

THE ROLE OF PUBLIC LAW IN JAPANESE PRIVATE INTERNATIONAL LAW*

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The division of law into public and private law has long been accepted in Japanese private international law. The traditional view of the function of the choice of law rules is that they are concerned only with private law, not with public law. They are understood to determine the private law applicable to the international legal relations between private individuals.¹⁾ However, the increasing role of public law in the form of the State's interference with those relations has raised much doubt as to whether, in regard to private international law, the above division is still tenable. A Japanese scholar argues that, if public law is, simply because of its nature, ousted from the range of private international law, not a few problems of the choice of law may be left unsolved.²⁾

It is true that public law has steadily extended its scope to matters which were regulated by private law. In face of the phenomenon of "publicization" of private law, we would have to take into consideration

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- 1) See, e.g., Egawa, *Kokusai Shiho (Private International Law)*, (1970), p. 4.
- 2) Sawaki, "Rodokeyaku niokeru Tojisha Jichi no Gensoku to Kyoko-hoki no Renketsu Mondai" (Governing Law of Labor Contract; Party Autonomy and Public Policy"), *Rikkyo Hogaku*, Vol. 9 (1967), p. 145.

certain roles of public law in reforming the choice of law rules on the family (III).^{3),4)} It does not seem, however, that, in practice, rules characterized as public law, whether of the foreign law or of the *lex fori*, have played important roles in private international law. Japanese scholars have hardly given sufficient answers to the question as to when and why certain rules of the *forum* apply to situations which, under the ordinary choice of law rules of the *forum*, are not subject to the *lex fori* (I). It seems to be even premature to survey the views with regard to the question of the treatment of foreign mandatory rules inspired by economic dirigism (II).

I. Rules of Necessary or Direct Application of the *Forum*

A. Categories of Rules of Necessary or Direct Application

There is no legislative provision designed to clarify when a particular rule of the *forum* is to be applied even in cases where, under a choice of law rule, foreign law should apply. It seems that the courts have readily opened the way for the application of certain mandatory rules of the *forum* in cases involving foreign elements. The rules as referred to below are principal rules thought to be applied irrespective of ordinary choice of law rules. Some of them have been,

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- 3) Most of Japanese choice of law rules are codified in the *Horei* [the Law Concerning the Application of Laws], promulgated in 1898. Subject to three minor amendments in 1942, 1947 and 1964, the *Horei* remains the primary source of our private international law.
 - 4) While, until recently, the problem of the interplay between the pre-existing choice of law rule and public law has not attracted the interest of Japanese scholars, it has been a matter of controversy whether some husband-oriented choice of law rules contained in the *Horei* should be regarded as contrary to the principle of equality of men and women as laid down in the Japanese Constitutional Law.

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in fact, applied in such a way by the courts. However, no judge-made rule has been established as to when a rule has the character of necessary application.

(1) When certain rules are characterized as of necessary application, the following points are usually observed in regard to them: (a) they are designed to serve the national or public interests; (b) their observance is ensured by several kinds of public organs; and (c) penal sanctions are imposed upon those who breach them. The exchange control law,⁵⁾ import and export regulations and anti-trust law would be good examples. Certain rules contained in the Protection

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- 5) Its direct applicability is undoubted. The courts, because of it, have frequently applied the law without indicating the reason for the direct applicability (*e.g.*, Nagoya District Court, January 31, 1970, *Kakyu Saibanrei Shu*, Vol. 21, p. 196), and, in many cases, Japanese law was found to govern the contracts (*e.g.*, Osaka District Court, September 24, 1966, *Hanrei Taimuzu*, No. 199, p. 178).
 - 6) This Act is sometimes translated as the Habeas Corpus Act. As this translation shows, it was enacted primarily to protect individuals under the restraint of the public authorities without due process of law. Any person may make application to the High Court for the release of the person detained. In practice, however, it has been applied by the courts in relation to private individuals rather than to public authorities, *e.g.*, when one of the spouses whose marital relationship was already breaking down removed his or her children without the prior consent of the other. It has also applied to the "international abduction case". The Supreme Court of Japan, on February 26, 1985, had to decide a case in which a Japanese husband removed his children from Italy to Japan in the absence of the Italian wife. She, according to this Act, applied to the Tokyo High Court for the release of the children. Although a tribunal of Turin had issued a temporary order which granted her the right to the custody, the High Court did not accept her allegation on the ground that the children had enjoyed stable lives in Japan. The Supreme Court affirmed the decision.
 - 7) Article 28 of the Act, for example, empowers the Prefectural Governor to place under the care of certain institutions children whose welfare is found to be in danger as a result of the misuse of the right to custody by their parents.

of Personal Liberty Act⁶⁾ and in the Child Welfare Act⁷⁾ may be added to them.

However, mandatory rules in regard to which all those points can be observed may not be always characterized as of necessary application. For example, Article 20 of the Labour Standards Act lays down the period of notice of dismissal. The effectiveness of the rule is ensured by the supervision of the relevant public organ and by a penal sanction. It has been a matter of controversy whether this mandatory rule is applicable irrespective of the *lex contractus*. On the one hand, the Tokyo District Court, in 1965, decided that it was.⁸⁾ It had to decide whether the rule in question was applicable in case of dismissal by a U.S. corporation of a U.S. employee working in Japan. The *lex contractus* was found to be Californian law under which no prior notice is said to be necessary. The Court says: "The dismissal should be governed by the labour law of the Japanese legal system as a law of the country in which the employee carries out his work... [T]he principle of party autonomy may be applicable subject to the labour law as a [law] of *ordre public* which applies within the boundaries of the State." A textbook writer supports this decision.⁹⁾ It does not seem, however, that it has been regarded as a precedent in subsequent decisions. Specifically, in another decision of the Tokyo District Court, New York law as a *lex contractus* was applied to a case in which a U.S. corporation had dismissed a U.S. employee working in Japan without prior notice.¹⁰⁾

(2) Some rules are thought to be directly applied only in view

8) Tokyo District Court, April 26, 1965, *Rodokankei Minji Jiken Saibanrei Shu*, Vol. 16, p. 69.

9) Orimo, *Kokusai Shiho* [Kakuron] (*Private International Law* [Special Part]), (1972), pp. 141-143.

10) Tokyo District Court, May 14, 1969, *Hanrei Jiho*, No. 568, p. 87.

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of their purpose. This would be illustrated by Article 757 of the Japanese Civil Code.¹¹⁾ This provision purports to protect the third party who usually cannot be expected to know the terms of the marriage contract or settlement by a foreign couple.¹²⁾ It is doubtless that, as far as the transaction is performed in Japan, this mandatory rule is applicable irrespective of the law which, according to Article 15 of the *Horei*, should govern the effect of marriage on the property.¹³⁾

B. Notion of Rules of Necessary or Direct Application

The above rules vary in nature. Further, we cannot find a common factor in the measures adopted to ensure their effectiveness. It is true that, for example, rules of the second category are to some extent related to the public interest. However, if the notion of public

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- 11) Article 757 of the Civil Code reads: "If, in cases where foreigners have entered into a marriage contract which differs, in its terms, from the legal matrimonial *régime* of the national law of the husband, they have, subsequent to their marriage, acquired Japanese nationality or established their domicile in Japan, the contract cannot be set up against their successors in title or third persons unless it has been registered within one year."
 - 12) According to Article 15 of the *Horei*, the matrimonial *régime* is governed by the *lex patriae* of the husband at the time of the marriage. This implies that, even after the foreign couple became closely connected with Japanese society, their matrimonial *régime* is still governed by the *lex patriae* of the husband at the time of their marriage. This result may be prejudicial to the security of transactions in Japan, because the third party does not always know the content of the matrimonial *régime* under which they were married. Article 757, it is said, purports to ameliorate such result to some extent.
 - 13) The Interest Restriction (Usury) Act, the Land Lease Act and the Building Lease Act may belong to this category. Article 403 of the Civil Code may be added to them. This provision enables a debtor to discharge a foreign money obligation in Japan by paying in domestic currency. While it is not mandatory, some authors suggest its direct applicability regardless of the *lex contractus*. If this view is upheld, it would mean that the rules of necessary application are not always mandatory.

law should be extended to these rules, it follows that the dividing line between public and private law would become blurred. If we dare to seek something that these rules have in common with each other, it would be that their purposes require them to apply to situations which, according to the ordinary choice of law rules, are not subject to the *lex fori*.

As mentioned above, the choice of law rule has been understood to refer to private law in Japanese private international law. It implies that public law of the *forum* which is intended to apply to the situation in point remains applicable even in cases where the choice of law rule refers to foreign law. If the division between public and private law is made, it would be necessary to clarify the criteria for such division. It is observed, however, that academic writers have almost always left the notion of public (private) law undefined. Recently, a demarcation line has been suggested by an author who asserts, in regard to public law, the existence of "international public law" which is said to correspond to private international law in the sphere of private law. According to this view, while rules of private law are rules to be enforced only on demand, rules which are to be enforced *ex officio*, e.g., with penal sanctions are regarded as belonging to

- 14) Orimo, Tojisha Jichi no Gensoku (*The Principle of Party Autonomy*), (1970), p. 399.
- 15) In the first place, a rule pertaining to the second category, for example, Article 757 of the Japanese Civil Code would be, according to this view, regarded as a rule of *private law*. It must be admitted, therefore, that there exists a rule of private law which ought to be applied even if the ordinary choice of law rule refers to foreign law. However, the reason for its direct applicability has not yet been explained by the author. Secondly, he affirms that, as far as the employee carries out his work in Japan, the mandatory rule relating to the dismissal is applicable irrespective of whether the parties to the employment contract have chosen the foreign law. However, the court decisions do not seem to show such a tendency.

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public law.¹⁴⁾ However, this criterion is not quite convincing.¹⁵⁾

C. Particular Conflict Rules

a) Before the Second World War, there was a controversy as to whether certain rules on *the legal status of foreigners*, e.g., rules purporting to restrict foreigners' ownership of land in Japan may be applicable regardless of the choice of law rules, e.g., Article 10 of the *Horei* which refers to the *lex situs*. It seems that many textbook writers were of the opinion that, as far as the rules on the legal status of foreigners have private law effects, they are subject to the choice of law rules. On the other hand, an author asserted their direct applicability on the ground that, since Japan exclusively has the legislative jurisdiction in regard to the matter in question, there is no conflict of laws to be resolved by the choice of law rule.^{16),17)} This view turned out to be an isolated one. After the War, an academic writer suggested that, since choice of law rules are designed to regulate indirectly situations involving foreign elements, all the substantive rules of private law nature that were specially enacted to regulate those situations should be applied directly, i.e., regardless of relevant choice of law rules.¹⁸⁾ This view was more refined by another writer who suggested that, the rules of the *forum*, whether of public law or of private law, which are susceptible of being directly applied have necessarily their own conflict rules as distinguished from the ordinary

16) Atobe, "Shototsu Kisoku to Shiho tono Kankei" ("The Relationship between the Choice of Law Rule and the Private Law"), *Hogaku Ronso*, Vol. 18 (1927), p. 159.

17) This controversy was of no practical importance. Whichever view may be adopted, e.g., certain rules contained in the Alien Land Law are applicable as rules of the *lex rei sitae* or as rules of direct application, as far as the rights pertaining to land in Japan are concerned.

18) Tameike, "Kokusai Shiho no Gainen" ("The Concept of Private International Law"), *Hogaku Ronso*, Vol. 70 (1961), pp. 53-55.

choice of law rules.¹⁹⁾ The existence of conflict rules pertaining to the rules of necessary application is also accepted by a protagonist of “international public law”, as far as they are characterized as rules of public law. According to this view, they have their own choice of law rules of a unilateral character.²⁰⁾ There appears to be a tendency in Japan to recognize that the rules of the *forum* susceptible of direct application have their own conflict rules superior to the ordinary choice of law rules.

b) It is very rare that the Japanese legislator lays down spatially restricted rules. Thus, the courts are, in most cases, expected to deduce the spatial limitation which would suit the purpose and the content of the substantive rule in question.²¹⁾ Even if the legislator enacted a provision containing a spatial restriction, it may be difficult to ascertain whether a conflict rule can be inferred from such spatial element (1) (2). In addition, when a certain substantive rule undoubtedly has its own conflict rule, it may be questioned whether such conflict rule exclusively determines the scope of application of the substantive rule (3).

(1) Article 1 of the International Carriage of Goods by Sea Act reads; “This Act shall apply to the carriage of goods by ship

19) Akiba, “Teishoku Ho to Gaijin Ho tono Kankei Saiko” (“Toward a Policy Science of the Conflict of Laws”), *Hitotsubashi Ronso*, Vol. 52 (1964), p. 48.

20) Orimo, *op. cit.*, pp. 142-143.

21) For example, while the Japanese anti-trust law (the Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade) provides, in Article 6(1), that no entrepreneur shall enter into an *international agreement or an international contract* which contains therein such matters as coming under the purview of unreasonable restraint of trade or unfair business practices, there is no provision designed to clarify the reach of the law.

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when either the port of loading or the port of discharge is a foreign one." This may be regarded as a conflict rule. A few authors, in fact, understand it to that effect. On the other hand, the governing view is that the whole of the rules contained in the Act are to be applied when and only when an ordinary choice of law rule refers to Japanese law, *i.e.*, in principle, the parties, explicitly or implicitly, choose Japanese law as a law governing their contract. Thus, the provision is regarded as laying down a rule which clarifies only a demarcation line between the rules contained in the Act and the other Japanese rules on the same matter, *i.e.*, the liabilities of the carrier.

(2) Some rules in the Japanese exchange control law prohibit certain transactions when persons resident in Japan are involved. The present reporter once suggested that a unilateral conflict rule is "hidden" in such provisions to the effect that the substantive parts of the provisions are to be applied when persons are resident in Japan.²²⁾ It seems, however, that this spatial element is only concerned with the scope of "prohibition", not with the scope of application of the rules. Even where the non-residents are involved, Japanese law on the exchange control regulation will apply to the transactions and, in this case, will permit them.²³⁾

(3) Further, when a particular substantive rule undoubtedly has its own conflict rule, one may ask whether the latter exclusively determines the scope of application of the former, in other words, whether, additionally, the substantive rule has the scope of application allotted to it by an *ordinary* choice of law rule. The author who asserts the

22) Yokoyama, "Hoteichi Kawase Kanri Ho no Tekiyo ni Kansuru Ichi Kosatsu" ("On the Application of the Exchange Control Law of the Forum"), *Hitotsubashi Ronso*, Vol. 78 (1977), p. 122.

23) See, P. Mayer, "Les lois de police étrangères", *Clunet*, (1981), pp. 302-304.

existence of “international public law” suggests that the mandatory rule on dismissal contained in the Labour Standards Act as a rule of public law should be applied when the employee carries out his work in Japan.²⁴⁾ If it is admitted that the mandatory rule in question has a conflict rule to that effect, does it follow that this conflict rule exclusively determines the scope of application? It is arguable that, unless one assumes that the rules of private international law do not refer to public law, the rule on dismissal may be also applied, *e.g.*, when the parties have chosen Japanese law as the *lex contractus*.²⁵⁾

II. Foreign Public Law

The following foreign rules of public law have played certain roles in Japanese private international law: (a) law of nationality in questions as to whether a person is a national of a particular foreign state; (b) *lex monetae* in questions as to which object constitutes the money of a foreign state²⁶⁾; and (c) constitutional law in questions as to whether a particular rule capable of regulating the situation was validly enacted.

The treatment of foreign public law which represents the state's interference with relations between private individuals, in particular, in the economic field is still uncertain.

24) Orimo, *op. cit.*, pp. 142–143.

25) A specialist in labour law suggests to this effect. See, Ariizumi, *Rodo Kijun Ho (Labour Standards Law)*, (1963), p. 54.

26) It is sometimes put forward that the relevant provisions of the *lex monetae* are “incorporated” into the contract (see, *e.g.*, Egawa, *op. cit.*, pp. 221–222). If this view should be adopted, the *lex monetae* would be taken into account as fact.

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A. *Article VIII(2)(b) of the Articles of Agreement of the I.M.F.*

There is no case in which a Japanese court had to apply the rule laid down in Article VIII(2)(b) of the Articles of Agreement of the International Monetary Fund.

B. *Inapplicability of Foreign Public Law*

Fortunately, there has been no academic writer who asserts that the application of foreign rules of public law inspired by economic dirigism should be, even in an indirect way, rejected only on the ground of their public law nature. Although the traditional view on the function of the choice of law rule is that a reference to foreign law is only a reference to foreign private law, we may presume that the rules of public law which the authors bear in mind are those which do not affect relations between private individuals at all. It may be safely said that they have accepted that, when the rules of public law are of the *lex causae*, its nature does not prevent the courts from applying it, as far as the rules may regulate relations between private individuals. There is no reported decisions affirming the principle of inapplicability of foreign public law. For example, the Great Court of Judicature allowed the English Trading with the Enemy Act to make the payment by a German debtor impossible under English law as the *lex causae*.²⁷⁾

C. *Supremacy of the Lex Causae*

While a few textbook writers admit that, in the economic field, a theory of *Sonderanknüpfung* has something to commend it, it does not seem that they vigorously support it.²⁸⁾ This is presumably

27) The decision of October 6, 1920, *Hanrei Taikei* [*Kokusai Shiho*], I, p. 577.

28) See, e.g., Yamada, *Kokusai Shiho* (*Private International Law*), (1983), p. 283-284. But the application of the *lex loci solutionis* is suggested by Orimo, *op. cit.*, p. 145.

explained by the fact that, as mentioned below, Japanese cases which would pave the way for that theory are very scarce. A decision even affirms the supremacy of the *lex causae*. The Tokyo District Court had to decide a case in which the plaintiff, a Japanese resident who was the assignee of a deposit, demanded payment from the defendant, the Tokyo branch of a Korean bank. The defendant bank alleged that the assignment of the deposit had been prohibited by the Minister of Finance of the Republic of Korea. The court, after finding that the assignment of the deposit was governed by Japanese law, held that the Korean ministerial order would give no legal ground for the defendant to derogate from the principle under the Japanese Civil Code that claims are assignable.²⁹⁾

D. Foreign Public Law as a Datum

While there are no reported decisions which, even *obiter*, refer to the applicability of mandatory rules which neither belong to the *lex fori* nor to the foreign *lex causae*, there are a very few decisions which took into account those rules as *data* within the framework of the substantive law of the *lex causae* or the *lex fori*.

(1) There is one case in which a foreign labour law was taken into account for the purpose of the application of Japanese law as the *lex contractus*. The Tokyo District Court had to decide a case in which a French airline dismissed Japanese stewardesses. The plaintiffs, the stewardesses, had been, under the contracts governed by Japanese law, employed in Tokyo and attached to the Tokyo branch of the defendant airline. Later, the defendant who wanted to subject the plaintiffs to the same conditions of employment as those to which French stewardesses were subject proposed a new contract which would enable the defendant to attach the plaintiffs to the Paris branch.

29) Tokyo District Court, July 11, 1967, *Hanrei Taimuzu*, No. 210, p. 206.

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As Japanese stewardesses refused to accept this proposal, the defendant airline dismissed them. They alleged that the defendant had abused the right of dismissal in the light of Japanese law. The court accepted this allegation. In justifying the decision, the court compared the rules on dismissal contained in the Japanese Labour Standards Act with the relevant rules in the *Code du Travail* which was supposed to govern relations between the plaintiffs and the defendant airline in Paris in order to ascertain which legal system would be more favourable to the plaintiffs in terms of dismissal.³⁰⁾

(2) It is observed that, when *Wengler* suggested the *Sonderanknüpfung* of mandatory rules on obligations, there had been already court decisions in several countries which would pave the way to his theory. He criticized those decisions as making an unnecessary detour.³¹⁾ They are related to cases in which a debtor invoked a foreign public law (*e.g.*, on exchange control or on trading with the enemy) as a fact causing an impossibility of performance under the *lex causae* different from a legal system to which the public law in question belonged, and to cases in which the validity of a contract purporting to infringe or evade a foreign public law (*e.g.*, on exchange control or on customs) was questioned under the substantive law of the *lex causae* or the *lex fori*. There appear to be no Japanese decisions which ascertained whether the mandatory rules of the third country might cause an impossibility of performance under the *lex causae*. On the other hand, there is a decision which regarded a contract for the sale of forged Korean currency as contrary to public policy in the sense of Article 90 of the Japanese Civil

30) The decision on February 28, 1975, *Hanrei Jiho*, No. 772, p. 95.

31) Wengler, "Die Anknüpfung des zwingenden Schuldrechts im internationalen Privatrecht", *Zeitschrift für vergleichende Rechtswissenschaft*, Vol. 54 (1941), pp. 203-205.

Code.³²⁾ The court said that, although the forgery of the Korean currency was not a crime within our territory, to accept the validity of such a contract might aggravate Japanese relations with Korea which prohibited the forgery.^{33),34)}

32) Article 90 of the Japanese Civil Code corresponds to *e.g.*, Article 138 of the German Civil Code.

33) Tokyo District Court, August 24, 1912, *Horitsu Shimbun*, No.819, No.24.

34) Since it is not until recently that the problem of the interplay between the choice of law rule and the foreign public law has attracted the interest of Japanese scholars, it is difficult to see at the present stage how they will treat a foreign prohibitory rule of public law which is not referred to by an ordinary choice of law rule of the *forum*. It will be hardly deniable, however, that, when a particular prohibitory rules of the third country effectively interferes with contractual relations, it may constitute a factual situation which would cause an impossibility of performance under the *lex causae*. It might be mainly a matter of theoretical preference whether one should go so far as to respect the evaluation of illegality as such by the third legal system. On the other hand, it seems unlikely that Japanese authors will accept, without hesitation, the view according to which a contract purporting to infringe or evade a prohibitory rule of the third country should be regarded as void on the strength of a substantive rule of the *lex causae* as laid down, *e.g.*, in Article 138 of the German Civil Code. We have many cases without any international connections in which it had to be ascertained whether a contract purporting to infringe Japanese prohibitory rules inspired by economic dirigism should be regarded as contrary to public policy in the sense of Article 90 of the Japanese Civil Code. We have learnt from most of those cases that, when the transaction turns out to bring one of the parties little or no profit, a prohibitory rule which he once intended to infringe is quite often invoked by himself as a pretext for being liberated from his obligations. Thus, the Japanese courts have almost always looked to the real intention of such a "shameless" party, in determining whether the contract is contrary to public policy. It is observed that it depends upon concrete circumstances of each case whether the infringement of a rule of public law leads to the invalidation of the contract. It seems that the courts are more likely to hesitate to invalidate the contract in the cases involving the infringement of a rule of public law of the third country, because they, in principle, are not obliged to promote the interests of the foreign country which enacted that public law. When the *lex causae* is also the *lex fori*,

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E. Recognition of Foreign Measures of Expropriation

There is one case relating to the recognition of foreign measures of expropriation. That is the case involving the Iranian expropriation of British oil concessions. The dispossessed Anglo-Iranian Oil Co. sought to enjoin a Japanese company from reselling oil purchased from National Iranian Oil Co. The Tokyo District Court recognized the title of the expropriator.³⁵⁾ The Tokyo High Court affirmed the decision. In recognizing the rights of the expropriator, the High Court applied the Iranian expropriation law as rules of the *lex rei sitae*.³⁶⁾ The academic writers criticize the reference to the *lex situs* which is supposed to govern only the transfer of immovables and movables between private individuals. They also assert the existence of a rule to the effect that, when property is located within a foreign state's territory, the state may expropriate it.³⁷⁾

they might invalidate such a contract, for example, in the case that a contract is related to the object whose transfer is regulated by an international agreement (*e.g.*, on the protection of cultural property) to which Japan and the foreign country are parties. One would add the case where both countries are so strongly knitted in political or economic interests that to invalidate the contract would, at the same time, promote the interests of our country. However, it is obviously a difficult task to determine whether the international relations between them would require the courts to do so. When the *lex causae* is foreign, it will be, if not impossible, much more difficult.

- 35) Tokyo District Court, May 27, 1953, *Kakyu Saibansho Minji Hanreishu*, Vol. 4, p. 755.
- 36) Tokyo High Court, September 11, 1953, *Koto Saibansho Minji Hanreishu*, Vol. 6, p. 712.
- 37) They differ as to whether the rule may be a rule of private international law or of public international law. See, Egawa, "Kokuyukahō no Kōkusaitēki Kōryōku" ("International Effects of Nationalization Law from the Point of View of Conflict of Laws"), *Hikakuho Zasshi*, Vol. 2 (1954), pp. 274-275; Orimo, "Kokuyukahō no Shōgaitēki Kōryōku" ("Nationalization and Conflict of Laws"), *Hogaku*, Vol. 28 (1964), p. 327.

III. Public Law and Reform of Private International Law

The choice of law rules in the *Horei* submit the following matters to the national law of the husband: effects of the marriage upon the personal relationship between husband and wife (Article 14); effects of the marriage upon the matrimonial property (Article 15); divorce (Article 16); and legitimacy of the children (Article 17). In addition, the relationship between parents and children is, in principle, governed by the national law of the father. It has been argued that such husband (father)-oriented conflict rules might neglect the principle of equality of men and women as laid down in Articles 14 and 24 of the Japanese Constitutional Law. It is true that the application of the national law of the husband does not necessarily lead to a result less favourable to the wife than the application of her own national law. It is no less true, however, that such choice of law rules undoubtedly enable the husband or the father to be subject to the law more familiar to him and to change the connecting factor of his own motion.³⁸⁾ Thus, while the question remains as to whether such discrimination implies the violation of the principle of equality of men and women in constitutional law, the predominant view has been that the choice of law rules in question should be reformed consistently with that principle.³⁹⁾

Drafting new choice of law rules on the family is now under way. We expect that sufficient regard should be paid to the increasing role of public authorities. It may be arguable, for example, that the

38) Yamada, *op. cit.*, pp. 333-336.

39) For example, connecting factors common to husband and wife will be appropriate in the light of the principle.

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habitual residence of the children should be chosen as the most appropriate connecting factor with regard to the relationship between parents and children, because the public authorities of the habitual residence of the children will be the best able to appreciate the situation under which the children are placed.⁴⁰⁾

40) The advisory panel of the Minister of Justice has been preparing the draft for the new choice of law rules. The work of the advisory panel is expected to finish at latest by the end of next year. The reporter is one of the members of the panel, but the view suggested here is a personal one.