I. 憲法（学）における議論

- 憲法の名宛人は公権力：社会契約論
  →人権は公権力を制限するもの
- 強大な社会的権力である会社、労働組合、大学等による私人の権利侵害は？
  ↓
- 三菱樹脂事件判決（最大判 1973（昭和 48）年 12 月 12 日）：「間接適用説」
  （Westlaw Japan には学内ネットワークからアクセス可）
- 「間接適用説」批判
  - 国家を名宛人とする憲法上の人権を私人間を規律する法律規定に読み込むことができる理由は？
- 基本権保護義務論
  - 国家は私人の基本権を保護する義務を負っている
    - 批判：個人の自由と両立しない
- （新）無適用説
  - 私人間に適用されるのは民法などの法律。
  - 裁判官は、法律解釈に際して私人間の自然権調整の権限を委任されている。

「ビジネスと人権」を考える上で留意すべき点

- 「『人権』という考え方は私人間でも妥当する」[1]
  - 法務省人権擁護局『人権の擁護』たとえば 4 頁参照。
  - 民法 2 条
- 「個人の自律を根拠とする『切り札』としての人権［……］は、何人に対しても主張できるはずの権利であり、対国家防御権にとどまるものではない」[2]
- 「自然権保護の方向に解釈することは、『憲法上の人権』を適用することとは異なる」[3]
  ↓

私人間適用が争われているのは「憲法上の人権」であって「人権」ではない。

では、私人間に適用される「人権（という考え方）」とは？

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[1] 佐藤幸治『日本国憲法論〔第 2 版〕』（成文堂、2020 年）187 頁。

[2] 長谷部恭男『憲法〔第 7 版〕』（新世社、2018 年）132 頁。

[3] 高橋和之『立憲主義と日本国憲法〔第 4 版〕』（有斐閣、2017 年）117 頁。

II. 国際法における議論

事例 1

国際司法裁判所コンゴ（DRC）対ウガンダ事件判決（2005 年）

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p.168.[4]

179. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.

[…]

209. The Court considers that there is also persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district. The reports of the Special Rapporteur of the Commission on Human Rights (doc. A/55/403 of 20 September 2000, para. 26 and E/CN/4/2001/40 of 1 February 2001, para. 31) state that the Ugandan presence in Ituri caused a conflict between the Hema (of Ugandan origin) and the Lendu. […] The reports also state that the confrontations in August 2000 resulted in some 10,000 deaths and the displacement of some 50,000 people, and that since the beginning of the conflict the UPDF had failed to take action to put an end to the violence.
[…]

219. […] Uganda also violated the following provisions of the international humanitarian law and international human rights law instruments […]

[…]

– International Covenant on Civil and Political Rights, Articles 6, paragraph 1, and 7;

[…]

事例 2

自由権規約人権委員会　日本第 7 回国家報告最終所見（2022 年）

国家報告は自由権規約[5]40 条 1 項により義務づけられており、委員会の最終所見は同条 4 項に基づく。講義にて以下の関連箇所を読む。

- パラ 13　ヘイトスピーチ
- パラ 15　性差別

[4] 日本語解説として、植木俊哉「紹介：コンゴ領域における軍事活動事件（コンゴ民主共和国対ウガンダ）国際司法裁判所本案判決」法学（東北大学）70 巻 6 号（2007 年）125 頁。

[5] 日本が当事国となっている条約は外務省サイトで日本語訳を見ることができる。

- パラ 19　女性への暴力
- パラ 31　技能実習生
- パラ 41　集会の権利

事例 3

ヨーロッパ人権裁判所 Young, Jamese and Webster 事件判決

Young, James and Webster v. The United Kingdom, Application no. 7601/76; 7806/77, Judgment [Plenary], 13 August 1981.[6]

事実：当時のイギリス法では、クローズドショップ協定に基づく非組合員の解雇は不当でないとされていた。原告らは、組合に加入しないことを理由にイギリス国鉄から解雇された。

49. Under Article 1 of the Convention, each Contracting State "shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention"; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged. Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis. Accordingly, there is no call to examine whether, as the applicants argued, the State might also be responsible on the ground that it should be regarded as employer or that British Rail was under its control.

[…]

55. […] Assuming that Article 11 does not guarantee the negative aspect of that freedom on the same footing as the positive aspect, compulsion to join a particular trade union may not always be contrary to the Convention. However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union. In the Court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11. For this reason alone, there has been an interference with that freedom as regards each of the three applicants.

[6] 日本語解説として、小畑郁「ヨーロッパ人権条約における国家の義務の性質変化（二・完）」法学論叢 121 巻 3 号（1987 年）83-90 頁

事例 4

ヨーロッパ人権裁判所「命のための医師団」事件判決

Plattform "Ärzte für das Leben" v. Austria, Application no 10126/82, Judgment, 21 June 1988.[7]

事実：妊娠中絶に反対する医師グループによるデモ行進に対して、反対派が妨害を試みた。医師グループは、警察が十分に保護しなかったことが集会の自由などに反するとしてとして提訴した。

32. A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.

Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. […]

[…]

34. While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used […].

[…]

39. It thus clearly appears that the Austrian authorities did not fail to take reasonable and appropriate measures.

事例 5

ヨーロッパ人権裁判所　Pechstein 事件判決

Mutu and Pechstein v. Switzerland, Applications nos. 40575/10 and 67474/10, Judgment, 2 October 2018.[8]

事実：ドイツのスピードスケート選手がドーピング検査で陽性となり、2 年間資格停止

[7] 日本語解説として、中井伊都子「私人による人権侵害への国家の義務の拡大（一）」法学論叢 139 巻 3 号（1996 年）50-52 頁、「同（二・完）」法学論叢 141 巻 2 号（1997 年）34-36 頁。

[8] 日本語解説として、井上典之「スポーツ仲裁と独立かつ公平な裁判所の公開審理を受ける権利」人権判例法 4 号（2022 年）40 頁。

処分を受けた。原告はスポーツ仲裁裁判所（CAS）で当該処分の有効性を争ったが敗訴[9]。CAS の手続が不当であるとしてスイス連邦裁判所に取消を求めたが認められず、ヨーロッパ人権裁判所に提訴。

64. […] [The Court] reiterates that the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention […].

65. […] The CAS is neither a domestic court nor any other institution of Swiss public law, but an entity emanating from the ICAS, a private-law foundation […].

66. That being said, the Court notes that, in certain exhaustively enumerated circumstances, especially as regards the lawfulness of the composition of the arbitral tribunal, Swiss law confers jurisdiction on the Federal Court to examine the validity of CAS awards (sections 190 and 191 of the Public International Law Act (PILA)[10]). In addition, that supreme court dismissed the appeals of both applicants in the present case, thereby giving the relevant awards force of law in the Swiss legal order.

67. The impugned acts or omissions are thus capable of engaging the responsibility of the respondent State under the Convention […].

[…]

182. The Court is of the view that the questions arising in the impugned proceedings – as to whether it was justified for the second applicant to have been penalised for doping, and for the resolution of which the CAS heard testimony from numerous experts – rendered it necessary to hold a hearing under public scrutiny. […] Moreover, […] the Federal Court[11] itself, in its judgment of 10 February 2010[12], expressly recognised in an obiter dictum that a public hearing before the CAS would have been desirable.

183. Having regard to the foregoing, the Court finds that there has been a violation of Article 6 § 1 of the Convention on account of the fact that the proceedings before the CAS were not held in public.

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[9] ドーピング紛争につき、宍戸一樹「5 アンチ・ドーピング・ルールの目的と手続」「6 アンチ・ドーピング・ルールの実体面」早川吉尚（編）『スポーツと法：オリンピック・パラリンピックから考える』（有斐閣、2021 年）。

[10] スイス国際私法における仲裁判断取消に関する規定。CAS 仲裁は民事法上の仲裁であり、国際商事仲裁と同様の扱いとなる。仲裁判断の取消につき、森下哲郎「第 8 章 仲裁判断の取消し」谷口安平・鈴木五十三（編）『国際商事仲裁の法と実務』（丸善雄松堂、2016 年）

[11] スイスの最高裁は「連邦裁判所（Tribunal fédéral/Bundesgericht）」という名称である。

[12] 本件 CAS 仲裁判断の取消請求を斥けた連邦裁判所判決。