

## ISSUE FOCUS

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# Implementation of the Convention on the Elimination of All Forms of Discrimination against Women in Japan

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*Upon Japan's ratification of the Convention on the Elimination of all forms of Discrimination against Women in 1985, certain law reforms for gender equality were realized. However, international human rights law has impacted limitedly on the Japanese judiciary. The Women's Convention has been invoked by parties in a number of cases, but so far has never been positively quoted by the courts. On the other hand, the jurisprudence of individual complaints under the Optional Protocol of the Women's Convention has developed significantly. This paper introduces the case law of the individual complaint procedure of the Women's Convention, and identifies its significance in comparison with Japanese jurisprudence. As the jurisprudence of individual complaints under the Women's Convention is still in the law-making stage, the author encourages the Japanese government to ratify the Optional Protocol so that it can participate in the process of developing this jurisprudence.*

### Keywords

Gender Equality, CEDAW, The Women's Convention, UN Women, Optional Protocol, Individual Complaint, CEDAW-OP, Japan

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## I. Introduction

Twenty-eight years have passed since Japan ratified the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter the Women's Convention or the Convention) in 1985. The Optional Protocol, which includes an individual complaint mechanism, was added to the Convention in 1999. At present, all nine core human rights treaties of the UN<sup>1</sup> are vested with individual complaint mechanisms. Yet, to date, Japan has not agreed to give individuals within its jurisdiction the right to access these mechanisms. Nonetheless, there has been a remarkable development of case law in treaty bodies.

The primary purpose of this research is to analyze the case law of individual complaints under the Optional Protocol of the Women's Convention in order to assess the potential impact of the ratification of the Optional Protocol by Japan. The remainder of this paper is composed of five parts including Introduction and Conclusion. Part two will give a brief history of Japan's law reforms upon ratification of the Women's Convention, and outline the shortcomings of these reforms as identified by the Committee on the Elimination of Discrimination against Women<sup>2</sup> (hereinafter the CEDAW Committee or the Committee). Part three will examine Japanese case law invoking the Women's Convention, and observe its limited impact as well as the negative attitude of the Japanese judiciary towards international human rights law. Part four will analyze the case law of individual complaints under the Optional Protocol of the Women's Convention, and contrasts it with the jurisprudence of Japanese courts. Finally, the author will propose, as a means of enhancing the implementation of the Convention, the establishment of a stronger link between the CEDAW Committee and UN Entity for Gender Equality and Empowerment of Women (hereinafter UN Women).<sup>3</sup>

<sup>1</sup> The followings are the nine conventions: the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social and Cultural Rights (1966); the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the Convention on the Rights of the Child (1989); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1998); the Convention on the Rights of Persons with Disabilities (2006); and the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

<sup>2</sup> CEDAW is a treaty body established pursuant to Article 18 of the Women's Convention to monitor State parties' implementation of their treaty obligations under the Convention.

<sup>3</sup> G.A. Res. 64/289, U.N. Doc. A/RES/64/289 (July 21, 2010), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/479/17/PDF/N0947917.pdf?OpenElement> (last visited on Sept. 20, 2013).

## II. Japan's Law Reforms upon the Ratification of the Women's Convention

### A. Brief Overview

When the Women's Convention was adopted by the United Nations General Assembly in 1979, Japan was among the 130 countries which voted for it.<sup>4</sup> Japan signed the Women's Convention in 1980, and ratified it in 1985. Treaties ratified by the Cabinet and promulgated in the official gazette have the legal binding force by virtue of Article 98(2) of the Japanese Constitution, which provides that: "Treaties concluded by Japan and the established laws of nations shall be faithfully observed." There is consensus among scholars that ratified treaties prevail over statutes, while most scholars support the view that the Constitution is superior to treaties.<sup>5</sup>

In an effort to bring domestic law into compliance with the Women's Convention, the Japanese government (hereinafter the Government) engaged in certain reforms prior to ratification of the Convention. First, the Government amended the Nationality Law in 1984, whose principle had been *jus sanguinis a parte*, thus conflicting with Article 9(2) of the Women's Convention. This amendment enabled Japanese women married to non-Japanese husbands to pass Japanese nationality on to their children.<sup>6</sup> Second, the Government enacted the Equal Employment Opportunity Law in 1985 after controversies among trade unions, the business community and women's organizations in civic society. This enactment of a new law rectified the lack of a statutory law guaranteeing the same employment opportunities for both men and women, which was required under Article 11 of the Women's Convention. Third, the Ministry of Education amended the national curriculum in 1989 to make it mandatory for both boys and girls at high school to study home economics, a subject which was previously compulsory only for girls.

The above-mentioned reforms conducted by the Government upon or shortly after the ratification of the Women's Convention have undoubtedly contributed to

<sup>4</sup> G.A. Res. 34/180, Annex, U.N. Doc. A/RES/34/180 (Dec. 18, 1979), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/378/07/IMG/NR037807.pdf?OpenElement> (last visited on Sept. 20, 2013).

<sup>5</sup> E.g. Nobuyuki Ashibe in *THE CONSTITUTION (KENPOU)* (available only in Japanese) 354-355 (3<sup>rd</sup> ed. 2002).

<sup>6</sup> Prior to this amendment, the court rendered a judgment that the Nationality Law did not violate Article 14 (the equality clause) of the Constitution (Judgment of the Tokyo High Court, Jun. 23, 1982). This example is noteworthy because even a law whose constitutionality had been affirmed by the judiciary was amended to avoid conflict with a treaty obligation.

enhancing gender equality<sup>7</sup> in Japanese society.<sup>8</sup> Moreover, since ratification of the Women's Convention, further significant laws have been adopted, including the Fundamental Law on Gender Equality (1999) and the Law on Prohibition of Spousal Violence and Protection of Victims (1999). However, not all discriminatory laws have been amended or repealed, and the legal reforms are not always comprehensive or drastic enough to address the root-cause of gender-based discrimination. As a result, these amendments have failed to bring profound and fundamental changes to the Japanese society. The Government's goal set out in the National Action Plan on Gender Equality<sup>9</sup> has been too modest to strike down gender stereotypes deeply rooted in society, which has allowed Japan to preserve *de jure* discrimination against women. Various international surveys on the status of women indicate that the gender gap in Japan is one of the biggest among the G20 countries.<sup>10</sup>

## B. Japan and the Constructive Dialogue of the CEDAW Committee

Under the core UN human rights treaties, State parties are required to submit periodic reports to the treaty bodies on progress and difficulties in implementing their obligations under the treaty concerned as a form of self-assessment.<sup>11</sup>

In accordance with the Women's Convention, the CEDAW Committee receives a report and holds a meeting with State parties in public, which is called 'constructive dialogue.'<sup>12</sup> The review of a State report ends with 'concluding observations,'

<sup>7</sup> The CEDAW Committee interprets the Women's Convention as addressing discrimination based on 'gender' rather than 'sex.' For its definition, see The Committee's general recommendation No.28, ¶ 5, U.N. GAOR, 47<sup>th</sup> Sess., Comm. on Elim. of Discrim. against Women, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010).

<sup>8</sup> See, e.g., YASUKO YAMASHITA, STUDY ON THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (Josei Sabetsu Teppai Joyaku No Kenkyu) (available only in Japanese) (1996); YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS AND JAPANESE LAW 205-248 (2009).

<sup>9</sup> The Government enacted a National Action Plan pursuant to the Fundamental Law on Gender Equality (1999), which sets an aim of increasing the number of women in decision-making bodies in all fields to more than 30 per cent by 2020.

<sup>10</sup> According to the World Economic Forum, Japan is ranked 101<sup>st</sup> among 135 countries in terms of the women's status in society. Among various indicators, Japan's record is particularly low regarding the proportion of women in corporate management (106<sup>th</sup>), in parliament (102<sup>nd</sup>) and enrolled in tertiary education (100<sup>th</sup>). See R. HAUSMANN ET AL., THE GLOBAL GENDER GAP REPORT (2012), available at [http://www3.weforum.org/docs/WEF\\_GenderGap\\_Report\\_2012.pdf](http://www3.weforum.org/docs/WEF_GenderGap_Report_2012.pdf) (last visited on Sept. 20, 2013).

<sup>11</sup> Women's Convention art. 18. It provides that State parties undertake to submit a report, for the consideration of the Committee, on the legislative, judicial and administrative or other measures which they have adopted to give effect to the Convention and on the progress made in this respect. All other core human rights conventions have similar provisions. On the other hand, the Convention is silent on the question of whether it is mandated to issue a written recommendation after the consideration of state reports.

<sup>12</sup> See *Committee on the Elimination of Discrimination against Women*, UN Office of the High Commissioner for Human Rights, available at <http://www2.ohchr.org/English/bodies/cedaw> (last visited on Sept. 20, 2013).

in which the CEDAW Committee takes the opportunity to make specific recommendations to the State concerned.<sup>13</sup>

Japan has so far experienced constructive dialogues with the CEDAW Committee four times; she has received various recommendations covering, *inter alia*, employment, education, political participation, the family, and violence against women.<sup>14</sup> In its concluding observations, the CEDAW Committee requests State parties to provide information in their next periodic report on steps taken to implement recommendations and to submit additional information, before the periodic report is due, on particularly pressing issues, in what is called a “follow-up procedure on concluding observations.”<sup>15</sup> In the most recent concluding observations, issued in 2009, the CEDAW Committee selected two subjects for Japan under the follow-up procedure, namely, adoption of temporary special measures under Article 4(1) of the Convention, and amendment of discriminatory provisions in the Civil Code (Family Law).<sup>16</sup> These discriminatory provisions include a six-month waiting period for re-marriage only applicable to women, discrimination against children born out of wedlock with regard to inheritance rights, different minimum age for marriage for boys (18 years old) and girls (16 years old), and a rule that stipulates that married couples cannot have different surnames (they must choose to share either the husband’s or the wife’s surname). The last item was considered by the Committee to constitute indirect discrimination against women, as more than 96% of married couples choose the husband’s surname.

### III. Japan’s Case Law Invoking the Women’s Convention

#### A. Lawsuits Invoking the Women’s Convention

While the Government has made slow progress in dealing with these and other issues of equality between the sexes, women have started filing lawsuits invoking

<sup>13</sup> This dialogue-based procedure lacks coercive aspects, but, at the same time, the consensus-based procedure enables the treaty bodies not only to denounce treaty violations, but also to identify ways of tackling them and to commend States on positive developments. *See* W. KÁLIN & J. KUNZLI, *THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION* 217-218 (2011).

<sup>14</sup> U.N. Doc. CEDAW/C/JPN/CO/6.

<sup>15</sup> *Supra* note 13, at 216.

<sup>16</sup> *Supra* note 14, ¶¶ 18, 28 & 59.

the Women's Convention before Japanese courts.<sup>17</sup> As of June 2013, there were approximately 40 cases publicized in law journals in which the Women's Convention had been invoked by the parties and/or the judiciary.<sup>18</sup> The issues dealt with by these cases can be classified into the following six categories.

### 1. *Discrimination in Employment*<sup>19</sup>

Equal pay, discrimination in promotion or wrongful termination on the grounds of pregnancy, maternity/childcare leave, etc.<sup>20</sup>

### 2. *Discrimination in Family Law*<sup>21</sup>

The six-month waiting period for remarriage that is only required for women, discrimination against children born out of wedlock (in terms of inheritance rights,<sup>22</sup> birth registration and residence certificate), the requirement that married couples must choose the same surname.<sup>23</sup>

### 3. *Discrimination in the Nationality Law against Children Born out of Wedlock*<sup>24</sup>

The Nationality Law. It provides that in order for a child born out of wedlock between a Japanese father and a non-Japanese mother to acquire Japanese nationality, the

<sup>17</sup> On the impact of litigation on Japanese society, see F. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 156-165 (1987). Upham argues that compared with the environmental (pollution) cases, the women's movement has been less successful in galvanizing political support in Japan, as their primary support has been 'doctrinal,' not 'political,' to apply legal pressure to their opponents in government and industry.

<sup>18</sup> See a database of Japanese court cases ("LEX/DB").

<sup>19</sup> Women's Convention art. 11.

<sup>20</sup> The following are judgments on the discrimination in family law: Tokyo High Court (Dec. 27, 2011); Osaka High Court (Jul. 16, 2009); Tokyo District Court (Jun. 29, 2009); Osaka District Court (Mar. 28, 2005, Nagoya District Court (Dec. 22, 2004); Tokyo District Court (Feb. 20, 2002); Tokyo District Court (Jan. 29, 2001); Osaka District Court (Jun. 27 2001); Osaka District Court (Jul. 21, 2000); Tokyo District Court (Mar. 25, 1998); Tokyo District Court (Nov. 27, 1996).

<sup>21</sup> Women's Convention art.16.

<sup>22</sup> The Supreme Court Grand Bench rendered the judgments in two cases dealing with inheritance rights for children born out of wedlock on September 4, 2013. The Court declared Article 900, paragraph 4. of the Civil Code, which provides that children born out of wedlock are entitled to receive only half as much as children born in wedlock, is unconstitutional. Though the judgment referred to the concluding observations of treaty bodies of the Convention of the Rights of the Child (the Committee on the Rights of Child) and the International Covenant on the Civil and Political Rights (the Human Rights Committee), it did not examine the applicability of the Women's Convention (LEX/DB No. 25445838).

<sup>23</sup> Japan Civil Code art. 750. *E.g.* judgments of the Tokyo District Court (May 29, 2013); Okayama District Court (Oct. 18 2012); Tokyo High Court (Nov. 24, 2011); Tokyo High Court (Mar. 24, 2005); Tokyo District Court (Mar. 2, 2004); Tokyo High Court (Mar. 22, 1993); Tokyo High Court (Mar. 29, 2001); Hiroshima District Court (Jan. 28, 2001).

<sup>24</sup> Women's Convention art. 9.

child must be recognized by his/her father before birth (“recognition of paternity for the fetus”). The first Supreme Court Grand Bench judgment which refers to international human rights law was rendered on this subject in 2008.<sup>25</sup>

#### 4. *Discrimination in the Amount of Damages for Compensation for Lost Earnings Capacity*<sup>26</sup>

The amount of damages women are awarded for lost profit in personal injury cases is in most cases much less than that awarded to men as a result of wage discrimination. A number of cases have been/are being contested to challenge precedent cases.<sup>27</sup>

#### 5. *Discrimination in Public Services*<sup>28</sup>

Social insurance benefits, taxation, obtaining places for children in State-funded nurseries.<sup>29</sup>

#### 6. *Compensation claims brought by World War II ‘Sex Slaves,’ or ‘Comfort Women’*<sup>30</sup>

No less than 10 separate lawsuits have been filed in Japanese courts by former ‘comfort women’ since the early 1990s.<sup>31</sup> Their petitions have relied primarily on

<sup>25</sup> Judgment of the Supreme Court Grand Bench (Jun. 4, 2008). (However, this judgment did not refer to the Women’s Convention). See Yasuhiro Okuda, *Nationality of Children Born Out of Wedlock under Japanese Law: Recent Developments in the Case Law*, 48 JAPANESE ANN. INT’L L. 26-43 (2005).

<sup>26</sup> Women’s Convention arts. 2, 5 & 11.

<sup>27</sup> E.g. judgments of the Supreme Court 3<sup>rd</sup> Petty Division (Sept. 11, 2001); Osaka High Court (Sept. 26, 2001); Fukuoka High Court (Mar. 7, 2001).

<sup>28</sup> Women’s Convention arts. 11 & 13.

<sup>29</sup> E.g. judgments of the Saitama District Court (Jan. 28, 2004); Osaka High Court (May. 16, 2000); Supreme Court 1<sup>st</sup> Petty Division (Oct. 17, 2001); Tokyo High Court (Sept. 19, 1989).

<sup>30</sup> Women’s Convention arts. 2 & 5; CEDAW Committee’s general recommendation No. 19. See U.N. Doc. HRI/GEN/1/Rev. (vol. II). The CEDAW Committee is mandated to produce general recommendations, which set out its authoritative interpretation of various aspects of the Convention, under Article 21 of the Convention. See also judgment of the Yamaguchi District Court Shimonoseki Branch (Apr. 27, 1998). For details, see Koji Teraya, *A Consideration of the so-called Comfort Women Problem in Japan-Korea Relations: Embracing the Difficulties in the International Legal and Policy Debate*, 6 J. EAST ASIA & INT’L L. 195-220 (2013). For the Korean position, see Seong Phil Hong, *Remedying “Enforced Sexual Slavery”: Validating Victims’ Reparation Claims against Japan*, J. EAST ASIA & INT’L L. 175-194(2013).

<sup>31</sup> See The digital archive of the Asian Women’s Fund, available at <http://www.awf.or.jp> (last visited on Jul. 1, 2013). The archive records petitions and judgments of ‘comfort women’ lawsuits, but the list is not exhaustive. For a more comprehensive list of lawsuits, see Hiroko Tsubokawa, *Factual Findings of the Japanese Courts on Victimization of “Comfort Women” I & 2* (Nippon no saibansho ga nintei sita nippongun ‘ianfu’ no higai jujitsu (jo) (ge)) (available only in Japanese), 56 & 57 Q. RES. WAR RESP. (2007).

international law relating to *jus ad bellum* and an ILO Convention on forced labor, both of which were in force during World War II.<sup>32</sup> It might not be a coincidence that the only judgment that has upheld the plaintiff's claim<sup>33</sup> quoted the CEDAW Committee. Regrettably, this judgment was later overruled by the high court.<sup>34</sup>

## B. Japanese Courts and International Human Rights Treaties

The courts did not, however, rely on the Women's Convention in their judgments in any of the abovementioned cases.<sup>35</sup> In other words, there have been no court cases in Japan in which the plaintiffs prevailed on the grounds of the Women's Convention. The judiciary either simply does not respond to the argument of international law, or dismisses such claims on the grounds that international human rights law is not self-executing or directly applicable in Japan. The two recent judgments in the following are typical examples of Japanese judicial interpretation of the Women's Convention:

### 1. *Kyoto Women's Centre Case (Osaka High Court Judgment dated July 16, 2009)*<sup>36</sup>

The plaintiff was a part-time counselor who was employed by the Kyoto Women's Centre, a non-profit organization founded by the City of Kyoto with a fixed contract term. The plaintiff argued that her wages were disproportionately low in comparison with those of full-time permanent employees, and that the Centre had thus violated various laws, including the non-discrimination clause in the Labor Standards Law, the International Covenants on Economic, Social and Cultural Rights, ILO Convention No. 100, and Article 11 of the Women's Convention. She argued that her treatment by the Centre constituted gender-based discrimination, since more women are employed on fixed-term contracts than men. The court dismissed her argument by interpreting Article 11 of the Women's Convention as merely declaring a rule to be respected by the international community from the perspective of sex-based discrimination, not establishing any concrete common norms,

<sup>32</sup> The Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) and the ILO Convention No. 29 on Forced Labour has been the two most frequently quoted legal documents in lawsuits brought by victims of the war. See HAE BONG SHIN ET AL., *POSTWAR REPARATION AND INTERNATIONAL HUMANITARIAN LAW*; Hae Bong Shin, *Compensation for Victims of Wartime Atrocities*, 3 J. INT'L CRIM. JUST. 187-206 (2005).

<sup>33</sup> *Supra* note 30.

<sup>34</sup> Hiroshima High Court Judgment (Mar. 29, 2001).

<sup>35</sup> In the *Sekiguchi v. Konami Entertainment* case, e.g., the Tokyo High Court held that the conduct of the defendant (an employer) which degraded a plaintiff (the female employee) upon her return from maternity and child care leave was illegal as it contravened her employment contract. The court ordered the defendant to pay compensation. However, the judgment states, without a substantive reason, that it is not necessary to respond to the plaintiff's claim regarding violation of the Women's Convention. See Tokyo High Court Judgment, Dec. 27, 2011.

<sup>36</sup> LEX/DB No.25451651. Appeal to the Supreme Court was dismissed and the case was finalized.



and finding on that basis that the Women's Convention did not have any self-executing power with regard to the principle of equal pay for equal-valued work.<sup>37</sup>

## 2. *Separate Surname for Married Couples Case (Tokyo District Court judgment on May 29, 2013)*<sup>38</sup>

A group of married women, who adopted their husbands' surnames as their surnames upon marriage, sued the Japanese government to seek compensation for damages, claiming that Article 750 of the Civil Code, which forces a married couple to have the same surname, infringes their right to retain their original name, a right guaranteed by the Constitution as well as the Women's Convention. The plaintiffs argued that the Diet abused its legislative discretion as it did not enact or amend the Civil Code in compliance with the Women's Convention to the effect that married women may keep their original surnames. The Tokyo District Court dismissed the claim on the basis of the following reasoning: "Although Article 16 of the Women's Convention obliges the State parties to "take all appropriate measures" or 'ensure' to couples "the same personal rights as husband and wife, including the right to choose a family name" and "the same right freely to choose a spouse and to enter into marriage only with their free and full consent," there is no provision that the Convention directly grants such a right to an individual. In the light of the text of the Convention, it should be interpreted that State parties contracted with each other that they will secure this right through amending their domestic laws and policies. Further, the content of the Convention under Articles 2(f) and 16(1)(b) and (g) cannot be interpreted such that "the rights under these articles are evident and decisive, and enforceable in the domestic sphere without enacting any domestic statute or regulation to realize its content." The decision concludes that Article 16(1) (b) and (g) of the Women's Convention are not directly applicable in Japan, and thus do not confer any rights on individual plaintiffs.<sup>39</sup>

As to the reasons why Japanese courts have been so reluctant to interpret and apply international human rights conventions, scholars point out the unfamiliarity of Japanese judges with international human rights law and a lack of adequate training

<sup>37</sup> Labor Standards Law art. 4. It guarantees equal pay for equal work between men and women. The plaintiff argued, by applying the Women's Convention, that this article further covered equal pay for equal valued work and guaranteed the principle of non-discrimination not only based on sex but also other grounds, including discrimination against employees on fixed-term contracts *vis-à-vis* employees on non-fixed term contracts. The court denied both of her arguments.

<sup>38</sup> LEX/DB No.2550084. Appealed and not yet finalized

<sup>39</sup> There is a case law in Japan which affirms the self-executing nature of ICCPR. *See, e.g.*, judgments of Osaka District Court (Apr. 27, 1994), Tokushima District Court (Mar. 15, 1996), Takamatsu High Court (Oct. 28, 1994), and Tokyo High Court (Feb. 3, 1993). Therefore, this decision is construed as either a retrogressive interpretation by the court of international human rights law in general, or an interpretation which places the Women's Convention as a less enforceable treaty than others such as ICCPR.

for them on this subject as the main causes.<sup>40</sup> In practice, as judges' attitude toward the scope of international human rights law does not go beyond the scope of human rights protection under the Japanese Constitution, they do not find any need to study international law.<sup>41</sup> As long as the judiciary ignores international human rights conventions, *per se*, they will be even less likely to take heed of soft law produced by treaty bodies, such as concluding observations, general recommendations, and case law under the individual complaint mechanisms. Although these instruments are not legally binding under general international law,<sup>42</sup> it should not be overlooked that each was produced by a treaty body in order to specifically supervise the application of the treaty.<sup>43</sup> As interpretive tools, these soft laws have been growing both in number and scope very rapidly.<sup>44</sup> Due to the lack of interest of Japan's judiciary in following the global trend, regrettably, Japanese people can neither benefit from the fruits of the development of international law, nor participate in the crucial lawmaking process at the global level.

### C. Individual Complaint Mechanisms in Japan

The most significant development of the Women's Convention since its inception has been the adoption of its Optional Protocol (hereinafter CEDAW-OP) in the UN General Assembly in 1999. Entered into force in 2000,<sup>45</sup> CEDAW-OP has granted individuals or groups of individuals claiming to be victims of States' violation of Convention rights the opportunity to complain of those alleged violations to the CEDAW Committee.<sup>46</sup> International lawyers commonly view that the greatest achievement of the international human rights law system is the individual

<sup>40</sup> Yuji Iwasawa points out that the general level of knowledge of Japanese judges on international human rights law needs to be raised. He also observes that passivity of the courts is not peculiar to international law, but in general Japanese courts are highly restrained in judicial review. *See supra* note 8, at 290-291.

<sup>41</sup> Among the eight optional subjects in the national bar examination, public international law is the least popular subject and was selected by only 1.55% of applicants in 2013.

<sup>42</sup> Due to the fact that UN committees are not empowered to make binding decisions, individuals opt for another forum wherever the choice exists, as it does in Europe and the Americas. Kälin & Kunzli, *supra* note 13, at 234.

<sup>43</sup> C. TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 188 (2<sup>d</sup> ed. 2008).

<sup>44</sup> As of August 1, 2013, the CEDAW Committee had produced 29 general recommendations, and currently the following thematic issues are being reviewed by working groups in the Committee to be new general recommendations: (i) Access to Justice; (ii) Armed Conflict; (iii) Asylum Seekers and Refugees; (iv) Education; (v) Rural Women; (vi) Harmful Practices (a joint working group with the Committee on the Rights of the Child has been established for this thematic issue); and (vii) Natural Disasters and Climate Change.

<sup>45</sup> CEDAW-OP art. 8. In addition to individual complaints, the CEDAW-OP invests the CEDAW Committee with competence to conduct inquiries into reliable allegations of grave or systematic violations of the rights protected by the Convention.

<sup>46</sup> *Id.*

complaint procedure, under which a claimant could institute a procedure against the government at the international level on an equal footing in areas traditionally regarded as domestic matters within the sphere of sovereignty.<sup>47</sup>

As of July 1, 2013, there were 104 State parties to CEDAW-OP, out of 187 parties to the Women's Convention. As explained above, Japan has not agreed to give individuals within its jurisdiction the right to access any of the individual complaint mechanisms of international human rights treaties. When Japan ratified the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESC") in 1979, the Diet adopted a supplementary resolution to urge the Government "to monitor the implementation of the individual complaint mechanism [at this point, the only international human rights treaty vested with a complaint mechanism was the ICCPR], and positively consider future ratification of the first optional protocol to ICCPR, which established this individual complaint mechanism."<sup>48</sup> In the 1980s, the Government responded to this issue in the Diet by stating that "overall there was no problem with regards to the individual complaint mechanisms as such." It could be interpreted that they did not oppose to introduce the mechanism. Nevertheless, in the 1990s, the Government became more cautious about this subject, referring to "the relationship with the independence of the judiciary" as grounds for its concern.<sup>49</sup> According to a study which closely examined Government terminology in relation to the history of non-acceptance by Japan of individual complaint mechanisms,<sup>50</sup> the Government was referring to a concern that judges might be influenced psychologically by the authority of the United Nations. The 1990s was the era when Japanese lawyers started collectively utilizing international human rights law in litigation, most notably in criminal justice proceedings, cases challenging the fingerprinting of aliens, and compensation claims by World War II victims including POWs, former Japanese soldiers from overseas territories, forced laborers, and comfort women. This new type of lawsuit may have influenced the Government to change its initial policy towards the individual complaint mechanisms. The negative

<sup>47</sup> Kälin & Kunzli, *supra* note 13, at 233.

<sup>48</sup> See the 87<sup>th</sup> Foreign Affairs Committee Report of the Diet (available only in Japanese), available at <http://kokkai.ndl.go.jp/SENTAKU/sangiin/087/1110/08706051110015c.html> (last visited 20 Sept. 2013)

<sup>49</sup> Response in the Diet on March 14, 1997 by the Minister of Foreign Affairs, Yukihiko Ikeda, and on March 19, 1999 by the Minister of Justice, Takao Jinnai. Subsequent ministers repeated similar answers. The Government reports to the treaty bodies also express these concerns. *E.g.* U.N. Doc. CCPR/C/70/Add.1. ¶ 7(4).

<sup>50</sup> Yasushi Higashizawa, *Issues Surrounding the Individual Complaint Mechanisms*, in *IT IS TIME TO REALIZE ACCESS TO INDIVIDUAL COMPLAINT MECHANISMS* (kojin tuho wo meguru omona souten in Ima Koso Kojin Tuho No Jitsugen Wo) (available only in Japanese) (Human Rights Now ed., 2012).

attitude of the Government towards the individual complaint mechanisms, together with the lack of a national human rights institution in Japan, has been repeatedly highlighted by treaty bodies and the Universal Periodic Review (“UPR”) under the Human Rights Council.<sup>51</sup> In recent Diet sessions, the Government has stopped referring to the “independence of the judiciary” in an abstract manner, replying in more concrete terms that they need more time to consider what to do in cases in which a treaty body finds a violation of a right enshrined in a treaty, especially if the treaty body recommends that the government pay monetary compensation to the victim(s).<sup>52</sup> Now, the Government seems to have no positive prospects for acceding to any of the individual complaint mechanisms in the near future.

## IV. Case Law concerning Individual Complaints under CEDAW-OP

### A. Jurisprudence of CEDAW-OP in General

While neither the Government nor the judiciary of Japan has ever accepted that decisions<sup>53</sup> of the treaty bodies on individual complaints are legally binding, it is paradoxical that they use their ‘concerns’ over the possible conflict between the ‘force’ of such decisions and “the independence of the judiciary.” This implies that the Government acknowledges a certain incompatibility between the case law of CEDAW-OP, and Japanese laws and jurisprudence. Though the Government has never explained what these incompatibilities are, some significant discrepancies between these two bodies of law can be identified.

As of August 1, 2013, 59 cases had been registered under CEDAW-OP since it entered into force in 2000 (Annex). This may seem a rather small number of

<sup>51</sup> U.N. Doc. A/HRC/22/14; U.N. Doc. A/HRC/22/14/Add.1 (2012).

<sup>52</sup> Reply by the Ministry of Justice at the Cabinet Committee of the House of Representatives on Mar. 18, 2009.

<sup>53</sup> The Committee adopts views with recommendations, if any, after it has considered communications (See CEDAW-OP art. 7). Views identify the provisions of the Convention that the Committee considers the State party has violated, while recommendations are prescribed for action to remedy violations. Recommendations are specific, but allow the State party latitude to determine its means of compliance. See J. Connor, *Optional Protocol, in THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: COMMENTARY 655-656* (M. Freeman et al. eds., 2012). In UN terminology, if a complaint does not satisfy admissibility requirements, the decision of the CEDAW Committee to dismiss the complaint is called an ‘inadmissibility decision,’ while the Committee’s decision on the merits when a complaint satisfies such requirements is called ‘views.’ In this paper, all decisions, including views on inadmissibility and the merits, are referred to as ‘decisions.’

complaints given that States from all regions of the world are parties to the Optional Protocol. However, it reflects the fact that complainants face various challenges in accessing the mechanism, the greatest of which is the requirement that they must exhaust domestic remedies before making a complaint.<sup>54</sup> The exhaustion of domestic remedies is a general rule of international law; a claimant is not entitled to approach an international body of investigation or settlement unless and until she has exhausted the means available to her in the State concerned for redressing her injuries.

Among the 59 registered cases, 29 cases have already been concluded while 25 are still pending. The remaining five have been discontinued; these include both cases where the complainant has withdrawn the complaint, and where the problem at issue has become moot. The CEDAW Committee has so far found violations of rights under the Women's Convention in 13 cases. The first 13 years of the operation of the CEDAW-OP (2000-2013) can be divided into the following three phases:

*1. Phase I of CEDAW-OP (from 2002 to 2007): four cases of violation*

The first five years of CEDAW-OP was nascent period. The CEDAW Committee adopted decisions on violations addressed to only two countries from Europe during this period, namely, Austria and Hungary (two cases for each, four in total).<sup>55</sup>

**Communication No. 2/2003 (A.T. v. Hungary)**<sup>56</sup>

A victim of domestic violence claimed that in the State party, there was no mechanism for obtaining both a protection order against her husband, and access to a shelter to stay in with her handicapped child. The Committee held that the State party had failed to enact sufficient legislative measures to combat discrimination against women; it recommended the State party to adopt appropriate legislation.

**Communication No. 4/2004 (A.S v. Hungary)**<sup>57</sup>

A woman in Rome was sterilized by hospital staff without informed consent while undergoing a caesarean section. The Committee found that the hospital's failure to obtain consent violated the complainant's reproductive health/rights under the Convention; it recommended the State party to provide compensation and amend laws to provide clear

<sup>54</sup> CEDAW-OP art. 4, ¶ 1.

<sup>55</sup> See Open Society Foundations: Human Rights Case Digests: CEDAW, available at <http://www.opensocietyfoundations.org>; Optional Protocol to CEDAW (un official website of CEDAW), available at <http://opcedaw.wordpress.com> (all last visited on Sept. 20, 2013).

<sup>56</sup> U.N. Doc. CEDAW/C/36/D/2/2003.

<sup>57</sup> U.N. Doc. CEDAW/C/36/D/4/2004.

guidelines on the administration of the sterilization procedure.

**Communication No. 5/2005 (Goerke v. Austria)<sup>58</sup> & Case No. 6/2005 (Yildirim v. Austria)<sup>59</sup>**

The complainants were the family members of victims of domestic violence, who were killed by their husbands. Despite victims' multiple requests, the local authorities did not arrest or detain the perpetrators. The Committee held that the State party did not adequately protect the victims and that this violated their rights to life and personal security; it recommended the State party to implement and monitor a law on domestic violence.

One might be struck by the fact that three out of the first four cases dealt with under CEDAW-OP concern domestic violence. Since there is no explicit reference in the Women's Convention to violence against women, efforts have been made by women's human rights advocates to develop a new normative instrument to remedy this deficiency. Their efforts have resulted in two important documents: one is the Committee's general recommendation No. 19,<sup>60</sup> issued in 1992, which delivers the 'missing link' by identifying gender-based violence as a form of discrimination against women<sup>61</sup>; the other is the Declaration on the Elimination of Violence against Women,<sup>62</sup> adopted by the UN General Assembly in 1993. It should be further noted that, in all four cases, the direct perpetrators of human rights violations were Non-State Actors ("NSAs"). The critical question of how State parties can be treated as responsible for violations committed by NSAs was not clearly elaborated by the CEDAW Committee in the first two cases (Nos. 2 & 4). It was addressed, however, in the decisions issued in 2007 in the two Austrian cases (Nos. 5 & 6) which applied the general international law standard of due diligence<sup>63</sup> pursuant to the Committee's

<sup>58</sup> U.N. Doc. CEDAW/C/39/D/5/2005.

<sup>59</sup> U.N. Doc. CEDAW/C/39/D/6/2005.

<sup>60</sup> *Supra* note 30.

<sup>61</sup> C. Chinkin, *Violence against Women*, in Freeman et al., *supra* note 53, at 443-474; Hei Soo Shin, *CEDAW and Violence against Women: Providing the "Missing Link."* in THE CIRCLE OF EMPOWERMENT: TWENTY-FIVE YEARS OF THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 223-233 (C. Flinterman et al eds., 2007).

<sup>62</sup> G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

<sup>63</sup> Thanks to the work of feminist scholars, contemporary international law has served to establish a legal framework on violence against women. For its theoretical history, see A. EDWARDS, *VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL LAW* 38-43(2011). Edwards classifies four development stages in feminist theorizing and activism on human rights, namely, formal equality stage (1948-1970s); deconstruction of law stage (1980s-present); reconstruction, reconceptualization and reinterpretation stage (1990s-present); and reflection, reevaluation and reassessment stage (2000-present). The author argues that theorizing "violence against women" is the product of stage 3 (reconstruction) where feminists try to conceptualize women's rights within existing laws and/or institutions.

general recommendation No. 19.<sup>64</sup> The due diligence standard, which has its origins in the international law of State responsibility for injury to aliens, has been extensively examined under a number of human rights treaties with regard to the issue of States' responsibility for human rights violations committed by NSAs.<sup>65</sup> The American Convention on Human Rights, in particular, has been held to impose responsibility on State parties for the acts of private individuals.<sup>66</sup> This responsibility arises if States fail to take reasonable measures to prevent human rights violations, to investigate violations that occur, to punish perpetrators, and/or to provide redress to victims.<sup>67</sup> The decisions in the two Austrian cases under CEDAW-OP built upon this approach and subsequently stimulated regional human rights bodies to apply the due diligence standard to cases of domestic violence when interpreting their own instruments.<sup>68</sup> Further, the CEDAW-OP jurisprudence has contributed to the birth of the European Council's new Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).<sup>69</sup>

From this early stage, decisions under CEDAW-OP have contained 'general' recommendations to State parties about how to reform their law and practice, including, through the adoption of legislative measures, national prevention strategies and rehabilitation programs for survivors and offenders.<sup>70</sup> The Committee has not yet considered whether or not it is appropriate to include such concrete prescriptions/means for law reform in its decisions in light of the "obligation of result" of State parties under international law.

<sup>64</sup> *Supra* note 30.

<sup>65</sup> A. Bynes, *Article 2*, in Freeman et al., *supra* note 53, at 88. The work of the Special Rapporteur on Violence against Women, its Causes and Consequences contributed to theorizing the due diligence standard. *See also* Y. Ertürk, *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*, U.N. Doc. E/CN.4/2006/61 (2006).

<sup>66</sup> *See Velasquez Rodriguez v. Honduras*, Inter-American Court of Human Rights, Ser. C, No. 4 (Jul. 29, 1988); *Maria da Penha Maia Fernandes v. Brazil*, Inter-American Court of Human Rights, Case 12.051, Report No. 54/01 (Apr. 16, 2001).

<sup>67</sup> J. CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY* (2002); *STATE RESPONSIBILITY* (2013). *See also* J. Verhoeven, *The Law of Responsibility and the Law of Treaties*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 105-113 (J. Crawford et al eds., 2010).

<sup>68</sup> *See, e.g., Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009); *Gonzalez et al. v. Mexico* (hereinafter 'Cotton Field' case) Inter-American Court of Human Rights (Nov. 16, 2009), Ser. C, No. 205. For details, *see* P. Londono, *Developing Human Rights Principles in Cases of Gender-based Violence: Opuz v Turkey in the European Court of Human Rights*, 9 HUM. RTS. L. REV. 657-667 (2009).

<sup>69</sup> As of August. 1, 2013, this Convention has not yet entered into force.

<sup>70</sup> A. Bynes & E. Bath, *Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women: Recent Developments*, 8 HUM. RTS. L. REV. 517-533 (2008).

## 2. Phase II of the CEDAW-OP (2008-2011): five cases of violation

From 2008, there were several new developments in the jurisprudence of CEDAW-OP. First, complaints became more geographically diverse. In this period, complaints were registered for the first time in relation to State parties located outside of Europe. Second, the subject matter of complaints also became more diverse, in terms of the rights under the Convention alleged to have been violated. Third, positive obligations of the State parties became a focus as the essential element of complaints.<sup>71</sup> Fourth, recommending monetary compensation for victims of rights violations almost became a principle in the Committee's practice.

### **Communication No. 17/2008 (Pimentel v. Brazil)**<sup>72</sup>

The complainant was a mother of African descent, whose daughter died due to inadequate medical treatment in a private medical clinic after she suffered a miscarriage. The mother filed a lawsuit in Brazil, but it was still pending after more than eight years. The Committee found that the State party was responsible for the failure to fulfill the daughter's right to quality medical treatment, and recommended the State party to pay compensation to the complainant and to amend laws and policies on health services.

### **Communication No. 18/2008 (Vertido v. The Philippines)**<sup>73</sup>

The complainant was raped by her former supervisor in the workplace, and subjected to negative gender-stereotypes by the judiciary associated with the "rape myth" during the criminal trial against the accused, which continued for eight years and resulted in an acquittal. The Committee found that the judge of the State party relied on gender-based stereotypes<sup>74</sup>; it recommended the State party to pay compensation to the complainant and to provide training to the legal profession and law enforcement officers.<sup>75</sup>

### **Communication No. 20/2008 (V.K. v. Bulgaria)**<sup>76</sup>

The complainant suffered domestic violence, but the protection given to her by the state

<sup>71</sup> The adoption of general recommendation No. 28 (The Core Obligations of State parties) in 2010 and its discussion during a preparatory period contributed to this phenomenon. In most cases, the focus of dispute was not on the existence of law and policies, but rather their actual implementation in practice.

<sup>72</sup> U.N. Doc. CEDAW/C/49/D/17/2008.

<sup>73</sup> U.N. Doc. CEDAW/C/46/D/18/2008.

<sup>74</sup> R. COOK & S. CUSACK, *GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES* (2010).

<sup>75</sup> S. Cusack and A. Timmer, *Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in Vertido v. the Philippines*, 11 HUM. RTS. L. REV. 329-342 (2011). The author supports the view of this paper. In Case No. 18, there was no need to refer to the due diligence standard to establish the liability of the State party as the case concerned wrongful gender stereotyping by the judge.

<sup>76</sup> U.N. Doc. CEDAW/C/49/D/20/2008.



was not adequate (e.g. the definition of domestic violence under Bulgarian law was too restricted, and required a high standard of proof on the victim's side). The Committee found that the State party was responsible for its failure to effectively protect the complainant; it recommended the State party to pay compensation to the complainant and to amend its laws and policies on domestic violence.

**Communication No. 23/2009 (Abramova v. Belarus)**<sup>77</sup>

The complainant was a political activist detained in a facility without adequate privacy and with only male officers, who touched, mocked and harassed her. The Committee found the State party was responsible for its failure to secure the privacy and dignity of women detainees; it recommended the State party to pay compensation to the complainant and to ensure the rights of women detainees.

**Communication No. 22/2009 (L.C. v. Peru)**<sup>78</sup>

The complainant was a mother whose daughter attempted suicide after she became pregnant at the age of 13 as a result of sexual abuse, and was unable to obtain either surgery for her injuries because of her pregnancy, or therapeutic abortion. The Committee found that the refusal of surgery due to pregnancy and absence of a procedure for granting a legal therapeutic abortion constituted a violation of rights under the Convention; it recommended the State party to pay compensation to the daughter of the complainant and to review laws on abortion.

*3. Phase III of CEDAW-OP (2012-present, four cases of violation)*

The phase commencing in 2012 indicates another new dimension of CEDAW-OP. In Case No. 19, the Committee highlighted women's access to justice, as well as the meaning of 'continuing violation,' an exceptional condition which enables an out-of-date complaint to be heard by the Committee. In Case Nos. 28, 31 and 32, the content of the due diligence standard was more closely examined compared with cases in Phases I and II.

**Communication No. 19/2008 (Kell v. Canada)**<sup>79</sup>

The complainant was an indigenous woman who was deceived by her common-law husband, depriving her of the title to their house. She alleged that she lost her lawsuit against him as the lawyers assigned by the legal aid scheme were not competent enough. Despite the fact that the alleged incident took place in 1993, i.e., prior to the entry into force

<sup>77</sup> U.N. Doc. CEDAW/C/49/D/23/2009.

<sup>78</sup> U.N. Doc. CEDAW/C/50/D/22/2009.

<sup>79</sup> U.N. Doc. CEDAW/C/51/D/19/2008.

of the Optional Protocol for Canada in 2003, the Committee found a 'continuing violation' pursuant to Article 4, paragraph 2(e) of the Optional Protocol,<sup>80</sup> and concluded that the case should not be barred on the ground of *ratione temporis*. The Committee recommended the State party to pay compensation to the complainant and to give training to legal aid lawyers on the rights of indigenous women.

**Communication No. 28/2010 (R.K.B. v. Turkey)**<sup>81</sup>

The complainant was an employee at a hairdressing salon, but her employment was terminated because of a rumor that she had had a sexual relationship with a male director. She filed and prevailed in a lawsuit and was awarded a severance allowance due to wrongful termination. However, the Committee still found that the State party violated the Convention because the domestic court did not find any sex-based discrimination. The Committee recommended the State party to pay compensation to the complainant and to provide gender-sensitive training to the legal profession.

**Communication No. 32/2011 (Jallow v. Bulgaria)**<sup>82</sup>

The complainant was a Gambian-origin illiterate woman married to a Bulgarian husband with a daughter in Bulgaria. Both parties sought protection from the other party pursuant to the Domestic Violence Act, but the authorities only heard her husband's allegation and did not act with due diligence toward her claim. The Committee found that the State party violated the rights of the woman under the Convention and recommended the State party to pay compensation to the complainant and to take measures to ensure victims of domestic violence have effective access to services and justice.

**Communication No. 31/2011 (S.V.P. v. Bulgaria)**<sup>83</sup>

The complainant was the mother of a daughter who was mentally retarded as a result of sexual violence she had suffered when she was seven years old. The perpetrator was charged with molestation, rather than attempted rape, and was sentenced only to a suspended sentence of three years. The compensation awarded by the court against the perpetrator was very low, and no legal aid scheme was available for the execution procedure, thus the complainant could not receive the amount awarded by the court. The Committee found the State party violated the rights of the daughter under the Convention, and recommended the State party to pay compensation and amend the Criminal Code

<sup>80</sup> CEDAW-OP art. 4, ¶ 2(e). It provides: "The Committee shall declare a communication inadmissible where the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned unless those facts continued after that date."

<sup>81</sup> U.N. Doc. CEDAW/C/51/D/28/2010.

<sup>82</sup> U.N. Doc. CEDAW/C/52/D/32/2011.

<sup>83</sup> U.N. Doc. CEDAW/C/53/D/31/2011.

so that sexual violence against women and girls is defined in line with international standards and effectively investigated, and perpetrators are prosecuted and sentenced commensurately.

## B. Jurisprudential Conflict between CEDAW-OP and Japan

Having examined these cases, we may conclude that in the following areas, Japanese law and practice would be incompatible with the CEDAW-OP jurisprudence, as follows.

### 1. Due Diligence Standard and Positive Obligations

Under Japan's constitutional regime, the State is authorized to decide whether or not to exercise its administrative power; it is not accountable for breach of the law unless an act or omission of the State is beyond reasonable discretion.<sup>84</sup> In particular, the State is held liable for the omission or non-action<sup>85</sup> of the executive with regard to human rights violations only in extremely exceptional circumstances. Further, the discretion of the legislature to enact or not to enact particular legislation is firmly protected under the Constitution.<sup>86</sup> These principles are in strong contrast with the CEDAW-OP jurisprudence, which is based on a tripartite framework of obligations, namely, to 'respect,' 'protect,' and 'fulfill.'<sup>87</sup> The Women's Convention obliges State parties not only to refrain from any discriminatory action, but also to positively exercise their power to realize and fulfill substantive equality, including, if necessary, the use of temporary special measures.<sup>88</sup> Moreover, the Convention obliges State parties to take action to protect women from human rights violations by private persons. If States fail to prevent violations, they must engage in investigation and prosecution and must also award redress to victims according to the due diligence standard. In the Okegawa Stalking-Victim case, *e.g.*, the Japanese court did not support the claim brought by a family whose daughter was killed by

<sup>84</sup> Japanese Constitution art. 17. It provides: "Every person may sue for redress as provided by law from the State or public entity, in cases where he has suffered damage through the illegal act of any public official." However, the word "illegal act" has been interpreted by the judiciary as well as scholars in a restrictive manner. The Supreme Court takes the position that legislatures cannot be held accountable unless the Parliament passes a law which *prima facie* violates a provision of the Constitution. See Judgment of Supreme Court Grand Bench decision, *minsyo* 39-7-1512, Nov. 21, 1985. Under the case law, the executive power also cannot be easily held accountable, though it is less protected than legislatures, as long as a public official pays due attention while he/she conducts his/her duties.

<sup>85</sup> *E.g.* Judgment of the Supreme Court Second Petty Branch (Oct. 15, 2004).

<sup>86</sup> *E.g.* Judgment of the Supreme Court Grand Bench (Sept. 14, 2005).

<sup>87</sup> General recommendation No. 28, ¶ 9. See also *supra* note 9.

<sup>88</sup> Women's Convention art. 4, ¶ 1.

a stalker after their requests to the police for assistance had been denied.<sup>89</sup> The court awarded nominal compensation for damages for their mental suffering, but denied any material damages. If the Japanese courts come to recognize the due diligence standard as well as the positive obligation of State parties, both of which are clearly defined in general recommendation No. 28 and adopted under CEDAW-OP, the outcome of such cases would be then more favorable to victims of violence.

## 2. *Definition of Rape in the Criminal Code*

The Japanese Criminal Code stipulates that rape is a crime committed by men against women by using either physical force or verbal threats as a means to oppress the victim.<sup>90</sup> An accused will be acquitted in criminal court if he can prove that he did not use physical force or verbal threats to the extent that such force/threats would oppress the free will of the victim. As the judiciary, including the Supreme Court, has tended to interpret the physical force and verbal threats requirement very narrowly, a number of accused have been acquitted.<sup>91</sup> In some cases, judges questioned the 'credibility' of the victim, as these women did not behave like 'typical victims' in the judges' minds. In Case No. 18 against the Philippines, the CEDAW Committee criticized this kind of gender-stereotyping and recommended the State party to amend the definition of rape in the Criminal Code.<sup>92</sup> This indicates that Japanese criminal law and practice regarding rape would likely be regarded as discriminatory if they were examined under CEDAW-OP.

## 3. *Right to Determine One's Own Name*

There are no decisions on the merits under CEDAW-OP regarding a woman's right to determine her own name.<sup>93</sup> However, the inadmissibility decisions in Cases No. 12 (*Group d'Intérêt pour le Matronyme v. France*)<sup>94</sup> and No. 13 (*SOS Sexisme v. France*)<sup>95</sup> set out criteria on this issue. These cases dealt with that, in France, a child born in

<sup>89</sup> Judgment of the Tokyo High Court (Jan. 26, 2013).

<sup>90</sup> Japanese Criminal Code art. 177.

<sup>91</sup> E.g. Supreme Court 2<sup>nd</sup> Petty Court judgment (Jul. 25, 2011) (hereinafter Chiba case).

<sup>92</sup> Though the decision of the CEDAW Committee only quotes THE HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN (UN Department of Economic and Social Affairs Division for the Advancement of Women ed., 2010), the origin of the idea came from not only the jurisprudence of international criminal courts, but also the definition of rape in the Elements of Crimes of the International Criminal Court.

<sup>93</sup> In accordance with rule 66 of its Rules of Procedure, the Committee may decide to consider the question of admissibility and merits of a communication separately.

<sup>94</sup> U.N. Doc. CEDAW/C/44/D/12/2007.

<sup>95</sup> U.N. Doc. CEDAW/C/44/D/13/2007.

wedlock is legally required to bear his/her father's surname. A group of women who wanted to have their mother's surname argued that this law constituted discrimination against their mothers, as well as against them as women. The Committee confirmed that under Article 16, paragraph 1(g) of the Convention, a married woman or a woman living in a husband-wife relationship has a right to keep her maiden name, which is part of her identity, and to transmit it to her children. However, the Committee declared the complaints 'inadmissible.' The reasoning of the Committee is that the complainants were not married women who had lost their maiden names, but women who wished to have their mothers' maiden names transmitted to them in their status as children. Seven members of the Committee submitted dissenting opinions to the majority opinion, stating that these complainants satisfied 'victim status' under CEDAW-OP, and so the State party should modify or abolish existing laws on women's surnames. This decision contains fertile suggestions for the ongoing "Right to Separate Surname" lawsuit in Japan.<sup>96</sup>

#### 4. Compensation for former 'Comfort Women'

To date, all cases filed by women who were forced to provide sexual services to the Japanese military during World War II have failed in Japanese courts. Nevertheless, this issue is still alive in UPR<sup>97</sup> of the Human Rights Council and concluding observations of the CEDAW Committee<sup>98</sup> and other treaty bodies. As the most recent example, the Committee against Torture, in its concluding observations to the Japanese Government in May 2013, described sexual slavery as torture. It stated that the sufferings experienced by the victims of sexual slavery is still ongoing, thus, statutes of limitations, i.e., 20-year period which bars any claims under Japanese Civil Code, should not be applicable to redress for claims of these victims.<sup>99</sup>

If such cases were brought to CEDAW-OP, it is likely that the complaints would not be barred by the doctrine of *ratione temporis* due to the demonstrated

<sup>96</sup> Apart from the CEDAW-OP's jurisprudence, there is also some case law in the Human Rights Committee on the right to determine one's own name. See *Coeriel et al. v. The Netherlands* (453/1991) and *Leonid Raihman v. Latvia* (1621/2007).

<sup>97</sup> *Supra* note 51.

<sup>98</sup> Chinkin, *supra* note 61, at 461. She wrote: "Without spelling out the basis for its remarks, the Committee has referred to the 'comfort women', the women across Asia who were forced into prostitution by the Japanese military during the Second World War. These events occurred long before the drafting of the Convention and Japan's ratification (1985). Nevertheless, some members of the Committee suggested that the Japanese Government should pay compensation to victims and create a fund in memory of those who had died."

<sup>99</sup> CAT/C/JPN/2/2013, ¶¶ 19, 20 & 29.

and ongoing suffering of the victims.<sup>100</sup> However, the requirement of exhaustion of domestic remedies, as the complainants had not argued a violation of the Women's Convention in the domestic courts, would still constitute a defense available to the Government.<sup>101</sup>

## V. Conclusion

The history of the modernization of the Japanese judiciary would attract two milestones to our attention. The first is the enactment of the Structure of the Court Law in 1890, which modeled after the European judicial system. The second is the drastic reform of the judiciary after World War II.<sup>102</sup> Under the Constitution of 1948, courts became vested with the power to review the constitutionality of any law, order, regulation or official act.<sup>103</sup> At this time, the original model was the American court system. All these changes were based on the foreign practices, yet Japan has absorbed and developed these practices into its own society. Sixty five years have passed since the promulgation of the Constitution (one hundred twenty-three years after the creation of the modern judiciary). Now is the time for Japanese law and practice to transform to adapt new inspirations from abroad. A key difference between the past two milestones and the Women's Convention is that Japan has already ratified the latter twenty-eight years ago. As the CEDAW-OP is a procedural tool, to accede to it does not impose any new obligation on the State parties. CEDAW-OP is just a procedural measure without any legal binding force to

<sup>100</sup> Under the first Optional Protocol of ICCPR, the Human Rights Committee has considered a number of complaints involving factual situations with roots in events that occurred prior to the entry into force of the Covenant and of the Optional Protocol. *E.g.* in *Adam v. The Czech Republic* case (No. 586, 1994), the Committee examined whether the failure by the State party to provide compensation for confiscations that occurred in 1949 could be raised under the Optional Protocol. It found that "although the confiscation took place before the entry into force of the Covenant and of the Optional Protocol for the Czech Republic, the new legislation that excludes claimants who are not Czech citizens has continuing consequences subsequent to the entry into force of the Optional Protocol for the Czech Republic, which could entail discrimination in violation of article 26 of the Covenant. *See* Human Rights Committee Annual Report, vol. II, annex VIII, § V, ¶ 6.3 (2007).

<sup>101</sup> The CEDAW Committee has insisted that a complainant must have raised in substance at the domestic level the sex discrimination claim she wishes to bring before the Committee. The following cases were declared inadmissible due to the lack of a sex discrimination claim in the domestic courts: Case No. 8 (*Kayhan v. Turkey*, CEDAW/C/34/D/2005); Case No. 10 (*N.S.F. v. United Kingdom*, CEDAW/C/38/D/10/2005).

<sup>102</sup> For the process of the modernization of Japan's judiciary, *see* W. Röhl, *The Court of Law*, in *HISTORY OF LAW IN JAPAN SINCE 1868*, 711-769 (Wilhelm Röhl ed., 2005); HIROSHI ODA, *JAPANESE LAW* 54-55 (3<sup>rd</sup> ed. 2009).

<sup>103</sup> *JAPANESE CONST.* art. 81.

the member States. As the CEDAW-OP is a procedural tool, to accede to it does not impose any new obligations on the State parties.

Japan is highly recommended to participate in the individual complaint mechanism under the Women's Convention mainly because CEDAW-OP is still in an initial stage of law-making. This means that many important concepts under CEDAW-OP, including "exhaustion of domestic remedies,"<sup>104</sup> "the same matter"<sup>105</sup> and 'continuing violation'<sup>106</sup> are still under review without an established interpretation. The State parties, together with complainants and NGOs, could participate in formulating precedents by submitting their own arguments. As international human rights law is a 'living instrument,' if Japan predicts certain disadvantages to joining CEDAW-OP, it should participate in the system and argue for its own rationale and logic rather than avoid discussion. It is regrettable that Japan has so far failed to take up this opportunity.

In the recent territorial disputes with neighboring countries,<sup>107</sup> as well as the Whaling in the Antarctic Case (Australia v. Japan) before the International Court of Justice,<sup>108</sup> Japanese leaders have frequently referred to the rule of law and "universally recognized principles of international law."<sup>109</sup> If they sincerely rely on the rule of law and international law in these fora, they must also respect and follow international human rights law. Japan should accede to the individual complaint mechanisms as they agreed to UPR, and also establish a National Human Rights Institution as a vehicle for promoting human rights in Japanese society.

From the viewpoint of the CEDAW Committee, the UN Women<sup>110</sup> has created a new possibility for implementing the Women's Convention in a global arena. Although there is no institutional link between the CEDAW Committee and UN Women at present, these two organs do exchange opinions from time to time. The Women's Convention already serves as a legally binding guideline for the activities of the UN Women, while the UN Women's local and regional offices may assist the

<sup>104</sup> CEDAW-OP art. 4, ¶ 1.

<sup>105</sup> *Id.* art. 4, ¶ 2 (a).

<sup>106</sup> *Id.* art. 4, ¶ 2 (c).

<sup>107</sup> Shigeyoshi Ozaki, *Territorial Issues on the East China Sea: A Japanese Position*, 3 J. EAST ASIA & INT'L L. 151-174 (2010).

<sup>108</sup> Hyunsoo Kim et al., *The Whaling Dispute in the South Pacific: A Japanese Perspective*, 4 J. EAST ASIA & INT'L L. 449-456 (2011). For the Australian position, see R. Davis, *The Whaling Dispute in the South Pacific: An Australian Perspective*, 4 J. EAST ASIA & INT'L L. 419-447 (2011).

<sup>109</sup> E.g. Chairperson's Statement of the 3<sup>rd</sup> East Asia Summit Foreign Minister's Meeting, ¶ 34 (Jul. 2, 2013, Brunei, Darussalam).

<sup>110</sup> The UN Women is mandated to set norms on gender equality to support UN member States, but its potential is still unknown due to the lack of a solid financial basis.

CEDAW Committee at the grass-roots level, particularly with regard to follow-up on concluding observations and the decisions of the CEDAW-OP.

As indicated at the title of a book, “The Circle of Empowerment”<sup>111</sup> which commemorates the CEDAW Committee’s 25<sup>th</sup> anniversary, positive implementation of the Women’s Convention by the Japanese courts will bring real change in the everyday lives of females in Japan. Interaction between international bodies and domestic fora is necessary.

<sup>111</sup> *Supra* note 61.



**Annex**  
**Status of Communications under CEDAW-OP**

Cases	Country	Subject matter	Decision / UN Document
1	Germany	Divorce law	Inadmissible (CEDAW/C/36/D/1/2003)
2	Hungary	Domestic violence	Admissible, violation (CEDAW/C/36/D/2/2003)
3	Netherlands	Maternity leave	Admissible, no violation (CEDAW/C/36/D/3/2004)
4	Hungary	Reproductive rights (sterilization)	Admissible, violation (CEDAW/C/36/D/4/2004)
5	Austria	Domestic violence	Admissible, violation (CEDAW/C/39/D/5/2005)
6	Austria	Domestic violence	Admissible, violation (CEDAW/C/39/D/6/2005)
7	Spain	Title of nobility	Inadmissible (CEDAW/C/39/D/7/2005)
8	Turkey	Ban on headscarf	Inadmissible (CEDAW/C/34/D/8/2005)
9	<u>Netherlands</u>	<u>Asylum</u>	<u>Discontinued(1)</u> (N/A)
10	UK	Asylum	Inadmissible (CEDAW/C/38/D/10/2005)
11	UK	Nationality	Inadmissible (CEDAW/C/37/D/11/2006)
12	France	Name right	Inadmissible (CEDAW/C/44/D/12/2007)
13	France	Name right	Inadmissible (CEDAW/C/44/D/13/2007)
14	<u>Netherlands</u>	<u>Asylum</u>	<u>Discontinued(2)</u> (N/A)
15	Netherlands	Asylum (trafficking)	Inadmissible (CEDAW/C/42/D/15/2007)
16	<u>Canada</u>	<u>Asylum</u>	<u>Discontinued(3)</u> (N/A)
17	Brazil	Reproductive rights (maternal mortality)	Admissible, violation (CEDAW/C/49/D/17/2008)
18	Philippines	Judicial gender bias (rape)	Admissible, violation (CEDAW/C/46/D/18/2008)
19	Canada	Property rights (indigenous woman)	Admissible, violation (CEDAW/C/51/D/19/2008)
20	Bulgaria	Domestic violence	Admissible, violation (CEDAW/C/49/D/20/2008)
21	<u>Italy</u>	<u>Domestic violence</u>	<u>discontinued(4)</u> (N/A)
22	Peru	Reproductive rights (abortion)	Admissible, violation (CEDAW/C/50/D/22/2009)
23	Belarus	Rights of detainee	Admissible, violation (CEDAW/C/50/D/23/2009)
24	(Not yet publicized)	Domestic violence	Admissible, review on the merit is ongoing <b>pending 1</b>
25	Canada	Asylum	Inadmissible (CEDAW/C/51/D/25/2010)
26	Canada	Asylum	Inadmissible (CEDAW/C/50/D/26/2010)
27	Italy	Child custody	Inadmissible (CEDAW/C/50/D/27/2010)
28	Turkey	Sexual harassment	Admissible, violation (CEDAW/C/51/D/28/2010)
29	Georgia	Residence permit	<b>Admissible, merit is pending 2</b>
30	(Not yet publicized)	Sexual harassment	<b>Pending 3</b>
31	Bulgaria	Sexual violence	Admissible, violation (CEDAW/C/53/D/31/2011)
32	Bulgaria	Domestic violence	Admissible, violation (CEDAW/C/52/D/32/2011)

33	Denmark	Asylum	Inadmissible (CEDAW/C/55/D/33/2011)
34	(Not yet publicized)	Judiciary gender stereotype	Pending 4
35	Denmark	Asylum	Inadmissible (CEDAW/C/55/D/35/2011)
36	(Not yet publicized)	Social security	Pending 5
37	(Not yet publicized)	Child custody	Pending 6
38	UK	Nationality (a male author)	Inadmissible (CEDAW/C/53/D/38/2012)
39	(Not yet publicized)	Asylum	Pending 7
40	Denmark	Asylum	Inadmissible (CEDAW/C/55/D/40/2012)
41	(Not yet publicized)	Trafficking, prostitution	Pending 8
42	(Not yet publicized)	Asylum	Pending 9
43	<u>Denmark</u>	<u>Child custody</u>	<u>Discontinued(5) (N/A)</u>
44	(Not yet publicized)	Asylum	Pending 10
45	(Not yet publicized)	Sexual harassment	Pending 11
46	(Not yet publicized)	Child custody	Pending 13
47	(Not yet publicized)	Domestic violence	Pending 14
48	(Not yet publicized)	Inheritance law	Pending 15
49	(Not yet publicized)	Asylum	Pending 16
50	(Not yet publicized)	Child custody	Pending 17
51	(Not yet publicized)	Asylum	Pending 18
52	(Not yet publicized)	Asylum (trafficking)	Pending 19
53	(Not yet publicized)	Asylum	Pending 20
54	(Not yet publicized)	Asylum	Pending 21
55	(Not yet publicized)	Criminal justice	Pending 22
56	(Not yet publicized)	Domestic violence	Pending 23
57	(Not yet publicized)	Asylum	Pending 24
58	(Not yet publicized)	Working conditions	pending 25
59	(Not yet publicized)	Asylum	Pending 26