

# CEDAW's Impact on Equality between Women and Men in Japan

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## **Introduction**

United Nations (UN) has adopted 31 international human rights treaties as of 1 November 2010. Japan is a State Party of 13 of them<sup>1</sup>. In the Japanese domestic law system, when a treaty concluded by the Government enters into force, it comes into effect at the same time as a domestic law<sup>2</sup>. And the concluded treaty takes precedence over all laws with the exception of the Convention. Accordingly, the Government has to amend or repeal a preexisting law if the law conflicts with the treaty and has to enact a new law and if the treaty obligates a State Party to take legislative measures but when there are no such measures in place. There are only three cases in which the *Diet* amended a law or enacted a new law before the Government had concluded human rights treaties. The one is The UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The others are the UN Convention Relating to the Status of Refugees and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others<sup>3</sup>.

In the case of CEDAW, Japan had to take numerous measures including legislative measures. Japan amended the Nationality Law in the field of nationality (article 9(2)) of CEDAW), revised the “Course of Study” in the field of education (article 10 of CEDAW), amended the Labor Standard Law

and enacted the Equal Employment Opportunity Law (EEOL) in the field of employment (article 11 of CEDAW). It proves that many provisions of Convention obviously conflicted with preexisting laws in those days. Although those measures taken by the Government is not enough for the full implementation of the Convention, NGOs in Japan play a very important role to push the Government to take such measures.

The year 2009 is a commemorative year as it marks the 30th anniversary of the adoption of CEDAW and the year 2010 also marks the 25th anniversary of its ratification of Japan. Currently 186 countries are party to the Convention as of 1 November 2010. The number corresponds to over 90% of the members of the UN. As known, CEDAW is the first comprehensive UN treaty with the aim of eliminating discrimination against women. CEDAW has been giving a big impact on Japanese society since Japan signed it in 1980. My old paper published in 2000 dealt with the CEDAW's impact on equality between women and men in Japan from 1980 to 1999 and NGO's contributions<sup>4</sup>. Therefore, in this paper, I will focus on the CEDAW's impact since around 2000.

CEDAW as well as other main human rights treaties obligates States Parties to submit a periodic country report on the legislative, judicial, administrative or other measures adopted by them to give effect to the provisions of the Convention. The Committee of CEDAW considers it and adopts the concluding observation in which the Committee recommends the State Party to take further measures. Japan submitted its sixth country report as of 1 November 2010. The Committee has considered the fourth and the fifth reports in 2003. Regarding the sixth report, the Committee has considered it on 23 July 2009 and adopted the concluding observation on 7 August 2009. My previous paper referred to the consideration by the Committee on Japan's second and third reports. Therefore, in this paper I will refer to the fourth, fifth and sixth reports (particularly, I will

focus on the sixth report) as well as the Committee's consideration and concluding observation on those reports and I also will refer to NGO's contribution.

Firstly, I will review the main legal and administrative improvements in equality between women and men that the Government made in order to implement the Convention since around 2000. Secondly I will explore challenges that the Government should further grapple with. Thirdly, I will explore the jurisprudence concerning CEDAW. Finally, I will conclude that CEDAW gave the biggest impact on Japan among the international human rights treaties Japan ratified.

## **I. The main legal and administrative improvements**

### **1) The Basic Law for a Gender-equal Society**

Article 2(a) of CEDAW stipulates as follows.

*(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle*

Article 14(2) of the Constitution includes the principle of equality of men and women, but cannot be said to fully embody it<sup>5</sup>. It provides that all of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

Then, Japan enacted the Basic Law for a Gender-equal Society in 1999 (The Basic Law). The Basic Law plays an important role in making gender equality policy at national and local levels<sup>6</sup>. It should be noted that not only legislative measures but also administrative measures based on the legislation

are essential for the practical realization of the principle of the equality of men and women.

We can find that CEDAW gave a big impact on the enactment of the Basic Law, particularly if one compared the basic principles on formation of a Gender-equal Society prescribed in Articles 3 to 7 with the articles of CEDAW relevant to such basic principles. Firstly, notice should be given to Article 7 of the Basic Law. Article 7 recognizes that the policy making for formation of a Gender-equal Society must not contradict international consensus on gender equality including CEDAW. Secondly, Article 4 recognizes that the social system or practices reflecting the stereotyped division of roles on the basis of gender can become factors impeding formation of a Gender-equal Society. The article reflects Article 5(a) of CEDAW that is one of the core articles as well as Article 4 of CEDAW. Finally, Article 8 provides that the State is responsible for the comprehensive formulation and implementation of policies related to promotion of formation of a Gender-equal Society and that positive action is included in such policies<sup>7</sup>. The article reflects Article 4(1) of CEDAW that provides about temporary special measures.

Although Article 4(1) of CEDAW does not necessarily obligate States Parties to adopt temporary special measures, the Committee of CEDAW has recommended States Parties to adopt them in consideration of their reports. It is appreciated that the Government made guidelines for the recruitment and promotion of women in national public service based on the Basic Law, and women came to account for 25% of members of national policy advisory councils in 2002. The goal was to reach 30% by 2005.

Nonetheless, the participation rate of women continues to be low in many areas. When the Committee considered the third and the fourth Japanese reports at the same time in 2003, the Committee recommended the Government

to adopt temporary special measures based on article 4(1) in order to raise the participation rate of women in the field of political and public life<sup>8</sup>. The Committee adopted general recommendation No. 5 in 1988 and No. 25 in 2004 which deal with temporary special measures<sup>9</sup>. Particularly, No. 25 deals with the matter in detail<sup>10</sup>.

In the consideration of the Japanese sixth report by the Committee in 2009, the Committee noted that women continued to be underrepresented in many areas. And the Committee recommended Japan to adopt temporary special measures in the workplace and the participation of women in political and public life, including women in the academia<sup>11</sup>. It can be said that it is still not so widely acceptable in the Japanese male dominant society to adopt temporary special measures for women in order to accelerate the elimination of *de facto* discrimination against women. In fact, this issue has also often triggered a controversy in the academia among Constitutional experts.

In concluding observation on the sixth report, the Committee also urged Japan to adopt temporary special measures, in accordance with article 4(1) of CEDAW and general recommendation No. 25 and requested Japan to provide, within two years, detailed written information on the implementation of the recommendation contained in para. 28 as well as para. 18<sup>12</sup>. It is true that temporary special measures should be taken more radically but also it can be appreciated that the Government continued to set concrete goals. If Japan did not ratify CEDAW or CEDAW did not have the provision of article 4(1), the participation rate of women in many areas would have been lower.

## **2) Basic Plan for Gender Equality**

Article 13(1) of the Basic Law provides that the Government shall establish a basic plan with regard to the promotion of formation of a Gender-equal

Society (the Basic Plan), in order to comprehensively and systematically implement policies related to promotion of formation of a Gender-equal Society. On 12 December 2000, the Basic Plan was formulated. It set up concrete measures in 11 fields such as the increase of women's participation in the field of political and public life, the review of social systems and practices reflecting gender bias etc, to be taken by 2005, as well as long-term policies and principles to be achieved by 2010. In 2005, the Second Basic Plan was formulated.

According to the sixth report, as of April 2005, every prefecture had already formulated such a plan, and 39.6% of the municipalities did so<sup>13</sup>. According to "White Paper of Gender Equality 2009", 57.1% of municipalities formulated such a plan. Municipalities are composed of cities, towns and villages. 88.5% of cities had such plans and 31.9% of towns and villages did so<sup>14</sup>. Furthermore, on local government level, enactment of ordinances similar to the Basic Law has followed the enactment of the Basic Law. In 2008, 97.9% of prefecture enacted such an ordinance as well as 21.9% of municipalities.

### **3) The Law on the Prevention of Spousal Violence and the Protection of Victims**

Regarding violence against women that CEDAW obligates States Parties to eliminate, the most notable legislative improvement is the enactment of the Law on the Prevention of Spousal Violence and the Protection of Victims in 2001 (the DV Prevention Law)<sup>15</sup>. It is the first time that such a law was enacted in Japan. The strong movement for enacting the DV Prevention Law arose after the Beijing Conference in 1995. As is well known, the Conference adopted the Platform for Action and the issue of violence against women was included in the Platform as one of the 12 areas of concern. Therefore, the enactment of the Law can be regarded as successful NGO's movements influenced by Beijing

Conference.

But it also should be noted that in 1989, the Committee of CEDAW has already adopted general recommendation No. 12 on violence against women and in 1992, the Committee dealt with the issue again in general recommendation No. 19. The adoption of these general recommendations led to the adoption of the Declaration on the Elimination of Violence against Women on 20 December 1993 (A/RES/48/104).

In the preamble of the Declaration, the General Assembly recognizes that violence against women violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms and that effective implementation of CEDAW would contribute to the elimination of violence against women and that the Declaration will strengthen and complement that process<sup>16</sup>. Furthermore, the Committee of CEDAW asks States Parties which measures they have adopted to eliminate violence against women in the consideration of the periodic country report.

It shows that CEDAW gave an impact on enacting the DV Prevention Law as well as the movement of NGOs in Japan did. In the enactment of the Law, NGOs pushed the Government very strongly to include the DV protection orders, which are composed of two kinds of orders. The one is an order to refrain from approaching the victim and the other is an order to leave the domicile that the spouse shares as the main home with the victim.

The Law has been revised twice as of 1 November 2010. Such a revision is based on article 3 in the supplementary provision of the Law<sup>17</sup>. The content of the Law has been substantially improved. In the first revision in 2004, the Law was revised on 8 points<sup>18</sup>. Here, among them I will introduce the broadened definition of “spousal violence”, the expansion of the scope of a protection order and the Basic Principle of the Government concerning policy to prevent

spousal violence and protect victims and the Basic Plan of prefectures concerning such a policy along The Basic Principle of the Government.

The first definition of “spousal violence” was limited to physical violence and did not cover violence by the former spouse, but the revised definition includes psychological violence and also covers cases where, subsequent to being subjected to such violence by spouse including persons who are in a *de facto* state of marriage, even if it has not been legally registered, the other spouse has obtained a divorce or annulment of the marriage but continues to be subjected to violence by the former spouse.

Regarding the expansion of scope of the protection order, the court now issues protection orders to the former spouse and the period of order to leave the domicile was also expanded from a two-week period to a two-month period (the period of the other order is a six-month period). Furthermore, an order to refrain from approaching victim’s children under 20 years old can be issued.

The second revised Law in 2007 (the effective date is 11 January 2008) was revised on 4 points<sup>19</sup>. Here, I will introduce the scope of protection order and the obligation of endeavor to formulate the Basic Plan by cities, towns and villages. The revised protection order covers cases where a victim has been subjected to life-threatening intimidation by the spouse including the former spouse. It also can be issued in order to refrain from requesting a meeting, telling the victims matters that suggest that the spouse is monitoring the victim’s behaviors or place the victim in a situation where she/he may know about it, using or carrying out extremely rude or violent words and deeds and so on<sup>20</sup>.

Regarding the obligation of endeavor to formulate the Basic Plan by cities, towns and villages, only 3 cities out of 1,782 cities, towns and villages formulated it according to the announcement of Cabinet Office on 11 November 2008. Although the recent exact number is not available as of 1



November 2010, the number of cities, towns and villages formulated or being formulating the Basic Plan seems to be increasing gradually.

#### **4) The amendment of EEOL**

Japan enacted the EEOL and amended the Labor Standards Law about one month before its ratification. In the process of ratification of CEDAW, Article11 became the subject of heated discussion. Ms. Ryoko Akamatsu, the then Chief of Women and Children Bureau in the Ministry of Labor had made all efforts to enact EEOL, facing a big dilemma between the employers' side and labor unions' side. Later, she told that EEOL in 1985 was an "ugly duckling", but she believed it would become a beautiful swan before long.

The Law in 1985 only obligated employers to "endeavor to treat both men and women equally" in recruiting and hiring, assignment and promotions, while it stipulated that employers shall not discriminate against their female employees in training, welfare provisions and mandatory retirement age, retirement and dismissal because of being a woman. In the context of the Japanese legislation, the term of "obligation of endeavor" is generally regarded as being just like a recommendation rather than a legally binding obligation.

The director of each Prefectural Labor Office can give employers necessary advice, guidance and recommendation to resolve disputes on discriminatory treatment (except for recruiting and hiring). Although the conciliation system for solution of dispute on such treatment was also newly established, it did not work for a long time because of the strict conditions. The director first had to find conciliation necessary to resolve the dispute. Additionally the employer had to agree with holding the conciliation. Particularly, most of employers did not agree with the conciliation even if the director found it was necessary. The system was, therefore, called an "Unopened Door". The first case was the

Sumitomo Metals Industries, Ltd. case in 1994. It was 8 years since the Law came into effect in 1986.

The Law was amended twice as of 1 November 2010 since 1986<sup>21</sup>. The first revised Law in 1997 (the effective date was 1 April 1999) changed the clause of “obligation of endeavor” to a clause of prohibition against discriminatory treatment because of being a women. And the conciliation came to be available to female employees without an agreement of their employers in case that the director recognizes its necessity. Furthermore, a provision on the prevention of sexual harassment was newly added. On the other hand, protective clauses only for women were deleted except for special measures aimed at protecting maternity.

The second revised Law in 2006 (the effective date was 1 April 2007) was amended extensively. I will introduce here some points. The previous Law focused on eliminating discrimination against female employees, but the second revised Law aims to prohibit discrimination based on sex. Additionally, the Law prohibits indirect discrimination, and expands the scope of prohibitions. Dismissal or other disadvantageous treatment because of such reasons as pregnancy and childbirth is also prohibited and dismissal of female employees who are pregnant or in the first year after childbirth is void if employers do not prove that dismissals are not by such reasons.

Regarding sexual harassment, employers have to put in place necessary measures in terms of employment management to prevent sexual harassment. Also the conciliation provisions cover disputes on sexual harassment. In case where employers do not comply with the advice, guidance or recommendation of the director to take corrective measures, the Minister of Health, Labor and Welfare may make a public announcement of such violation.

## **II. Challenges the Government should further grapple with**

### **1) Allergy to the term of “equality”**

It should be noted that the Basic Law for a Gender-equal Society avoids using the term of “equality”. In Japanese, the term of “byoudou” itself relates with the concept of rights. For example, “equality before the law” is known as “hou no moto no byoudou” in Japanese and “equal rights” is “byoudou ken”. In English version of the Law, the Government uses officially a term, “Gender-equal” in its title. But if the official Japanese term used in the Law is translated literally, “the Basic Law for a Gender-equal Society” will be “the Basic Law for participation in society with cooperation between men and women”. In the process of drafting of the Basic Law, they did not reach an agreement in using the term of “equality”, and decided to use such a term that is also unfamiliar to the people in Japan.

The interpretation over the term of “equality between women and men” or “gender equality” is still often controversial in many countries, and it also leads to a controversy over the interpretation of the term of “discrimination against women”. But it should be noted that CEDAW defines not only “discrimination against women” in article 1, but also has clear principles. CEDAW is a treaty, and should be interpreted along article 31 of the Vienna Convention on the Law of Treaties<sup>22</sup>. Japan, as a State Party of CEDAW, agreed that it is indispensable for the achievement of equality between men and women to eliminate discrimination against women and to take concrete measures CEDAW provides in each article. For example, CEDAW obligates States Parties to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the

sexes or on stereotyped roles for men and women (article 5(a)).

In Japan as well as other countries, it is even now difficult to eliminate such prejudices and customary practices. In 1997, people who oppose the stereotyped division of roles on the basis of gender accounted for 42.2%. In 2007, it exceeded 50% (52.1%) for the first time<sup>23</sup>. It took 22 years to raise the rate to more than 50% since the ratification in 1985. But when the figure is seen disaggregated by sex, 50.7% of men still support such an idea while 39.8% of women do so. And surprisingly, when seen disaggregated by sex and age, 40.2% of women in her twenties support it, comprising the third highest age group among women (after 70 or older, followed by those in their sixties). On the other hand, among men, the results indicate that the higher the age, the larger the ratio in support of the idea. It proves that education for particularly young women should be promoted so that they can understand the importance of equality between women and men. Moreover, looking at the practice, even in the case of working wives who are regular workers, the ratio in which only or mainly the wife does housework accounts for about 75%. It proves that there is a big gap between practice and consciousness.

## **2) Backlash**

As mentioned above, on the local government level, the enactment of ordinances similar to the Basic Law has followed the enactment of the Basic Law. However, some of ordinances contradict article 5(1) of CEDAW. It shows that also in Japan, “backlash” has emerged particularly since the Basic Law was enacted in 1999. People supporting “backlash” are against the purpose of article 5(1) of CEDAW.

Particularly some of the Diet members of the then ruling party take the lead in the “backlash”. When the ordinances in some municipalities were

drafted or after they were adopted, whether stereotyped role for men and women should be reviewed or not was a very controversial matter. As the result, some bills of ordinances in line with article 5(a) of CEDAW were abandoned or some ordinances were revised later under the influence of “backlash”<sup>24</sup>. The main argument for the “backlash” is that such a stereotyped role is caused by a natural characteristic of men and women, and its elimination contradicts “nature”, and as the result, people may become to be neutral. Additionally, in Japan, the education for elimination of the stereotyped role is called as “gender-free education”. Those people also argue that such an education leads to “extreme” sex education and also the denial of stereotyped role corresponds to that of the role of a full-time housewife.

Under the circumstances, the second Basic Plan in 2005 newly explained about “gender perspective” to correct the misunderstanding of the term of “gender”. It explains that although some of the stereotyped roles for men and women obstruct the formulation of gender equal society, others do not, and that the Plan does not aim to review such roles. It is necessary to review the stereotyped roles with a national consensus. Nonetheless, the Plan does not describe clearly which roles do not obstruct the formulation of gender equal society.

The Government should note that article 5(1) of CEDAW is one of the core articles. In addition to article 10, the preamble of CEDAW stipulates that the States Parties of CEDAW should be aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women. The Plan also explains that the term, “gender-free” does not deny sex and never aims at rendering people neutral. The Plan is kind enough to give some examples. The examples include extreme sex education without considering a stage of children’s growth,

changing clothes and lodging in the same room and so on.

It is obvious that CEDAW does not obligate States Parties to do so. Such confusion in Japan proves that the aim and the content of CEDAW have not been yet understood very well particularly among members of the Diet and municipal assemblies. In the concluding observation that the Committee of CEDAW adopted on 7 August 2009, the Committee also recommended the Government to incorporate a specific definition of discrimination against women in accordance with article 1 of CEDAW in domestic legislation<sup>25</sup>.

### **3) The invisible “Dating DV”**

As mention above, the success of enacting the DV Prevention Law and amending it twice are some of the dazzling results of NGOs' movement in Japan. Particularly, Nationwide Women's Shelter Net has been playing a very important role in the enactment and amendment of the Law and raising social awareness about DV. It was founded in 1988 as a network of supporters for DV victims on grassroots level. It has held a symposium in various places every year since 1988. The first symposium's theme was “Blow! Wind of Shelter Movement!”, and the wind has blown successfully. The symposium gives an important chance not only for female parties concerned but also for activists, officials and so on to meet and discuss the matters on DV together. The number of members is over 60 private shelters out of about 100 private shelters in Japan<sup>26</sup>.

In spite of big improvements in the Law, there remain some challenges. I will point out one of them. The term “spouse” in the Law includes persons who are in *de facto* state of marriage, even if it has not been legally registered. But it does not cover violence by persons having intimate relations. Most of such persons are juveniles. In Japan, such violence is called “dating DV”. As far as I

know, girls as young as junior high school students to university students (13 years-olds to 22 years-olds) are included in victims.

On 22 November 2007, "Symposium on Violence against Women" sponsored by the Cabinet Office was held and there the "Report on violence from couples between young generations formulated by Cabinet Office" was distributed to its participants. The research by using Internet was conducted with unmarried men and women in their teens to their twenties. 128 men and 130 women responded. According to the report, one or two men and women respectively experienced physical violence and as the result, were injured. 5% of women and 4% of men were threatened with words like "if you break off with me, I will commit suicide." or "if you break off with me, I will set fire to your house." 9% of women and 1% of men suffered forced sex.

Nationwide Women's Shelter Net also calls on the Government to amend the Law so that it covers dating DV. Regarding domestic violence, although the Committee of CEDAW did not refer to dating DV, in the concluding observation, it recommended the Government to speed up the issuance of protection orders and open a 24-hour free hot-line for counseling women victims of violence against women. Furthermore it urged the Government to collect data and to conduct research on the prevalence, causes and consequences of all forms of violence against women, including domestic violence, and to use such data as the basis for further comprehensive measures and targeted intervention<sup>27</sup>.

#### **4) Female employees' disadvantaged situation**

Female workers' NGOs, particularly Working Women's Network (WWN) lobbied strongly, aiming to have the EEOL revised to prohibit indirect discrimination. As the result, it is appreciable that EEOL now prohibits indirect

discrimination. Nonetheless, female workers' disadvantaged situation still remains<sup>28</sup>.

The Equal Employment, Children and Families Bureau in Ministry of Health, Labor and Welfare publishes an annual report titled "Current Situation of Working Women". According to the report in 2008, the number of female employees in 2008 increased more than the previous year by 0.15 million to 23.12 million, the largest number yet, continuing its upward trend for sixth year. The percentage of female workers in the total labor force decreased for the first time in five years, to 48.4% (48.5% in 2007). The percentage of female employees within total employees was 41.9%, increasing 0.3% from the previous year. While the number of female regular employees, excepting those in executive positions is 10.40 million (46.4% of the total female workers), an increase by 10,000 from the previous year, the number of female non-regular employees is 12.02 million, an increase of 80,000<sup>29</sup>.

Furthermore, according to Labor Force Survey in 2008, the percentage of regular employees within total female employees is 46.4%, which is lower than the percentage of non-regular employees (part time employees), while the percentage of regular employees within total male employees is 80.8%. And the percentage of female non-regular employees within in total male and female non-regular employees is 68.3%<sup>30</sup>. The reason was that the labor force participation rate for women by age group still formed a M-shaped curve because generally women in Japan quit after marriage or childbirth and restart working as non-regular employees.

According to "Current Situation of Working Women" in 2008, the labor force participation rate for women by age group still formed a M-shaped curve, with the rate for women aged 25-29 (76.1%) and 45-49 (75.5%) as the peaks at both ends and the rate for women of child-bearing and rearing age in the 30



-34 age group (62.2%) at the bottom of the M-curve. According to “Basic Survey on Wage Structure”,<sup>31</sup> the average wage of non-regular employees (170,500yen) is 69.9% of that of regular female employees (243,900yen). Furthermore, the wage gap between female employees (including regular and non-regular) and male employees is still very wide. As for men, the older they are, the larger the wage increases, and the wages reach a peak at the 50–54 age group (421,600yen). On the other hand, as for women, the wages reach the peak at the 40–44 age group (251,700yen), and even if they get older, their wages do not increase so much.

### **III. Jurisprudence concerning CEDAW**

#### **1) Jurisprudence concerning article 9(2) of CEDAW**

The Nationality Law was amended in 1984 in order to ratify CEDAW, which obligates State Parties to grant women equal rights with men with respect to the nationality of their children in article 9(2). As the result, now a child can be granted Japanese nationality when the mother or the father is a Japanese nationality. But under article 2(1) of the old nationality law, a child could acquire Japanese nationality only when the father was of Japanese nationality. As the result, there were many cases where a child was stateless when the father's country's national law adopted the *jus soli* (the principle in which a child born in a country's territorial jurisdiction acquires that country's nationality)<sup>32</sup>.

In 1981, Tokyo district court handed down that article 2(1) (i)–(iii) of the Nationality Law did not violate article 14 (equality under the law including the principle of equality between women and men) nor article 24(2) (equality between women and men in family life) nor article 13 (principle of respect for human rights) of Constitution<sup>33</sup>. In this case, the plaintiff was a child who was

born in 1977 and was stateless. The court mentioned in its judgment that in 1950 when Nationality Law was enacted, article 2(1) was designed to prevent double nationality and it was a considerably effective measure, and moreover in those days among countries that adopted *jus sanguinis* (the principle in which a child has the nationality of his/her parents), all countries adopted the paternal lineage system. Also the court said that although it was true that the case like the plaintiff might happen and stateless was not desirable in ensuring human rights and its prevention was more important than that of double nationality, under the Nationality Law, such children as the plaintiff could naturalize almost unconditionally (article 6(ii)). And the court concluded that article 2(1) discriminated against a child's mother regarding acquirement of a child's nationality by birth, but as long as article 6(ii) could work as a supplementary remedy for such a child, article 2(1) could not be said that it lacked substantial balance with the legislative purpose. The court also mentioned that whether the Nationality Law could adopt *jus sanguinis* (which is equal between men and women) or not, was worthy to consider as judicial policy, but that the court could not say immediately that the present article 2 was unconstitutional. In 1982, Tokyo high court also ruled that it was not unconstitutional although the reason was different from the district judgment. In 1984, the Nationality Law was amended in order to ratify CEDAW. Therefore, this case can be said to be a good example of CEDAW's impact on domestic law in Japan.

## **2) Jurisprudence of article 11**

As mentioned repeatedly, the implementation of article 11 is the largest challenge that Japan faces. Particularly, the movement of WWN plays a very important role in their trials and struggle against discrimination against women

in this field<sup>34</sup>. Its big feature is that many working women including lawyers and legal scholars support such women in the struggle, while these supporting women are encouraged by the women in return. The courts regrettably have never applied any articles of CEDAW to the cases related to discrimination against women in spite of the plaintiffs' invoking relevant articles CEDAW, general recommendations and concluding observation adopted by the Committee of CEDAW in the courts<sup>35</sup>. Nonetheless, the struggles have led to the amendment of EEOL consistent with CEDAW and many members succeeded in winning substantial victory with reconciliation in the high court, while other members are still struggling in the courts. Particularly the so-called series of "Sumitomo cases"<sup>36</sup> of discrimination against women in pay and promotion are very famous for achieving substantial victory through reconciliation by the high court.

Here, I will explore the Sumitomo Electric Industries, Ltd. case because the plaintiffs sued not only a major company but also the State, Japan. The director of Osaka Labor Office did not find conciliation necessary to resolve the dispute. The women submitted a complaint to the Office. They argued that there was big gap in pay and promotion compared with the male workers who were high school graduates like them and were employed as clerical workers like them in the same year when they were employed. But the director concluded that these men were not comparable with them because while the company employed the men, expecting them to be executives in the future, the women were expected to be assistants of these men. In other words, the director denied that such career tracking systems based on sex were discrimination against women.

Concerning articles of CEDAW that the plaintiffs invoked, the defendant, the State argued that while article 2 obligates States Parties to agree to pursue by all appropriate means and without delay a policy of eliminating

discrimination against women, article 18 requires them to submit the national report on measures taken to implement the Convention periodically to the Committee of CEDAW, that it was obvious that the Convention did not require States Parties to implement the obligations immediately in all fields when they ratified it, and that it expected them to do so gradually. The State also argued that it did not always obligate to prohibit all of discriminations by law. Concerning article 11, the State argued that it allowed them to ensure the rights stipulated in CEDAW by taking measures that States Parties considered as being appropriate according to their countries' situation.

The court judged that the different career tracking systems based on sex caused big gap in pay and promotion but such a distinction could not be said to be a discrimination against women. The reason was that when the plaintiffs were hired (1965–1975), any positive law (*jus positivum*) that prohibited such a distinction did not exist, nor did the systems violate the clause of “public order and morals” in article 90<sup>37</sup> of the Civil Code. And the court added that although the plaintiffs argued that such a career tracking system violated CEDAW, the Convention could not be applied to this case because it could not be applied retroactively. It means that women hired before CEDAW came into effect in Japan cannot receive any legal protection by the court.

This judgment triggered many women's anger and they protested against it strongly, surrounding Osaka District Court joining hands to form a human chain. The plaintiffs appealed to Osaka High Court soon after the judgment. In the end, they won substantial victory in a reconciliation by the high court. In its reconciliation record, the plaintiffs and the State agreed on the following points. The Minister of Health, Labor and Welfare shall strive to ensure the implementation of EEOL amended in 1997 by positive administrative guidance. Also the Minister shall endeavor to manage the reconciliation by the Committee

of EEOL positively and fairly, paying full attention to whether the track-based system which substantially discriminates against women is caused by the different employment management categories.

## **Conclusion**

I have explored CEDAW's impact on equality between women and men in Japan since around 2000 above. I can say that CEDAW had a big impact on ensuring women's human rights in Japan. The International Covenant on Civil and Political Rights (ICCPR) has been attached to the most importance in not only international human rights treaties but also academic societies of international human rights including the Japanese one. The Committee on ICCPR considered the fifth country report of Japan in October 2008. The Committee has adopted the concluding observation on 30 October 2008 and expressed its concern that many of its recommendations made after the consideration of Japanese fourth periodic report have not been implemented<sup>38</sup>.

The prohibition of door-to-door canvassing during pre-election campaigns under the Public Offices Election Law is one of them. The Committee recommended that Japan should repeal any unreasonable restriction on freedom of expression and on the rights to take part in the conduct of public affairs from its legislation to prevent the police, prosecutors and courts from unduly restricting political campaigning under article 19 and 25 of the Covenant.

However, Supreme Court in Japan has repeated its constitutional decisions more than 20 times since the judgment on 27 September 1950, and the judgment on the issue is now an established jurisprudence although it has been criticized strongly in the academic society of the Constitution. ICCPR has been invoked in courts by defendant's lawyers since around 2000, but it has never

been successful.

One of the major reasons why provisions such as the prohibition of door-to-door canvassing has not yet been repealed is that such issues are not known very well among people in Japan. With the issues relevant to CEDAW, we can find that women's NGOs have been played a very important role<sup>39</sup>. They have been struggling not only in the courts but also held numerous symposiums and other meetings to appeal to people and lobbied strongly to enact new laws as well as amend existing laws. Although international human rights treaties are effective as domestic laws, the Supreme Court in Japan has never applied them. It is true that we should not attach less importance to the role of the court, but it should be also noted that we do not necessarily persist in only changing an established jurisprudence in Japan's implementation of the international human rights treaties. The CEDAW's impact proves that we can push the State to implement them by various methods.

## ENDNOTES

- 1 See [http://www.hurights.or.jp/database/J/un\\_treaty.html](http://www.hurights.or.jp/database/J/un_treaty.html) (Japanese only). The date of access to all web site in this paper is 1 November 2010.
- 2 Japanese laws in English are available at <http://www.japaneselawtranslation.go.jp/>
- 3 Before ratification of the Convention Relating to the Status of Refugees, Japan enacted the Immigration Control and Refugee Recognition Law. The reason was that Japan did not have any procedures for refugee recognition until then. And before ratification of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Japan enacted the Anti-Prostitution Law. The Law in English version is available at <http://www.immi-moj.go.jp/english/index.html>.
- 4 Masumi Yoneda, "Country Papers: Japan" (*The First CEDAW Impact Study, Final Report* published by the Centre for Feminist Research and the International Women's Rights Project, York University, Toronto, Canada. pp. 63-76.)
- 5 The Supreme Court has never ruled any case concerning equality between women

and men unconstitutional under article 14(1).

- 6 The Law provides that the purpose of this Law is to comprehensively and systematically promote formation of a Gender-equal Society by laying out the basic principles in regard to formation of such a society, clarifying the responsibilities of the State and local governments and citizens, and also stipulating provisions to form the basis of policies related to promotion of formation of a Gender-equal Society (art.1). It should, therefore, be noted that the Law does not comprehensively prohibit all forms of discrimination. The Provisions of the Law in English is available at [http://www.gender.go.jp/english\\_contents/basic\\_law/index.html](http://www.gender.go.jp/english_contents/basic_law/index.html).
- 7 The Law defines "positive action" as "positive provision of the opportunities stipulated in the preceding item to either women or men within the necessary limits in order to redress gender disparities in terms of such opportunities" (article 2(2)).
- 8 A/58/38, paras. 367–368.
- 9 The General recommendations are available at <http://www2.ohchr.org/english/bodies/cedaw/comments.htm>.
- 10 Considering that States Parties use various terminologies such as "positive action", "affirmative action", "positive measures" and so on, the Committee recommends that States Parties preferably adhere to the terminology "temporary special measures", to avoid confusion.
- 11 CEDAW/C/JPN/CO/6, paras. 27–28.
- 12 In para. 28, the Committee urges Japan to adopt temporary special measures, with and emphasis on the areas of employment of women and participation of women in political and public life, including women in academia, and with numerical goals and timetables to increase representation of women in decision-making positions as all levels. In para. 18, the Committee urges to amend or repeal the discriminatory provisions in the Civil Code.
- 13 CEDAW/C/JPN/6, para. 33.
- 14 White Paper on Gender Equality 2009, Part 1, section 1–2(3). The Paper from 2000–2008 in English version is available at [http://www.gender.go.jp/english\\_contents/white\\_paper\\_index.html](http://www.gender.go.jp/english_contents/white_paper_index.html). "White Paper on Gender Equality 2009" in English version is expected to be available soon. The Japanese version is available at <http://www.gender.go.jp/whitepaper/whitepaper-index.html>.
- 15 The most recent Law in English version is available at [http://www.gender.go.jp/english\\_contents/index.html](http://www.gender.go.jp/english_contents/index.html).

- 16 The preamble of the fourth paragraph (A/RES/48/104).
- 17 Article 3 stipulates that with regard to the provisions of the New Law, approximately three years after this Law comes into force, a review shall be conducted by taking into consideration the status of the enforcement of the New Law and any necessary measures shall be taken based on the results thereof.
- 18 8 points are as follows; 1) the definition of “spousal violence” was broadened. 2) the scope of protection order was expanded. 3) The Government was given the responsibility to decide on the Basic Principle on the policy about this issue and Municipalities was obligated to formulate the Basic Plan along the Government's Basic Principle. 4) Municipalities also were given the ability to enforce activities of Spousal Violence Counseling and Support Centers. 5) Provisions for supporting victims to become self-reliant were added. 6) The revised Law newly set forth provisions concerning the support of victims by the Superintendent General of the Metropolitan Police Department or the Chief of the Prefectural Police Headquarters. 7) The Law newly set up provisions concerning appropriate and prompt processing of complaints from victims regarding the performance of duties of personnel in charge of the protections of victims. 8) The Law newly provides that officials related to the protection of victims, investigations and judicial decisions pertaining to spousal violence have to respect their human rights regardless of their nationality or disability in the performance of their duties.
- 19 The 4 points are as follows; 1) the further expansion of scope of protection order. 2) the imposition of the obligation of endeavor to formulate the Basic Plan on cities, towns and villages. 3) revisions concerning Spousal Violence Counseling and Support Centers. 4) the notification on the issue of protection order to the Center where a victim consulted with the personnel.
- 20 Article 10(2), subpara. 2(i)–(viii) of the revised Law in 2007
- 21 The most recent Law in English version is available at <http://www.mhlw.go.jp/general/seido/koyou/danjokintou/index.html>.
- 22 Article 31(1) provides as follows;  
*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
- 23 See “White Paper on Gender Equality” (FY 2009 version) (<http://www.gender.go.jp/whitepaper/whitepaper-index.html> (Japanese only))



- 24 One famous case is the one in 2002 in which, the Chiba prefecture assembly abandoned the bill of the ordinance on gender equality. The Ichikawa city assembly (Ichikawa city is located in Chiba prefecture) made an overall revision of the ordinance in 2006. The first ordinance drafted by members of the then assembly was enacted in 2002. But under the influence of strong backlash, the new one deleted the term of “equality” (“byodou” in Japanese) or replaced the term of “byodou” with “taitou” which means equivalent, and uses the unfamiliar term, “participation with cooperation of men and women”. Moreover it defines “the society in which men and women cooperatively participate” as the society where men and women can participate by charging of their respective responsibilities as need arises with making the most of their own peculiarity as men and women and by cooperating and complement with each other on an even footing, and by being ensured opportunities to participate in the field of family, community, workplace, school and other all fields (article 2). Furthermore, it is one of the basic principles to build the society where men and women are not denied their own characteristic as men and women but a society where their own characteristic with each other and their dignity are respected (article 3(2)).
- 25 CEDAW/C/JPN/CO/6, para. 22.
- 26 See its website (<http://nwsnet.or.jp/shelter/index.html>. Japanese only)
- 27 CEDAW/C/JPN.CO/6, para. 32.
- 28 The Committee of CEDAW expressed the same concerns in concluding observation on the sixth country report of Japan (ibid. paras. 45–46.).
- 29 See 『平成20年版 働く女性の実情』 (*Current Situation of Working Women in 2008*) is available at <http://www.mhlw.go.jp/houdou/2009/03/h0326-1.html> (Japanese only).
- 30 See 『平成20年労働調査年報』 (*Labour Force Survey in 2008*) is available at <http://www.stat.go.jp/data/roudou/2.htm> (Japanese only).
- 31 It is available at <http://www.mhlw.go.jp/toukei/itiran/roudou/chingin/kouzou/z2008/index.html> (Japanese only).
- 32 Particularly in Okinawa where 75% of the USA military bases are located, about 3,500 children were stateless because their American fathers stayed in Okinawa for a lengthy period because of the Vietnam War. A child born abroad to one U.S. citizen parent and one alien parent acquires U.S. citizenship at birth under Section 301(g) of the Immigration and Nationality Act provided the U.S. citizen parent was physically present in the United States or one of its outlying possessions for the time

- period required by the law applicable at the time of the child's birth. (For birth between December 24, 1952 and November 13, 1986, a period of ten years, five after the age of fourteen, is required for physical presence in the United States or one of its outlying possessions to transmit U.S. citizenship to the child.) The U.S. citizen parent must be genetically related to the child to transmit U.S. citizenship.
- 33 Tokyo district court, 1978 (行ウ) No. 360.
- 34 WWN submitted the alternative report to the Committee of CEDAW in the consideration of country report of Japan. It is available at <http://www2.ohchr.org/english/bodies/cedaw/cedaws44.htm>
- 35 See "Court Judgment Referring to CEDAW" in News No. 13. Sep. 7. 2003 (<http://wwn-net.org/english/?cat=3>).
- 36 It generally means Sumitomo Electric Industries, Ltd. Case, Sumitomo Chemical Co. Case, Sumitomo Metal Industries, Ltd. Case. All cases are related to discrimination against women workers.
- 37 See the English version Ministry of Justice provides at <http://www.japaneselawtranslation.go.jp/>. However, I used my own translation of article 90.
- 38 CCPR/C/JPN/CO/5, para. 6.
- 39 In this regard, notice should be given to the activities of Japan NGO Network for CEDAW (JNNC) since 2003 when Japan's third and fourth reports were considered by the Committee and also to that of Japanese Association of International Women's Rights (JAIWR) which was established to facilitate the advancement of women through research and dissemination of information on CEDAW in 1987. Ms Ryoko Akamatsu was the second president of JAIWR (1989-2008) as well as a member of the Committee of CEDAW from Japan (1987-1994).

## 要約

# 日本の男女平等への女性差別撤廃条約の影響

米 田 眞 澄

2010年は、女性差別撤廃条約を日本が批准して25周年の年である。日本は国連が作成した31の人権条約のうち13の条約の締約国であるが、なかでも女性差別撤廃条約の締結、その後の報告書制度による女性差別撤廃委員会の条約の履行監視システムは、日本のNGOによる活動と連動して、日本の男女平等の進展に大きな影響を与えてきた。

本稿では、とりわけ2000年以降の女性差別撤廃条約による日本の男女平等への影響について、男女共同参画社会基本法やDV防止法の制定などの進展面を取り上げるとともに、依然として残る課題についても考察している。また、女性差別撤廃条約に関連する判例を考察することによって、女性差別撤廃条約が、日本の男女平等の促進に大きな影響を与えたことを結論づけるものである。