relief.<sup>5</sup> Positive rights, on the other hand, require the government to provide certain things and are common among post-World War II constitutions.<sup>6</sup> Often referred to as “aspirational rights,” positive rights usually convey affirmative benefits and protections.<sup>7</sup>

Courts can interpret rights as either concrete rights or programmatic declarations. A concrete right enables a citizen to sue if the State denies him or her that right.<sup>8</sup> However, a programmatic declaration only guides the legislature, directing it to pass legislation that promotes the right.<sup>9</sup> Programmatic declarations provide no mechanism for citizens to seek judicial relief if the government fails to provide or enforce the right.

This Comment argues that the Supreme Court of Japan should recognize and apply the concrete, negative right<sup>10</sup> within Article 25 in its ruling, enabling the individual to bring a claim against the government. Article 25 is currently understood to be a programmatic declaration, which merely directs the legislature to pass certain programs (such as social welfare programs), and a concrete right that provides a justiciably enforceable claim. As a concrete, negative right, Article 25 allows an individual to bring a claim against the State for infringing upon a right. A positive right mandates the government act (i.e. provide certain benefits) whereas a negative right prohibits the government from acting in a certain way.<sup>11</sup> The State can violate Article 25’s concrete, negative right in three ways: 1) the Diet could pass a law that prevents individuals from

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<sup>2</sup> Some also refer to first-generation and second-generation rights in expressing the same distinction. Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 6 (2004).

<sup>3</sup> Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 345 (2007).

<sup>4</sup> See Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT’L L. REV. 35, 45 (2006). The Fifth Amendment to the United States Constitution provides an example of a negative right. See *infra* notes 22-35 and accompanying text.

<sup>5</sup> Akira Osuka, *Welfare Rights*, 53 LAW AND CONTEMP. PROBS. 13, 17 (1990).

<sup>6</sup> See Patricia M. Wald, *Some Unsolicited Advice to My Women Friends in Eastern Europe*, 46 SMUL. REV. 557, 559 (1992) (using the term “aspirational rights” in the place of “positive rights”).

<sup>7</sup> See *id.* at 558-59.

<sup>8</sup> See Osuka, *supra* note 5, at 17.

<sup>9</sup> See *id.* at 18.

<sup>10</sup> While the terms “first-generation rights” and “second-generation rights” also can apply, this Comment uses the terms “positive rights” and “negative rights” as a matter of stylistic preference and not to indicate any substantive difference in meaning.

<sup>11</sup> See Wald, *supra* note 6, at 559; Christiansen, *supra* note 3, at 345.

maintaining a minimum standard of living, 2) the executive could prevent individuals from maintaining a minimum standard of living (independent of any statute), and 3) the executive could enforce a law so that it infringes upon one's ability to maintain a minimum standard of living.

Part II of this Comment demonstrates that although the constitutional framers drafted Article 25 as an enforceable right, the Supreme Court of Japan has interpreted it as only a programmatic declaration. Part III argues that Article 25 provides both a positive and a negative right, but the negative right makes the provision enforceable, enabling an individual to bring a claim. Part IV explains how the Court has failed to engage in any negative-rights analysis in its Article 25 opinions. Part V shows how the Court's misinterpretation of Article 25 conflicts with Japan's obligations under international law. Part VI argues the Court should interpret Article 25 as a concrete, negative right to provide the public stronger protection of the right.

This Comment makes three assumptions. First, a definition of what constitutes a "minimum standard of living" may help the Court's Article 25 enforcement, but deriving one is beyond the scope of this Comment. This Comment assumes the judiciary can use a reasonableness standard to determine whether the State infringed upon an individual's Article 25 rights. The Japanese judiciary should balance the harm the government imposes on the individual against the public welfare it promotes. The courts should employ that standard, provided they do not abuse it to avoid enforcing the provision.

As a second assumption, this Comment recognizes that the Diet could provide more detailed language directing the executive on how to enforce statutes. While this could prevent the executive from improperly applying laws so as to violate Article 25, this legislative direction counters the wide discretion the Diet habitually gives the executive.<sup>12</sup>

Finally, this Comment treats Article 25 and other social rights as human rights. International human rights treaties protect many of the same rights enumerated in constitutions.<sup>13</sup> The terms "human rights" and "constitutional rights" are often used interchangeably within this Comment.

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<sup>12</sup> See Christopher A. Ford, *The Indigenization of Constitutionalism in the Japanese Experience*, 28 CASE W. RES. J. INT'L L. 3, 55 (1996).

<sup>13</sup> See Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407, 407 n.2 (2003).

## II. ARTICLE 25 GRANTS AN INDIVIDUALLY ENFORCEABLE NEGATIVE RIGHT ALONG WITH STATING A PROGRAMMATIC POSITIVE RIGHT

Article 25 provides a negative right in addition to a positive right, and therefore should allow individuals to obtain judicial relief. Article 25, like many human rights, grants both a positive right (“the State shall use its endeavors for the promotion and extension of social welfare”<sup>14</sup>) and a negative right (“[a]ll people shall have the right to maintain the minimum standards of wholesome and cultured living”<sup>15</sup>), prohibiting the government from preventing one from maintaining a minimum standard of living. Positive rights are harder to enforce, and courts throughout the world are hesitant to interpret positive rights as concrete rights,<sup>16</sup> which explains why so many positive rights become merely programmatic declarations. In contrast, a negative right is naturally concrete and therefore has more force than a positive right, which is not naturally concrete.<sup>17</sup> The existence of both negative and positive rights in Article 25 is supported by objective criteria that define such rights and by examining the Article’s text.

### A. *Under Objective Criteria, Article 25 Provides a Negative Right in Addition to a Positive Right*

Article 25 has three essential components of a negative right: 1) the right focuses on the individual,<sup>18</sup> 2) the right prohibits state action,<sup>19</sup> and 3) injunctive relief for a violation of the right requires a preventative writ.<sup>20</sup> Negative and positive rights delineate easily as concepts, but in reality, most rights encompass aspects of both. When interpreting rights, one can expect a government to take, at a minimum, the easiest route to enforcement. It requires less effort for a state to enforce a negative right than a positive right;<sup>21</sup> therefore, when faced with a right both positive and negative, the courts would at least enforce the negative right. The above criteria define

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<sup>14</sup> KENPŌ, art. 25(2).

<sup>15</sup> *Id.* art. 25(1).

<sup>16</sup> See Christiansen, *supra* note 3, at 345.

<sup>17</sup> See Osuka, *supra* note 5, at 17.

<sup>18</sup> Charles H. Brower II, *NAFTA’s Investment Chapter: Initial Thoughts About Second-Generation Rights*, 36 VAND. J. TRANSNAT’L L. 1533, 1538 (2003) (referencing the International Covenant on Civil and Political Rights as a document possessing negative rights).

<sup>19</sup> See Ezer, *supra* note 2, at 4.

<sup>20</sup> Requiring a preventative writ is not a formal criterion for a negative right. However, it logically follows that a preventative writ to stop a prohibited state action would provide redress.

<sup>21</sup> See Wald, *supra* note 6, at 559 (positing the view that positive rights cannot be judicially enforceable); Wiles, *supra* note 4, at 50 (restating arguments about the difficulty in legally enforcing socio-economic rights).

Article 25 as both a positive and a negative right; thus, the courts should prefer interpreting Article 25 as a negative right because of the relative ease in enforcement.

The first element in establishing that a negative right exists requires an examination of whether the right's language focuses on the individual or the State. Language in a positive right directs the State; language of a negative right focuses on the individual.<sup>22</sup> The Fifth Amendment of the United States Constitution exemplifies the individual focus of negative rights. The right holds that "*No person* shall be held to answer for any . . . crime . . . *nor shall any person* be subject for the same offence."<sup>23</sup> The language aims at the individual's freedom. Article IX of the Washington State Constitution provides an example of a positive right: "It is the paramount *duty of the state* to make ample provision for the education of all children residing within its borders."<sup>24</sup> Unlike the Fifth Amendment, Article IX focuses on the State and its duty.

When applied to Article 25, the objective criteria show that the Promotions Clause<sup>25</sup> provides a positive right while the Minimum Standards Clause<sup>26</sup> provides both a positive and negative right. Under the first criteria, Section 1 focuses on the individual: "All *people* shall have the right."<sup>27</sup> However, Section 2 focuses on the State: "the *State* shall use its endeavors."<sup>28</sup> On whole, therefore, Article 25 provides a negative right and a positive right.

The second criterion examines whether the right requires state action or prohibits it. A positive right requires the State to take affirmative action, often demanding state resources<sup>29</sup> and intervening in private affairs.<sup>30</sup> A negative right restricts certain governmental action upon an individual. Applying the above examples, the Fifth Amendment lists a number of individual liberties of which the State cannot interfere.<sup>31</sup> If the government

<sup>22</sup> See Ezer, *supra* note 2, at 4.

<sup>23</sup> U.S. CONST. amend. V (emphasis added).

<sup>24</sup> WASH. CONST. art. IX, § 1, available at <http://www.leg.wa.gov/LawsAndAgencyRules/constitution.htm> (emphasis added).

<sup>25</sup> KENPŌ, art. 25(2) ("In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.").

<sup>26</sup> *Id.* art. 25(1) ("All people shall have the right to maintain the minimum standards of wholesome and cultured living.").

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> *Id.* art. 25(2) (emphasis added).

<sup>29</sup> See Ezer, *supra* note 2, at 4; Wiles, *supra* note 4, at 45.

<sup>30</sup> See Brower, *supra* note 18, at 1545.

<sup>31</sup> See U.S. CONST. amend. V (granting the right not to be held for a crime without a grand jury indictment, the right against double jeopardy, the right against self-incrimination, the right to due process of law, and the right not to have private property taken for public use without just compensation).

does not do anything to infringe upon the rights, no violation occurs. Contrarily, if Washington State does not act to “make ample provision for the education of all children,”<sup>32</sup> then the government violates the right.

This second criterion paints Article 25 as a negative and positive right. The Minimum Standards Clause mandates the State “use its endeavors for the promotion and extension of social welfare and security, and of public health.”<sup>33</sup> The text of the Promotion’s Clause does not clearly point to government restraint or government action. Intuitively, Section 1 could require the State to provide a minimum standard of living. Yet, Section 1 implicitly prohibits the government from interfering upon one’s attempts to maintain a minimum standard of living. If everyone has “the right to maintain the minimum standards of wholesome and cultured living,”<sup>34</sup> then a state action that prevents someone from maintaining a minimum standard of living would violate that right. Little sense lies in providing a right but allowing the government to deny its existence by abusively violating it. Just as the Fifth Amendment right against forcibly being a witness against oneself<sup>35</sup> restricts the State from interfering with that right, the right to a minimum standard of living prevents the State from interfering with that right as well. Section 1’s textual phrasing may not give a clear answer as to what action it requires from the State, but it appears to hold aspects of both a negative and a positive right.

The final criterion examines whether injunctive relief for a violation of the right would require state action or prohibit it. Injunctive relief for a positive right requires the State to provide something, and the court issues an affirmative writ. Conversely, injunctive relief for a negative right requires the State to stop acting, and the court issues a preventative writ.<sup>36</sup>

The type of injunctive relief required for effective enforcement defines Article 25 as a positive and a negative right. An affirmative writ for Article 25 requires legislation or executive action providing benefits that enable a person to maintain a minimum standard of living, essentially actively decreasing poverty rates. At the same time, one also can imagine a situation wherein the State’s actions violate an Article 25 right. For example, in *Asahi v. Japan*, the minister, after stopping all governmental payment assistance to Asahi, took an additional 900 yen from Asahi.<sup>37</sup> In the

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<sup>32</sup> WASH. CONST. art. IX.

<sup>33</sup> KENPŌ, art. 25.

<sup>34</sup> *Id.*

<sup>35</sup> See U.S. CONST. amend. V.

<sup>36</sup> See Christiansen, *supra* note 3, at 345.

<sup>37</sup> *Asahi v. Japan*, 21 MINSHŪ 5, 1043 (Sup. Ct., May 24, 1967), translated in HIROSHI ITOH & LAWRENCE WARD BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN 133 (1978) [hereinafter *Asahi*].

*Staple Food Act Case*,<sup>38</sup> the government prosecuted the defendant for obtaining food above the ration limit. In the *Health Insurance Case*,<sup>39</sup> the mayor required payment of health insurance premiums the appellant could not afford, while refusing to apply any exemption or reduction because the appellant lived in a constant state of poverty rather than temporary hardship.<sup>40</sup> In all these cases, a preventative writ could redress the violations, assuming the Court engaged in the reasonableness standard test.<sup>41</sup> Furthermore, the government would find these preventative writs easier to enforce than the affirmative writs.<sup>42</sup>

*B. A Textual Reading of Article 25 Supports Its Classification as Both a Positive and a Negative Right*

A plain text reading of Article 25 also establishes that it supplies both a positive and a negative right. Section 2 indicates a positive, albeit unenforceable, right because it instructs the legislature and executive to promote social welfare.<sup>43</sup> Article 25(2) directs the Diet to enact legislation promoting the public's ability to maintain a minimum standard of living.<sup>44</sup>

Two qualities of Article 25's text support it as containing a negative right: 1) the principle that disapproves of reading text so as to make a provision superfluous, and 2) the definition of "maintain." First, an accepted American canon of construction directs interpretation of legal text so as not to render a portion superfluous.<sup>45</sup> Therefore, if Article 25 provides only an unenforceable programmatic declaration as the Supreme Court contends, then Section 1 only adds redundancy to the provision. However, if Section 1 articulates a negative right, prohibiting the State from interfering with one's minimum standard of living, then Section 1 adds meaning not articulated in Section 2.

Second, the definition of "maintain" characterizes Article 25 as a negative right. *Black's Law Dictionary* defines "maintain" as meaning "to

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<sup>38</sup> See 2 (No. 6) MINSHŪ 1235 (Sup. Ct., Sept. 29, 1948), translated in JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN 254-55 (1964) [hereinafter *Staple Food Act Case*].

<sup>39</sup> Case no. 2000 Gyo-Tsu 62, 60 MINSHŪ 2, translated in <http://www.courts.go.jp/english/judgments/text/2006.03.01-2000.-Gyo-Tsu-.No..62.html> [hereinafter *Health Insurance Case*].

<sup>40</sup> *Id.* at Reasons III.

<sup>41</sup> See *infra* Part V.B. (establishing that a negative-rights interpretation of Article 25 is practical, promoting courts to issue preventative writs).

<sup>42</sup> See *infra* Part V.B.

<sup>43</sup> See KENPŌ, art. 25(2) ("the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health").

<sup>44</sup> *Id.*

<sup>45</sup> See 16 AM. JUR. 2D *Constitutional Law* § 61 (2008). While this follows American constitutional law, the logical argument applies to the Japanese Constitution.

continue (something).”<sup>46</sup> The definition gives the impression of inertia, that a person already has or already is working to achieve a minimum standard of living. A violation of the Article is one that changes the status quo; it stops the existing situation, preventing it from continuing. That violation manifests itself as government action that prevents one from continuing to have or continuing to work towards achieving a minimum standard of living. Thus, Article 25, Section 1 provides a negative right.

C. *Positive and Negative Rights May Coexist; They Are Not Mutually Exclusive*

The international legal community would easily accept the position that Article 25(1) provides both a positive and negative right.<sup>47</sup> Even though the Minimum Standards Clause communicates a positive right on the surface, it also contains a concrete, negative right, enabling individuals to obtain relief from the courts. International human rights legal theory has begun to reject the binary distinction between negative and positive rights,<sup>48</sup> supporting the argument that Article 25 provides both a negative and a positive right. Legal theorists have fused the negative and positive rights categories together, viewing rights as simultaneously encompassing both as different sides of the same coin.<sup>49</sup>

Judicially enforcing positive rights proves more difficult than negative rights.<sup>50</sup> Courts may rule a positive right not concrete, but they will find a coexisting negative right as concrete and identify the judiciary as the proper institution to provide individual relief. Therefore, the Court ruling Article 25 as a positive right would not foreclose interpreting Article 25 as a concrete, negative right.

As the South African Constitutional Court has recognized: “The obligations created by the socioeconomic rights in the South African Constitution take two basic forms. They impose a negative duty not to interfere with, or create barriers to the fulfillment of the rights in question,

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<sup>46</sup> BLACK’S LAW DICTIONARY 973 (8th ed. 2004).

<sup>47</sup> See Osuka, *supra* note 5, at 17.

<sup>48</sup> Ida Elisabeth Koch, *Dichotomies, Trichotomies or Waves of Duties?*, 5 HUM. RTS. L. REV. 81, 85 (2005).

<sup>49</sup> See Berta Esperanza Hernandez-Truyol, *International Law, Human Rights, and Latcrit Theory: Civil and Political Rights—an Introduction*, 28 U. MIAMI INTER-AM L. REV. 223, 236-37 (1997) (indicating the conception of negative rights as only civil and political rights is misleading because such rights also can be categorized as positive rights, requiring affirmative state action).

<sup>50</sup> See Osuka, *supra* note 5, at 17 (discussing how “as to the guarantee of a negative right under the Constitution, all the theories recognize the legal nature of the right to a decent life as giving rise to judicially enforceable concrete rights,” while “the guarantee of any positive right” is not so universally held); Wiles, *supra* note 4, at 50 (discussing why positive rights are seen as unenforceable).

and a positive duty to promote and fulfill those rights.”<sup>51</sup> No clear separation exists between negative and positive rights; instead, most rights incorporate aspects of both. The South African Constitutional Court has asserted that, “At the very minimum, socio-economic rights can be negatively protected from improper invasion.”<sup>52</sup> While social rights may fail justiciability as positive rights, they are enforceable as negative rights.<sup>53</sup>

### III. THE FRAMERS DRAFTED ARTICLE 25 AS AN ENFORCEABLE RIGHT BUT THE COURT MISINTERPRETS IT AS A PROGRAMMATIC DECLARATION

Those framing the Showa Constitution in 1946 intended Article 25 to provide an enforceable, positive right. However, members of the former, ultra-conservative, Japanese government formed the judiciary.<sup>54</sup> Within two years, the Supreme Court interpreted Article 25 as merely a programmatic declaration,<sup>55</sup> a position reaffirmed as recently as 2006.<sup>56</sup> Furthermore, when the Court addresses Article 25 claims, it fails to engage in any negative-rights analysis.

#### A. *The Drafters Intended Article 25 to Provide an Enforceable Right*

Members of the Governmental Section (“GS”) of the Supreme Commander Allied Powers (“SCAP”)<sup>57</sup> drafted Article 25 as a forceful, positive right. Following World War II, the GS drafted Japan’s Showa Constitution.<sup>58</sup> They modeled it after Germany’s Weimar Constitution,<sup>59</sup> demonstrating the intended force behind the social rights provisions. The

<sup>51</sup> Joan Fitzpatrick and Ron C. Slye, *Economic and Social Rights-South Africa-Role of International Standards in Interpreting and Implementing Constitutionally Guaranteed Rights*, 97 AM. J. INT’L L. 669, 676 (2003).

<sup>52</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at 78 (S. Afr.), available at <http://www.constitutionalcourt.org.za/uhtbin/cgiisirs/20080217183929/SIRSI/0/520/J-CCT23-96>.

<sup>53</sup> See *supra* notes 5, 17 and accompanying text (stating that negative rights are enforceable).

<sup>54</sup> See Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 1 U. PA. J. CONST. L. 415, 443 (1998) (stating the “judiciary was never purged to remove from positions of authority individuals with . . . obvious opposition to the new Constitution”).

<sup>55</sup> See *Staple Food Act Case*, *supra* note 38, at 254-55; Osuka, *supra* note 5, at 17 (explaining how the Supreme Court found in the *Staple Food Act Case* that Article 25 was purely a “programmatic declaration”).

<sup>56</sup> See generally *Health Insurance Case*, *supra* note 39.

<sup>57</sup> General McArthur led the Supreme Commander Allied Powers [“SCAP”], the American force overseeing the occupation. See RAY A. MOORE & DONALD L. ROBINSON, *PARTNERS FOR DEMOCRACY* 4-6 (2002).

<sup>58</sup> BEATE SIROTA GORDON, *THE ONLY WOMAN IN THE ROOM* 104 (1977).

<sup>59</sup> See Osuka, *supra* note 5, at 16 (stating that social rights were modeled on the Weimar Constitution and incorporated American New Deal characteristics).

drafters wrote the document to require the government to provide for the people. However, those involved in the enacting process did not have uniform expectations for the new constitution,<sup>60</sup> and the Japanese government pushed back vigorously, which ultimately led to vaguer language than the drafters desired.<sup>61</sup>

The Weimar Constitution and New Deal philosophy heavily influenced the drafters of Japan's Showa Constitution, explaining the social rights' weight and force. The steering committee leading the GS contained few people familiar with Japan.<sup>62</sup> While most were American lawyers, military officials, and political scientists, all were New Dealers who incorporated their perspectives in forming Japan's new Constitution.<sup>63</sup> A shared sense of responsibility existed among many drafting the Showa Constitution's provisions "to effect a social revolution in Japan, and the most expedient way of doing that is to force through a reversal of social patterns by means of the constitution."<sup>64</sup> They used the Weimar Constitution as a model, which had provided Germans with social welfare rights<sup>65</sup> intended to be concrete, positive rights.<sup>66</sup> Drafters applied the philosophy encompassed within the Weimar Constitution, which professed the State's duty to promote social welfare policies to social and civil rights provisions.<sup>67</sup> In one week and in complete secrecy, the GS drafted the Showa Constitution,<sup>68</sup> crediting

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<sup>60</sup> See MOORE & ROBINSON, *supra* note 57, at 103-04.

<sup>61</sup> See GORDON, *supra* note 58, at 120-24.

<sup>62</sup> MOORE & ROBINSON, *supra* note 57, at 97-98.

<sup>63</sup> *Id.* at 98.

<sup>64</sup> GORDON, *supra* note 58, at 116; Fritz Snyder, *The Fundamental Human Rights*, 14 INT'L LEGAL PERSP. 30, 31 (2005).

<sup>65</sup> See WEIMAR CONSTITUTION, pt. 2, ch. 4 (granting the right to education); ch. 5, art. 157, 159, 165 (granting the right to organize labor and promoting collective bargaining); ch. 5, art. 161 (granting universal insurance) (F.R.G.), available at [http://www.zum.de/psm/weimar/weimar\\_vve.php](http://www.zum.de/psm/weimar/weimar_vve.php). Social rights in the Weimar Constitution required the State establish comprehensive insurance systems and granted every person the opportunity to work or economic support if no appropriate work was available.

<sup>66</sup> The Social Democrats involved in forming the Japanese Constitution saw the Weimar Constitution as a model modern constitution because it used positive rights to adjust constitutional doctrine to modern conditions. State power used social welfare measures to protect and further wanted modern constitutions to reflect this new state. According to Social Democrats, Germany's democracy collapsed because the Weimar Constitution was not truly in force. The social rights included within the Weimar Constitution were positive, concrete rights; however, while they may have been individually justiciable, in reality they could not be enforced without judicial review. See Peter E. Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 AM. J. COMP. L. 303, 304 (1999); MOORE & ROBINSON, *supra* note 57, at 256.

<sup>67</sup> GORDON, *supra* note 58, at 110 (documenting Beate Sirota Gordon's philosophy for constitutional rights, one that was common among the Governmental Section).

<sup>68</sup> Snyder, *supra* note 64, at 32. It is important to acknowledge that neither the American occupation authorities nor the Japanese officials working with SCAP "talked past" or "duped" each other, misunderstanding the constitutional scheme envisioned by the other. Ford, *supra* note 12, at 58.

the document to the Japanese government to give it greater legitimacy.<sup>69</sup> The original SCAP version of the Showa Constitution included a number of provisions from the Weimar Constitution that granted specific rights.<sup>70</sup> Thus, the drafters originally intended that Article 25 supply an enforceable, positive social right.<sup>71</sup>

The framers did not all hold one view about how the judiciary would interpret the social rights provisions; however, a strong contingent believed the social rights provisions provided a forceful and progressive mandate on the government's public role.<sup>72</sup> Two camps within SCAP, the practicalists and the idealists, disagreed on social policy, and eventually General Whitney<sup>73</sup> had to make an executive decision "to leave out detailed policies and to include instead a general statement providing for social welfare protection."<sup>74</sup> The drafters wanted the social rights provisions to contain strong, enforceable language, but the steering committee tempered the language for political reasons, hoping this would instigate the Japanese government to agree faster and with less resistance.<sup>75</sup> Although the steering committee struck down prospects for strong, positive rights enforcement, the forceful spirit remained in the negative right of Article 25, albeit dormant due to the judiciary's failure to recognize the negative right. As it is written, Article 25 consists of a positive right (the Promotions Clause directs the government to enact policies that promote the public's ability to maintain a minimum standard of living)<sup>76</sup> and a negative right (the Minimum Standards Clause prohibits the government from preventing one from maintaining a minimum standard of living).<sup>77</sup>

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<sup>69</sup> *Id.* at 32.

<sup>70</sup> See GORDON, *supra* note 58, at 107 (stating Gordon's special interest in the Weimar Constitution as a model when drafting social rights provisions of the Showa Constitution); SNYDER, *supra* note 64, at 32 (listing many of the specific provisions Gordon included).

<sup>71</sup> See, e.g., Yasuhiro Okudaira, *Forty Years of the Constitution and Its Various Influences: Japanese, American, and European*, 53 LAW & CONTEMP. PROBS. 17, 24 (1990) (stating that Japan's Constitution "is more extensive than that of the American Constitution" because it "enumerates socioeconomic rights because of the influence of the Weimar Constitution and the experience of the American New Dealers").

<sup>72</sup> See SNYDER, *supra* note 64, at 31.

<sup>73</sup> General Whitney was a chief aid to General MacArthur. MOORE & ROBINSON, *supra* note 57, at 6.

<sup>74</sup> GORDON, *supra* note 58, at 116.

<sup>75</sup> *Id.* at 120 (stating that MacArthur was in a hurry to draft the Constitution before the Allied powers, who opposed MacArthur's imperial system, established the Far Eastern Commission, and Japan had an election scheduled for April 10).

<sup>76</sup> The Livelihood Protection Act is an example of a law passed to promote the public's ability to maintain a minimum standard of living. See OSUKA, *supra* note 5, at 16 (stating that the present Livelihood Protection Act of 1950 provided a legal means to confirm the right to a decent life).

<sup>77</sup> The Minimum Standards Clause can be defined as both a negative and a positive right. See *supra* Part II.

B. *Contrary to Its Textual Meaning and Original Intent, the Judiciary Has Interpreted Article 25 as Merely a Programmatic Declaration*

Contrary to the drafters' intentions and the provision's textual meaning, early judicial holdings refused to recognize Article 25 as a concrete or a negative right.<sup>78</sup> The first judiciary under the new democratic Showa Constitution consisted of government officials from the prior regime.<sup>79</sup> They held ultra-conservative beliefs about the government's role to promote the general welfare,<sup>80</sup> applying this ideology in Article 25 case decisions.

Individuals have repeatedly come to the judiciary seeking relief, claiming the State violated their Article 25 right. In each instance, the Court rejected the plaintiff's claim for relief. Three cases illustrate how the Supreme Court repeatedly interprets Article 25 as a programmatic declaration. The Court first interpreted Article 25 in the *Staples Food Act Case*, gave a historic ruling in *Asahi*, and provided a recent opinion in the *Health Insurance Case*. Additionally, one more case demonstrates how this social rights<sup>81</sup> interpretation conflicts with international human rights treaty obligations.<sup>82</sup>

In 1948, the Supreme Court first interpreted Article 25 as a mere programmatic declaration in the *Staples Food Act Case*. In this case, the defendant violated the Staple Food Management Law by purchasing and transporting a small amount of rice.<sup>83</sup> The Staple Food Management Law regulated price, supply, and demand as well as rationed foodstuffs to guarantee the population had staple foods and a stable economy.<sup>84</sup> The defendant claimed the Staple Food Management Law, and its application, violated his Article 25 right because he could not maintain a minimum standard of living on the rations.<sup>85</sup> He pled, "It is impossible to preserve life or maintain health on the current food ration."<sup>86</sup>

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<sup>78</sup> See *Staple Food Act Case*, *supra* note 38, at 255.

<sup>79</sup> Hamano, *supra* note 54, at 443.

<sup>80</sup> *Id.*

<sup>81</sup> Constitutional scholars distinguish social rights and political rights, which correspond to the positive and negative rights distinctions. Jo M. Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System*, 31 HASTINGS INT'L & COMP. L. REV. 1, 9 (2008).

<sup>82</sup> See generally *Staple Food Act Case*, *supra* note 38, at 253-56; *Asahi*, *supra* note 37; *Health Insurance Case*, *supra* note 39.

<sup>83</sup> *Staple Food Act Case*, *supra* note 38, at 253, 255.

<sup>84</sup> *Id.* at 253.

<sup>85</sup> *Id.* at 255.

<sup>86</sup> *Id.* at 254.

Second, the Court affirmed the programmatic declaration interpretation of Article 25 in *Asahi v. Japan* without addressing whether Article 25 granted a negative right.<sup>87</sup> Shigeru Asahi, a tuberculosis patient at the Okayama National Sanitarium, received 600 yen (U.S. \$1.75)<sup>88</sup> a month in government assistance,<sup>89</sup> the highest amount the minister of welfare allowed.<sup>90</sup> However, this could not support him. When his brother began sending him 1,500 yen (U.S. \$4.38) each month,<sup>91</sup> the minister of the social welfare office ceased the welfare payments.<sup>92</sup> Moreover, the minister ordered Asahi to pay the government an additional 900 yen each month from what his brother sent to cover part of Asahi's expenses.<sup>93</sup> Asahi claimed the minister's application of the Livelihood Protection Act violated his Article 25 rights.<sup>94</sup>

The Supreme Court ruled against Asahi and held that Article 25 "merely proclaims that it is a duty of the State to administer national policy in such a manner as to enable all the people to enjoy at least the minimum standards of wholesome and cultured living, and it does not grant the people as individuals any concrete rights."<sup>95</sup> Reiterating much of what it held in the *Staple Food Act Case*,<sup>96</sup> the Court reaffirmed the minister's discretion to apply the law.<sup>97</sup>

Recently, the Supreme Court maintained its programmatic declaration interpretation of Article 25, ignoring any negative-rights analysis, in the 2006 *Health Insurance Case*.<sup>98</sup> Here, the appellant sued the City of Asahikawa because the mayor required full health insurance premiums despite the plaintiff's claim that he could not afford them.<sup>99</sup> The National Health Insurance Act mandated universal coverage<sup>100</sup> and delegated regulation to the local municipalities.<sup>101</sup> Under the national health insurance

<sup>87</sup> *Asahi*, *supra* note 37, at 130.

<sup>88</sup> *Id.* These are 1978 dollars. Today, 600 yen translates into U.S. \$5.53.

<sup>89</sup> *Id.* at 133.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 133. Today 1500 yen translates into U.S. \$13.84.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *See id.* at 133-34.

<sup>95</sup> *Id.* at 134 (quoting 2 KEISHŪ 1235 (Sup. Ct., Sept. 29, 1948) [*Staple Food Act Case*]). Asahi also received free meals, medical treatment, and accommodations at the hospital.

<sup>96</sup> *Id.* at 134.

<sup>97</sup> Interestingly, *Asahi* spurred an immense amount of scholarship within Japan, advocating that the Court interpret Article 25 as a concrete, positive right. Osuka, *supra* note 5, at 17.

<sup>98</sup> *See generally Health Insurance Case*, *supra* note 39.

<sup>99</sup> *Id.* at Reasons I(1), III.

<sup>100</sup> Kokumin Kenkō Hōkenhō [National Health Insurance Law], Law No. 192 of 1958, art. 5, translated in 8 EHS LAW BULL. SER. no. 8430 (1983).

<sup>101</sup> *Id.* art. 3.

system, heads of households paid a premium or tax to finance the program.<sup>102</sup> However, the local ordinance that enforced the system in Asahikawa did not account for those in a constant state of poverty;<sup>103</sup> it only allowed payment exemptions and reductions if lives became excessively difficult due to unforeseen disasters or incomes fell significantly in that particular year.<sup>104</sup>

The Court found the ordinance's restriction of premium reductions to only those in temporary financial hardship not excessively unreasonable or unreasonably discriminatory against the economically weak.<sup>105</sup> According to the Court, the Social Security Act justified the mayor's method of collecting premiums because it covered those permanently poor.<sup>106</sup> The Court therefore held the National Health Insurance Act and the ordinance did not guarantee reduced payments for the permanently impoverished.<sup>107</sup> Thus, the Court found the mayor complied with Article 25 despite the fact that he forced the appellant to pay insurance premiums he could not afford.<sup>108</sup> The Court affirmed the mayor's discretion to enforce the ordinance for the Health Insurance Act, found the Social Security Act covered the poor, and the Court therefore quickly dismissed the Article 25 claim.<sup>109</sup>

The emergence of international law and deliberate treaty ratifications strengthened Japan's established human rights protections by law despite the Supreme Court's continued weak application of constitutional rights. Article 98(2) of the Showa Constitution gives international treaties the force of law within the country.<sup>110</sup> Strong judicial enforcement of treaty rights often conflicts with the Court's weak enforcement of constitutional rights, leaving the lower courts uncertain as to the extent they should protect human rights, as the *Fingerprint Case* illustrates.<sup>111</sup> Here, a Korean political leader applying for a replacement registration card refused to allow police officers

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<sup>102</sup> *Id.* arts. 42(1), 43, 44.

<sup>103</sup> *Health Insurance Case*, *supra* note 39, at Reasons I(1).

<sup>104</sup> *Id.* at Reasons III.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> KENPŌ, art. 98(2) ("Treaties concluded by Japan and established laws of nations shall be faithfully observed.").

<sup>111</sup> Hamano, *supra* note 54, at 476-77 (discussing 1513 HANREI JIHŌ 71 (Osaka High Ct., Oct. 28, 1994) [hereinafter *Fingerprint Case*]; *Arrest Over Fingerprinting Refusal Not Illegal Supreme Court Rules*, JAPAN TIMES, Sept. 8, 1998). In this case, the international treaties conferred the same rights as the Constitution, preventing the judiciary from providing a consistent ruling while simultaneously strictly enforcing the treaty obligations but not enforcing the constitutional claims.

to fingerprint him, as the Alien Registration Law required.<sup>112</sup> After being arrested for declining “repeated requests to appear for ‘voluntary’ police questioning,”<sup>113</sup> officers strip-searched, forcibly fingerprinted and interrogated him, holding the man for the day.<sup>114</sup> The man sued, claiming the legal requirement of fingerprinting violated Articles 13 (right to life, liberty, and pursuit of happiness)<sup>115</sup> and 14 (equal protection)<sup>116</sup> of the Showa Constitution and Articles 7 (degrading treatment)<sup>117</sup> and 26 (prohibition against discrimination/equal protection)<sup>118</sup> of the International Covenant on Civil and Political Rights.<sup>119</sup> The high court ruled for the plaintiff on all four counts, but the Supreme Court overturned the decision without recognizing the international treaty claims.<sup>120</sup>

C. *Japan Corrects Interpretations of Its Constitution Through Constitutional Transformation Rather than Amendment*

The Supreme Court can fix its misinterpretation of Article 25 through so-called constitutional transformation. The Showa Constitution has never been formally amended;<sup>121</sup> instead, Japan keeps its supreme legal document relevant through constitutional transformation.<sup>122</sup> Constitutional transformation “is deemed to mean ‘a change in the meaning of particular constitutional provision(s) brought about through “reinterpretation” of the provision rather than through formal constitutional amendment.’”<sup>123</sup> Shifting the judiciary’s interpretation of Article 25 is therefore reasonable, practical, and appropriate given the country’s reticence to amend the constitution.<sup>124</sup>

Interest in constitutional amendment made a brief surge in the early 1950s and culminated in 1957, when the government appointed an official Commission on the Constitution to study the issue.<sup>125</sup> However, the

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<sup>112</sup> *Id.* at 476.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> KENPŌ, art. 13.

<sup>116</sup> *Id.* art. 14.

<sup>117</sup> United Nations International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 7 [hereinafter ICCPR].

<sup>118</sup> *Id.* art. 26.

<sup>119</sup> Hamano, *supra* note 54, at 476 (discussing the *Fingerprint Case*).

<sup>120</sup> *Id.* at 477, 480.

<sup>121</sup> Snyder, *supra* note 64, at 48.

<sup>122</sup> Ford, *supra* note 12, at 58.

<sup>123</sup> *Id.* (quoting Tomosuke Kasuya, *Constitutional Transformation and the Ninth Article of the Japanese Constitution*, 18 LAW IN JAPAN 1 (Paul S. Taylor trans., 1986)).

<sup>124</sup> *Id.* at 56.

<sup>125</sup> *Id.*

Commission's 1964 report failed to put forth any recommendations and laid to rest any prospect for future amendments.<sup>126</sup>

Absent the possibility of constitutional amendment, judges and legal scholars rely on constitutional transformation to keep the Showa Constitution effective and to eliminate disjunction between constitutional norms and social reality.<sup>127</sup> Constitutional transformation is more than a theoretical proposition; the Supreme Court has adopted the idea "to fashion a new garment out of the constitutional fabric supplied by the Americans in 1947."<sup>128</sup> Therefore, even though the Court has disregarded the true intent of Article 25, it can correct its wrongs in the same manner it adjusts other outdated constitutional interpretations simply by employing constitutional transformation.

*D. When the Court Addresses Article 25 Claims, It Fails to Engage in Any Negative-Rights Analyses*

When promulgating judicial decisions, the Court fails to examine Article 25 from a negative-rights perspective, the view that provides easier enforcement. Therefore, while the Court has repeatedly ruled against plaintiffs in Article 25 suits, it has yet to issue an opinion declaring that Article 25 is not a negative right and is unenforceable as such. Untrodden ground exists for the Court to rule Article 25 contains a concrete, negative right. The three aforementioned cases demonstrate the Court's silence on the negative-positive rights distinction.

In the *Staple Food Act Case*, rather than examining whether the State actually prevented the defendant from maintaining a minimum standard of living, the Court only focused on Article 25 as conferring a positive, programmatic declaration and justifying the Staple Food Act's application.<sup>129</sup> In addition to holding that the Promotions Clause<sup>130</sup> merely declared the government take positive action to strengthen social services,<sup>131</sup> the Court further held that the Minimum Standards Clause<sup>132</sup> was also a declaration to

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 58-59.

<sup>128</sup> *Id.* at 59. Perhaps the most common example is Article 9 of the Showa Constitution, the provision renouncing war and prohibiting a military force. See Canon Pence, *Reform in the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution*, 32 N.C. J. INT'L L. & COM. REG. 335, 373-74 (2006); Kenneth L. Port, *Article 9 of the Japanese Constitution and the Rule of Law*, 13 CARDOZO J. INT'L & COMP. L. 127, 150-51 (2005).

<sup>129</sup> *Staple Food Act Case*, *supra* note 38, at 255.

<sup>130</sup> KENPŌ, art. 25(2).

<sup>131</sup> See *Staple Food Act Case*, *supra* note 38, at 254-55.

<sup>132</sup> KENPŌ, art. 25(1).

enact and enforce social legislation.<sup>133</sup> According to the Court, “the state does not bear such an obligation [to strengthen and extend social services] concretely and materially toward the people as individuals.”<sup>134</sup> The Court only considered the positive rights aspect and ruled the Showa Constitution obligates the State to provide social services, but individuals cannot demand they receive these social services.<sup>135</sup> Thus, the Court transformed Article 25 from a right to a declaration, deviating from its original intended force. However, the Court’s opinion shows it only considered Article 25 under a positive rights lens.

The Court’s use of the word “any” in the *Asahi* opinion could incorporate negative and positive rights, but the emphasis on “duty of the state” and administering policy so as to “enable” indicates an emphasis on positive rights rather than preventing state interference.<sup>136</sup> The Court declared that only the laws enacted under Article 25 provide concrete rights.<sup>137</sup> Article 25 did not protect individuals against government actions violating the provision. Once again, the Court’s language focused on the possibility that Article 25 might require the government to provide something;<sup>138</sup> the Court then found Article 25 as a nonjusticiable, positive right, without using the negative-positive rights distinction.<sup>139</sup>

In the *Health Insurance Case*, the Court briefly addressed the appellant’s Article 25 claim. Upon doing so, the Court quickly dismissed it,<sup>140</sup> effectively ignoring any negative-rights analysis. The government applied the Social Security Act and the Health Insurance Act, preventing the plaintiff from being covered by either. Therefore, the government’s application of the laws left the plaintiff unable to afford health insurance or comply with the law mandating coverage. However, the Court only saw the appellant’s claim about the State’s failure to provide health insurance,<sup>141</sup> not the barriers it created to obtain health care and follow the law.

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<sup>133</sup> See *Staple Food Act Case*, *supra* note 38, at 255.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Asahi*, *supra* note 37, at 134-35.

<sup>137</sup> *Id.* at 134 (“A concrete right is secured only through the provisions of the Livelihood Protection Law enacted to realize the objectives prescribed in the provisions of the Constitution.”).

<sup>138</sup> See *id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Health Insurance Case*, *supra* note 39, at Reasons III.

<sup>141</sup> See generally *id.*

#### IV. MISINTERPRETATION OF ARTICLE 25 AS MERELY A PROGRAMMATIC DECLARATION CONFLICTS WITH JAPAN'S TREATY OBLIGATIONS

Japan's lower courts have struggled to follow the Supreme Court's constitutional holdings because these holdings conflict with treaty provisions guaranteeing rights similar to those granted in the Showa Constitution. Starting in the 1970s, the legislature began ratifying a number of international treaties containing rights that reinforced those enumerated in the Showa Constitution, including Article 25.<sup>142</sup> For example, within the International Covenant on Civil and Political Rights ("ICCPR"), Article 3 grants the right to equal protection<sup>143</sup> and Article 7 guarantees the right against inhuman and degrading punishment.<sup>144</sup> The United Nations International Covenant on Economic, Social and Cultural Rights ("ICESCR") provides the right to organize labor in Articles 7 and 9<sup>145</sup> and guarantees the right to an adequate standard of living in Article 11.<sup>146</sup> The Showa Constitution provides these same rights.<sup>147</sup>

##### A. *Japan Has Ratified International Human Rights Treaties That Reinforce Constitutional Rights, Including That of Article 25*

Japan joined the international community to ratify human rights treaties, which enumerated rights already existing within the Showa Constitution. Article 98(2) of the Showa Constitution gives treaties the force of law<sup>148</sup> equal to legislatively-created law. When ratified without reservations,<sup>149</sup> the executive, the legislature, and the judiciary must follow and adhere to the treaties as they abide by constitutional and statutory provisions.<sup>150</sup> These treaties specifically reinforced the right to social

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<sup>142</sup> See United Nations High Commissioner for Human Rights, Status by Country, <http://www.unhcr.ch/TBS/doc.nsf/newhvhstatusbycountry?OpenView> (expand "Japan" hyperlink) (last visited Feb. 22, 2008) (showing when Japan ratified various international human rights treaties).

<sup>143</sup> ICCPR, *supra* note 117, art. 3.

<sup>144</sup> *Id.* art. 7.

<sup>145</sup> United Nations International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, arts. 7, 9 [hereinafter ICESCR].

<sup>146</sup> *Id.* art. 11.

<sup>147</sup> KENPŌ, arts. 14, 25 (granting the right to equal protection, a minimum standard of living, to organize labor, and against cruel punishment).

<sup>148</sup> *Id.* art. 98(2) ("treaties concluded by Japan and established laws of nations shall be faithfully observed").

<sup>149</sup> Hamano, *supra* note 54, at 468.

<sup>150</sup> *Id.*

standards.<sup>151</sup> The two most prominent are the ICCPR, ratified in 1979,<sup>152</sup> and the ICESCR, ratified in 1979.<sup>153</sup>

The ICCPR and ICESCR contain provisions that mirror the Constitution's social rights provisions. Article 11(1) of ICESCR requires states to "recognize the *right of everyone to an adequate standard of living* for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right."<sup>154</sup> This language resembles Article 25's "right to maintain the minimum standards of wholesome and cultured living" and its requirement that the State "use its endeavors" to promote "social welfare and security."<sup>155</sup>

The absence of any noteworthy reservations indicates that the Japanese government wanted full enforcement of the treaties as written.<sup>156</sup> The government had the option to accept the treaties conditionally by making reservations, understandings, and declarations ("RUDs"). RUDs allow a country to become party to an international treaty in a qualified manner by exempting itself from certain obligations mandated upon member states.<sup>157</sup> It is significant that before ratifying the treaties, the Japanese Government engaged in careful reviews of the legal system to ensure compliance<sup>158</sup> and accepted the treaties without modification.

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<sup>151</sup> Additional treaty examples include Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 189 U.N.T.S. 150, and the Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13. Japan signed these treaties in 1982 and 1985. See United Nations Treaty Collection: Convention Relating to the Status of Refugees, <http://www.unhchr.ch/html/menu3/b/treaty2ref.htm> (last visited Feb. 22, 2008); Convention on the Elimination of all Forms of Discrimination Against Women: Japan, <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet> (expand "Japan" hyperlink; then follow "CEDAW-Convention on the Elimination of All Forms of Discrimination against Women" hyperlink) (last visited Feb. 22, 2008).

<sup>152</sup> International Covenant on Civil and Political Rights: Japan, <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet> (expand "Japan" hyperlink; then follow "CCPR-International Covenant on Civil and Political Rights" hyperlink) (last visited Feb. 22, 2008).

<sup>153</sup> International Covenant on Economic, Social, and Cultural Rights: Japan, <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet> (expand "Japan" hyperlink; then follow "CESCR-International Covenant on Economic, Social, and Cultural Rights" hyperlink) (last visited Feb. 22, 2008).

<sup>154</sup> ICESCR, *supra* note 145, art. 11 (emphasis added).

<sup>155</sup> KENPŌ, art. 25.

<sup>156</sup> See International Covenant on Civil and Political Rights: Japan, *supra* note 152 (lacking any documents on reservations and only noting one procedural reservation); International Covenant on Economic, Social, and Cultural Rights: Japan, *supra* note 153 (lacking any documents on reservations and only noting a few procedural reservations on such things as specialized secondary and higher education, social security, leisure, and labor unions).

<sup>157</sup> Eric Neumayer, *Qualified Ratification: Explaining Reservations to International Human Rights Treaties*, 36 J. LEGAL STUD. 397 (2007).

<sup>158</sup> Hamano, *supra* note 54, at 468.

B. *The Court Defers to the Other Branches When Interpreting Constitutional Rights, Which Conflicts with Treaty Obligations*

Even though the treaties and the Showa Constitution have the same force of law, the Court enforces them differently. Rather than enforce the constitutional rights of Article 25, or the other social rights provisions, the Supreme Court defers to the other branches of government to enforce these rights. However, the Court does not extend that same deference when interpreting and enforcing rights under international treaties ratified by the government.<sup>159</sup> Judicial opinions illustrate this conflict and further illuminate the growing division between the lower courts and the Supreme Court. A negative-rights interpretation of constitutional rights (including Article 25) that provides greater enforcement and stronger protection would harmonize interpretations of international treaty rights with constitutional rights by giving them the same force.

Rights under international treaties have strong legal force, but when considering those same rights under the Showa Constitution, the Court defers to the other branches of government rather than providing strong enforcement. Plaintiffs regularly bring actions<sup>160</sup> claiming the violation of a right under both the Constitution and the ICCPR. Both are legally binding within Japan's domestic legal system.<sup>161</sup> When confronted with these mirroring claims, the Supreme Court either ignores the treaty right or renders a very narrow interpretation of it.<sup>162</sup> This unfortunate outcome runs counter to those principles embedded within Japan's legal tradition and culture for "balance" and "harmony" between competing claims of right.<sup>163</sup>

The Supreme Court's rulings leave to lower courts the task of reconciling opposing interpretations of similar rights. To resolve this conflict, some lower courts started applying constitutional rights more vigorously to conform to treaty rights. This approach, however, has created a rift between lower court and Supreme Court decisions. The treaty ratifications "rejuvenated litigation over the breadth of human rights protection in Japan," and the courts found themselves drawn into questions of direct conflict.<sup>164</sup> At first, the courts simply narrowed their interpretation

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<sup>159</sup> See *id.* at 469 (using strong language about judicial enforcement of treaty rights, particularly the ICCPR, which provide broad rights compared to constitutional rights narrowed by the courts).

<sup>160</sup> See *id.* at 476-77.

<sup>161</sup> KENPŌ, art. 98(2).

<sup>162</sup> See *supra* Part III.B.

<sup>163</sup> Ford, *supra* note 12, at 34, 48.

<sup>164</sup> Hamano, *supra* note 54, at 469.

of the rights guaranteed within the treaties by denying valid claims.<sup>165</sup> However, around 1993 a shift occurred among the lower courts, and rulings began to recognize international human rights principles.<sup>166</sup> To provide a consistent interpretation of treaty and constitutional rights, the lower courts ultimately began to enforce the constitutional rights more vigorously and did not passively defer to the executive as the judiciary system as a whole had done previously.

The *Fingerprint Case* reveals the conflict between lower courts and the Supreme Court about the judiciary's interpretations of human rights.<sup>167</sup> While the *Fingerprint Case* did not contain an Article 25 claim, it demonstrates the Court's deference to the other branches of government in constitutional claims and the resulting conflict with similar international treaty claims. The conflicting interpretations between the Supreme Court and the lower courts, as well as between the constitutional claims and international treaty claims, hinder Japan's solid legal tradition of harmonious rulings and interpretations. In the *Fingerprint Case*, the defendant sought a replacement alien registration card but refused to provide fingerprints or submit to "voluntary" questioning.<sup>168</sup> He sued, claiming the fingerprint requirement violated Articles 13 and 14 of the Constitution<sup>169</sup> (right to life liberty, and pursuit of happiness; equal protection)<sup>170</sup> as well as Articles 7 and 26 of the ICCPR<sup>171</sup> (degrading treatment; equal protection).<sup>172</sup> While the plaintiff did not raise an Article 25 claim, the judicial rulings on constitutional rights apply to Article 25 decisions.<sup>173</sup> The Osaka High Court's ruling for the plaintiff found the ICCPR and the Constitution provided broad human rights protection.<sup>174</sup> The Osaka High Court held that

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<sup>165</sup> See *id.* at 469-70 (describing the various narrow views taken regarding treaty rights).

<sup>166</sup> *Id.* at 473.

<sup>167</sup> An earlier Supreme Court ruling, similar to the *Fingerprint Case*, demonstrates imbalance within the Supreme Court concerning treaty and constitutional rights treatment. In the earlier case, five of ten judges dissented the Court's overruling and stressed the importance of ICCPR rights. Thus, a division also exists within the Court about the appropriate legal weight to give to the human rights treaties. *Id.* at 477.

<sup>168</sup> See Hamano, *supra* note 54, at 476 (discussing the *Fingerprint Case*); see also *supra* notes 111-120 and accompanying text (providing details of the case).

<sup>169</sup> *Id.* (discussing the *Fingerprint Case*); see also *supra* note 119 and accompanying text.

<sup>170</sup> KENPO, arts. 13, 14.

<sup>171</sup> See Hamano, *supra* note 54, at 476 (discussing the *Fingerprint Case*); see also *supra* note 119 and accompanying text.

<sup>172</sup> ICCPR, *supra* note 117, arts. 7, 26.

<sup>173</sup> Arguably, the right to a minimum standard of living is not as forceful as some of the rights asserted by the plaintiff in the *Fingerprint Case*. Nonetheless, the case still provides an example applicable to Article 25 and the general conflict created by interpreting constitutional rights with deference and international treaty rights with strength.

<sup>174</sup> Hamano, *supra* note 54, at 477 (discussing the *Fingerprint Case*); see also *supra* note 119 and accompanying text.

the ICCPR expanded individual rights because many specific ICCPR protections did not exist in Japanese domestic law.<sup>175</sup> The Supreme Court overturned the high court's ruling, but it made no reference to the ICCPR claim.<sup>176</sup> The short opinion exhibited a common, but poorly applied, standard in constitutional case decisions to defer to the executive. The absence of any mention of the ICCPR claim is especially significant in the *Fingerprint Case* given the apparent momentum in the lower courts to broaden the scope of individuals' rights by recognizing the rights provided in the ICCPR.<sup>177</sup>

The Court's refusal to acknowledge the ICCPR claim in the *Fingerprint Case* demonstrates the Court's reticence to reconcile the two supreme legal documents, showing the incompatibility between recognizing international treaty rights and applying the Supreme Court's lackluster protection of constitutional rights. Both the Constitution and the ICCPR have equal force under the Japanese legal system, should be interpreted consistently, and neither preempts the other.<sup>178</sup>

V. THE SUPREME COURT SHOULD INTERPRET ARTICLE 25 AS A CONCRETE, NEGATIVE RIGHT TO PROVIDE STRONGER PROTECTION

Part V analyzes the policy behind interpreting Article 25(1) as a concrete, negative right. This includes examining the positive consequences resulting from such an interpretation, the practical methods to provide such an interpretation, and the internal and external pressures pushing for such an interpretation.

A. *Interpreting Article 25 as a Concrete, Negative Right Will Produce Positive Results for Japan's Legal System*

Interpreting Article 25 as a concrete, negative right will benefit Japan's legal system by giving Article 25 greater force and improving Japan's system of checks and balances.

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 480.

<sup>178</sup> *Id.* at 469 (quoting Japan's Third Periodic Report to the Human Rights Committee that implies the government claims to view the ICCPR on the same level as the Constitution and asserts that both are to be interpreted with similar authority).

1. *Article 25's Concrete, Negative Right Will Improve Japan's System of Checks and Balances, Strengthening Its Legal System*

Interpreting Article 25 as a concrete, negative right allows judicial redress when the State violates an individual's right to maintain a minimum standard of living.<sup>179</sup> Serious adherence to that responsibility requires judicial oversight upon the executive and legislature, strengthening the system of checks and balances and promoting a healthier, better functioning legal system.

A healthy legal system usually requires judicial oversight of the executive and legislature. While the Diet holds a supreme position relative to the judiciary and executive,<sup>180</sup> the Showa Constitution explicitly affirms the Court's power of judicial review.<sup>181</sup> The constitutional framers intentionally included Article 81 because many viewed the collapse of German democracy under the Weimar Constitution as a result of the absence of judicial review and a powerful judiciary capable of effective oversight.<sup>182</sup>

While the Supreme Court has demonstrated a preference for deferring to the other governmental branches,<sup>183</sup> it has been more willing to oversee the executive and the Diet when faced with violations of concrete, negative rights, especially when such violations hinder the public welfare.<sup>184</sup> When the Court finds a law or government action unconstitutional, it declares that the State violated a negative right.<sup>185</sup> Consistent with Japan's cultural and legal attitudes, the Court only overturns a statute or government action after balancing the individual harm against the public welfare promoted by the restriction.<sup>186</sup> The negative right to maintain a minimum standard of living does not directly oppose the general welfare, and enforcing it promotes the general welfare because everyone benefits from the reduction of poverty. Therefore, the Supreme Court will more likely enforce the right to a minimum standard of living if it recognizes Article 25 as a negative right.

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<sup>179</sup> See Ezer, *supra* note 2, at 7-8.

<sup>180</sup> Ford, *supra* note 12, at 42.

<sup>181</sup> KENPŌ, art. 81 ("The Supreme Court is the court of last resort with the power to determine the constitutionality of any law, order, regulation or official act.").

<sup>182</sup> MOORE & ROBINSON, *supra* note 57, at 257.

<sup>183</sup> See Hamano, *supra* note 54, at 435; Ford, *supra* note 12, at 42.

<sup>184</sup> See Ford, *supra* note 12, at 29-35 (providing examples of the Supreme Court's pattern of striking down legislation restricting negative rights provided the general welfare of the statute does not outweigh the individual harm, which include a 1960 freedom of expression case and a 1966 workers' rights case).

<sup>185</sup> See *id.* at 30 (discussing a case where the Court struck down a law that limited the freedom of expression); *Toyama et al. v. Japan*, 20 KEISHŪ 901 (Sup. Ct., Oct. 26, 1966), translated in HIROSHI ITOH & LAWRENCE WARD BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN 90-91 (1978) (ruling a law that restricted labor rights unconstitutional).

<sup>186</sup> See Ford, *supra* note 12, at 26.

2. *The Court Must Interpret Article 25 as a Concrete, Negative Right to Observe the Drafters' Original Intent of It as a Forceful Right*

Those drafting the Showa Constitution intended Article 25 to be an enforceable right,<sup>187</sup> and the judiciary can enforce a negative right more easily than a positive right.<sup>188</sup> If Article 25 only provided a positive right, it would not be forceful, as seen with the application of merely programmatic declarations.<sup>189</sup> Practically, the judiciary cannot allow individuals to sue when the State fails to eliminate poverty and provide everyone with a minimum standard of living. Effective judicial relief would be impossible; courts cannot force the State to do what it is incapable of doing.

Concrete, negative rights avoid these problems. A state can reasonably refrain from doing harm whereas it cannot necessarily cure all ills. The specific nature of the former, compared to the open-endedness of the latter, indicates the feasibility of the negative right.<sup>190</sup> For example, the Court can easily order the State stop prosecuting an individual for violating the Staple Food Act because as applied, the Act forces the man to go hungry. The Court could also issue an opinion that warns the Diet that the Court finds that a certain law violates the Constitution, directing the Diet to change the law.<sup>191</sup> The Court has trouble demanding the State eliminate poverty or construct housing for every homeless individual. The Supreme Court, by recognizing Article 25's concrete, negative right, would grant relief only on specific occasions when the State actively prevented someone from maintaining his or her minimum standard of living.

3. *Interpreting Article 25 as a Concrete, Negative Right Resolves the Conflict Between the Constitution and International Treaties*

The judiciary could take one of three approaches to resolve the existing conflict between the level of protection the judiciary applies to constitutional rights with that applied to international treaty rights. First, the courts could rule each document provides a different level of protection.

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<sup>187</sup> See *supra* Part III.A.

<sup>188</sup> See Wald, *supra* note 6, at 559 (positing the view that positive rights cannot be judicially enforceable); see also Wiles, *supra* note 4, at 50 (restating arguments about the difficulty in legally enforcing socio-economic rights).

<sup>189</sup> See *Asahi*, *supra* note 37, at 134 (holding and quoting the *Staple Food Act Case* that Article 25 "merely proclaims that it is a duty of the State to administer national policy in such a manner as to enable all the people to enjoy at least the minimum standards of wholesome and cultured living, and it does not grant the people as individuals any concrete rights").

<sup>190</sup> Wiles, *supra* note 4, at 50 (restating arguments about the difficulty in legally enforcing socio-economic rights).

<sup>191</sup> See *infra* Part V.B.1.

However, this interpretation contravenes Japan's legal culture and tradition of interpreting similar rights consistently to promote harmony and balance within the legal system.<sup>192</sup> Second, the judiciary could weaken the force with which it protects international treaty rights. Finally, the judiciary could interpret constitutional rights with greater force.

Interpreting constitutional rights with greater force provides the best solution. First, in addition to resolving the conflict of laws between the rights protected in the Showa Constitution and international treaties, stronger enforcement of constitutional rights alleviates the rift between the lower courts and the Supreme Court. The lower courts' previous attempts to apply this strategy<sup>193</sup> demonstrate their preference for stronger constitutional enforcement as opposed to weakening treaty rights or simply yielding to interpret the documents with different force. Second, stronger constitutional enforcement promotes Japan's legal tradition of harmony among decisions and governmental branches. Third, individuals will realize greater protection in their constitutional and treaty rights. Fourth, this route supports the desires within the international community.<sup>194</sup> Finally, international treaty provisions can provide the courts guidance when they interpret vague provisions within the Constitution.

The concrete, negative-rights interpretation provides a relatively uncontroversial path for the judiciary to enforce constitutional rights with greater vigor, enabling the courts to oversee the other branches of government.<sup>195</sup> The Supreme Court's attitude towards Article 25 follows the Court's general attitude towards constitutional social rights. Interpreting Article 25 as a concrete, negative right will generate greater human rights protections under the Constitution, ameliorating the inconsistent rulings and providing a map towards resolving the larger issue.

#### *B. Interpreting Article 25 as a Concrete, Negative Right Is Practical*

The Supreme Court can realistically enforce Article 25 as a concrete, negative right. First, the Court can maintain its preference for judicial harmony and balance by applying the "warnings approach"<sup>196</sup> and

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<sup>192</sup> "The Charming Betsy" canon provides a U.S. law analogy, where the United States Supreme Court ruled that "an act of Congress ought never be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804).

<sup>193</sup> See Hamano, *supra* note 54, at 476 (discussing the *Fingerprint Case*); see also *supra* notes 111-120 and accompanying text (providing details of the case).

<sup>194</sup> See *infra* notes 230-236 and accompanying text.

<sup>195</sup> See *supra* notes 17-22, 121-124 and accompanying text (discussing how courts realistically should not find it difficult to enforce provisions as concrete, negative rights).

<sup>196</sup> See Ford, *supra* note 12, at 47.

“constitutional transformation” rather than overtly overruling legislation or formally amending the Showa Constitution in order to achieve the concrete, negative-rights analysis.<sup>197</sup> Second, the South African Constitutional Court’s rulings provide a useful model for the Japanese judiciary, consistent with Japan’s legal culture, through statutes parallel in construction to Japan’s. The South African Constitutional Court gives a dual interpretation to constitutional social rights provisions as providing both positive and negative rights.

1. *The “Warning Approach” and “Constitutional Transformation”  
Enable Article 25 Enforcement Consistent with Japan’s Legal Values*

The judiciary can use the “warning approach” to minimize conflict that a concrete, negative-rights interpretation could produce with other branches of government. A warning is a judicial notice of unconstitutionality, directing the Diet or executive to fix the problem by changing the law or action.<sup>198</sup> While most unconstitutional behavior would result from the executive improperly applying a law, the judiciary, at times, may have to invalidate a whole act that violates Article 25. In similar situations, when the judiciary issues a warning of unconstitutionality, the Diet usually responds quickly, changing the legal provision and avoiding conflict with the courts.<sup>199</sup> The “warning approach” adheres to Japan’s legal culture, which seeks to achieve balance and harmony when faced with constitutional conflicts.<sup>200</sup> Through this approach the Supreme Court neither wholly abdicates its responsibility for judicial review nor actually enforces its reading of the Showa Constitution.<sup>201</sup> A successful claim ultimately ends with improved government action no longer hindering one’s ability to maintain a minimum standard of living without an opinion that explicitly overrules the action or policy.

“Constitutional transformation” supports the Supreme Court recognizing Article 25 as a concrete, negative right. The Court applies “constitutional transformation” to modernize the Constitution in place of constitutional amendment. Social and economic conditions now exist to support Article 25 becoming a stronger, individually enforceable right, true to the framers’ original intent.<sup>202</sup> Reinterpreting Article 25 to recognize its

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<sup>197</sup> *Id.* at 58.

<sup>198</sup> *Id.* at 47.

<sup>199</sup> *Id.* at 47, 49.

<sup>200</sup> *Id.* at 48-49.

<sup>201</sup> *Id.* at 47.

<sup>202</sup> *See infra* Part V.C.

concrete, negative right provides the ideal mechanism that remains compatible with Japan's legal culture and system.

2. *The South African Constitutional Court Provides a Model for the Supreme Court to Interpret Article 25 as a Negative Right*

The South African Constitutional Court has effectively adjudicated constitutional social rights from a negative-rights perspective while still maintaining respectable deference to the other branches of government. Two South African rulings provide a useful model for the Supreme Court in Article 25 rulings.

The structure of South African constitutional rights parallels the structure of rights within the Showa Constitution. For example, Section 26 of the South African Constitution states, "(1) Everyone has the right to have access to adequate housing [negative right]. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right [positive right]."<sup>203</sup> Section 26 mirrors the language and structure of Article 25. The first subsection guarantees the right and provides the concrete, negative right. The second subsection provides the programmatic declaration, placing a duty upon the State to develop proposals in furtherance of the provision.

The South African Constitutional Court's ruling in *Government of the Republic of South Africa and Others v. Grootboom and Others*<sup>204</sup> provides a lens through which courts can recognize concrete, negative rights within social rights. The plaintiff, Irene Grootboom, along with 510 children and 390 adults sued when evicted from a squatter settlement and then inhumanely forced from an informal settlement. Their possessions were burned and their homes destroyed.<sup>205</sup> Plaintiffs claimed the Government violated Section 26 of the South African Constitution, granting the right to housing,<sup>206</sup> and Section 28 of the South African Constitution, granting children the right to basic nutrition, shelter, health care services, and social services.<sup>207</sup>

The Court began its opinion by identifying the State's negative obligation, "to desist from preventing or impairing the right of access to

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<sup>203</sup> S. AFR. CONST. 1996, § 26, available at <http://www.concourt.gov.za/site/theconstitution/english.pdf> (alterations added). Subsection 3 prohibits arbitrary eviction, but that is irrelevant for this case analysis.

<sup>204</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC) (S.Afr.).

<sup>205</sup> *Id.*

<sup>206</sup> S. AFR. (Interim) CONST. 1993 § 26.

<sup>207</sup> *Id.* § 28.

adequate housing.”<sup>208</sup> The Court articulated the issue before it as whether the State acted reasonably,<sup>209</sup> and ruling in favor of the plaintiffs, it gave some deference to the legislature.<sup>210</sup> While the Court ordered the State to remedy the failing, it left implementation up to the legislature.<sup>211</sup> Recognizing the limitations of enforcing Section 26 as a concrete, positive right, the Court stated that the rights in question did not entitle “the respondents to claim shelter or housing immediately upon demand.”<sup>212</sup> The Court, aware that enforcing Section 26 as a positive right proved impractical, applied the provision’s negative right, assuring it had meaning and muscle.<sup>213</sup>

In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*,<sup>214</sup> the Constitutional Court affirmed the existence of negative rights within social rights, modeling their judicial enforceability.<sup>215</sup> The plaintiffs sued, alleging the State violated their constitutional right to housing after their residences were sold to recover debt owed to another private party.<sup>216</sup> Ruling on the negative rights provision, the Court unanimously held, “at the very least, any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1),” and that the absence of judicial oversight for the forced sale procedure meant the action violated Section 26.<sup>217</sup>

The Supreme Court of Japan should adopt the South African Constitutional Court’s analyses and rulings. Doing so would provide a natural solution to alleviate harms that occur from an unconstitutional law or the executive branch unconstitutionally applying a statute causing harm to individuals such as in the *Staple Food Act Case*, *Asahi*, and the *Health Insurance Case*.

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<sup>208</sup> Christiansen, *supra* note 3, at 366 (quoting *Grootboom*, 2000 (11) BCLR 1169, ¶ 34).

<sup>209</sup> See Fitzpatrick & Slye, *supra* note 51, at 677.

<sup>210</sup> See *Grootboom*, 2000 (11) BCLR 1169, ¶ 99.

<sup>211</sup> *Id.*

<sup>212</sup> Fitzpatrick & Slye, *supra* note 51, at 673.

<sup>213</sup> See *Grootboom*, 2000 (11) BCLR 1169, ¶¶ 38, 46, 71, 73, 88, 90 (recognizing the limitations of enforcing the positive right and finding the municipality’s involvement in the evictions breached the negative constitutional right).

<sup>214</sup> *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2003 (3) All SA 690 (CC) at 34 (S. Afr.)

<sup>215</sup> See *id.* Two cases were consolidated because they have similar facts and raise the same issue.

<sup>216</sup> Community Law Centre, Case Brief of the *Jaftha* opinion, <http://www.communitylawcentre.org.za/Socio-Economic-Rights/case-reviews-1/south-african-cases/> (follow “High Court Cases” hyperlink; then follow “Jaftha v Shoeman and Others” hyperlink) (last visited Feb. 17, 2008) (summarizing the *Jaftha* opinion).

<sup>217</sup> Christiansen, *supra* note 3, at 372 (quoting *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) ¶ 78 (S. Afr.)).

C. *Internal and External Pressures Push the Supreme Court to Interpret Article 25 as a Concrete, Negative Right*

The legal community, the international human rights community, and current domestic economic conditions pressure Japan for judicial reform. The attitudes within these communities and the surrounding conditions have developed and aligned to make this the most opportune time for change.

1. *The Legal Community's Dissatisfaction with the Supreme Court's Current Constitutional Interpretations Indicates a Desire for Change*

The legal community's dissatisfaction with the Supreme Court's conservative constitutional rights interpretations has brewed for some time. Interpreting Article 25 as a concrete, negative right could lessen the accruing sentiments subtly, avoiding an upsurge.

The Young Lawyers Association ("YLA") movement demonstrates the first clamor in the steady progression of rumblings within the legal community towards the drafters' original intent behind constitutional rights. The YLA, founded in 1954, promoted constitutional ideals,<sup>218</sup> including preserving the principle to judicially enforce individual constitutional rights and strictly implement the Showa Constitution's original intent.<sup>219</sup> The organization grew in numbers with a large proportion of new judges holding YLA memberships.<sup>220</sup> By 1969, however, a full-scale purge occurred of YLA members from the bench, and the General Secretariat of the Supreme Court asked all judges to resign from the YLA.<sup>221</sup>

That same resistance to the Supreme Court's conservative rulings appears today with the increasing conflict between human rights treaties and constitutional rights. As previously explained, the high courts have started to handle constitutional and ICCPR claims differently, providing more oversight and deferring less to the other branches of government.<sup>222</sup> The *Illegitimate Child Case*<sup>223</sup> provides one such example. In 1993, the Tokyo High Court, indicating a break from the Supreme Court's deference to the

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<sup>218</sup> Hamano, *supra* note 54, at 446. Members of the Young Lawyer's Association ("YLA") included "judges, schooled in postwar democracy, came from different political backgrounds, including socialism, the left wing of the LDP, and communism."

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* (reporting that by 1963, the YLA encompassed 140 judges, and about one-third of new assistant judges who entered the judiciary each year were YLA members).

<sup>221</sup> *Id.* at 447. The Supreme Court stifled the 1968 movement after an article named and accused YLA member judges of being communists. The Supreme Court distributed copies of the magazine to courts throughout the country.

<sup>222</sup> *See id.* at 469.

<sup>223</sup> *See id.* at 475 (discussing 1465 HANREI JIHŌ 55 (Tokyo High Ct., June 23, 1993)).

other governmental branches, ruled that a provision of the Civil Code violated the Constitution, the ICCPR, and the Children's Rights Treaty.<sup>224</sup> The provision required an intestate share guaranteed by law to an illegitimate child be one-half of that guaranteed to a legitimate child.<sup>225</sup> The court relied on the ICCPR and the Children's Rights Treaty, to interpret the constitutional provision.<sup>226</sup> The mid-1990s brought more high courts following suit,<sup>227</sup> and pressure continues to mount from the lower courts to reconcile ICCPR rights with constitutional rights.

At the same time, Japanese non-governmental organizations ("NGOs") have grown critical of the Supreme Court's stance.<sup>228</sup> NGOs submitted over 120 counter reports to the Human Rights Committee, criticizing the Supreme Court's human rights enforcement and ICCPR implementation.<sup>229</sup> Organizations like the Japan Federation of Bar Associations and Japanese Civil Liberties Union have expressed similar concerns.<sup>230</sup>

Concern also exists within the international community regarding the Supreme Court's human rights enforcement. In the 1990s, the United Nations Human Rights Committee expressed skepticism about Japan's claims that courts effectively enforced the ICCPR.<sup>231</sup> Organizations that have issued disparaging reviews include Amnesty International,<sup>232</sup> Human Rights Watch,<sup>233</sup> World Organisation Against Torture,<sup>234</sup> Asia-Japan Women's Resource Center,<sup>235</sup> and Madre<sup>236</sup> among others.

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<sup>224</sup> *See id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 475 n.281.

<sup>227</sup> *See id.* at 475-80 (giving case examples where lower courts ruled accordingly).

<sup>228</sup> *Id.* at 481.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 473.

<sup>231</sup> *Id.* at 470.

<sup>232</sup> *See generally* Amnesty Int'l, *Japan: Abusive Punishments in Japanese Prisons*, AI Index: ASA 22/004/1998, June 1, 1998, available at <http://asiapacific.amnesty.org/library/Index/ENGASA220041998?open&of=ENG-380> (criticizing the court's failure to address violations of prisoners' rights under the ICCPR).

<sup>233</sup> *See* HUMAN RIGHTS WATCH, *OWED JUSTICE: THAI WOMEN TRAFFICKED IN DEBT BONDAGE IN JAPAN*, pt. IX (2000), available at <http://www.hrw.org/reports/2000/japan/9-response-japan.htm> (explaining the government's failure to afford redress to women trafficked from Thailand into Japan's sex industry despite constitutional, statutory, and international treaty rights against such treatment).

<sup>234</sup> *See* ASIA-JAPAN WOMEN'S RESOURCE CENTER, *VIOLATIONS OF WOMEN'S RIGHTS IN JAPAN: ALTERNATIVE REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE 3, 24, 29 (2007)*, available at [http://www.omct.org/pdf/UNTB/2007/CAT\\_38th/CAT\\_Report\\_VAW\\_Japan.pdf](http://www.omct.org/pdf/UNTB/2007/CAT_38th/CAT_Report_VAW_Japan.pdf).

<sup>235</sup> *Id.*

<sup>236</sup> Madre, *Practical Implications of International Human Rights Law*, <http://www.madre.org/articles/int/hrconv.html> (last visited Feb. 17, 2008) (describing wage discrimination case under the Convention on the Elimination of All Forms of Discrimination Against Women).

2. *Economic Conditions and Public Welfare Support a Forceful Interpretation of Article 25 as a Concrete, Negative Right*

Recent poverty trends combined with the potential of Article 25 to alleviate poverty make a convincing case for the judiciary to enforce Article 25 as a concrete, negative right. Japan's poverty levels are increasing at alarming rates. A country once known for maintaining a strong middle-class in the face of rapid economic growth now sees more and more individuals falling into the lower-income brackets.<sup>237</sup> Between the mid-1980s and 2000, the proportion of the population living in absolute poverty increased by five percentage points.<sup>238</sup> Moreover, Japan is the only OECD country to record such an increase within this time period.<sup>239</sup> The economic conditions give a sense of urgency and make it even more necessary that every branch of the Japanese government use its full power to ensure all individuals can maintain that minimum standard of living guaranteed within Article 25.

Article 25 has enormous potential to alleviate these growing economic problems. Unfortunately, the Supreme Court currently prohibits the provision from granting any individual redress. As seen in the *Staple Food Act Case, Asahi*, and the *Health Insurance Case*, had the Court interpreted Article 25 as a concrete, negative right, while applying the reasonableness standard, the individuals may have escaped the state actions that prevented them from their pursuit of a minimum standard of living. The Court would allow *Asahi* to keep his money, the defendant of the *Food Staple Act Case* to acquire more food (or at least avoid prosecution), and the *Health Insurance Case* appellant to refrain from paying an insurance premium he could not afford.

## VI. CONCLUSION

As long as poverty continues to exist, governments have the responsibility to work towards its eradication. They must act forcefully and follow through on commitments made to alleviate poverty and ensure everyone can maintain a minimum standard of living. The three branches of government must work together and challenge each other to fulfill this obligation. Japan made a commitment to its people in Article 25 in this effort to eliminate poverty. The Article has substantial potential, but in practice, the judiciary refuses to allow the provision to achieve this potential.

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<sup>237</sup> Mariko Sanchanta, *More Families Are Falling into Japan's Poverty Trap*, FINANCIAL TIMES, Nov. 30, 2006, at Careers Asia.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

Recognition of the concrete, negative right within Article 25 and an unwavering commitment to enforce it provides an interpretation consistent with what the drafters originally intended. Such an interpretation of Article 25 harmonizes the Showa Constitution with international treaties and could provide significant progress for the Japanese people in the crusade to achieve a country in which everyone truly can maintain that minimum standard of wholesome and cultured living.