
UT Soft Law Review

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Introduction Masahiko IWAMURA

Changing Society and the Role of Law

Welcome Speech Hiroshi TAKAHASHI

Keynote Speech Koya MATSUO

Session 1 Business Crime

(Development of Economy and Crime)

On the Crime of Taking Bribes in Chinese Criminal Law
—interpretation, Loopholes and it's complementarity—
..... Genlin LIANG

Three Controversial Issues in Controlling Corporate Crime in Korea
..... Kuk CHO

Developments in the Penal Protection of Trade Secrets in Japan
—Protection by Unfair Competition Prevention Act—
..... Atsushi YAMAGUCHI

Session 2 Autonomy of Family and the Role of State-Protection of women and children

(Domestic Violence, Alimony, and Maintenance for Children)

An In-depth Study on the Implementation of the Convention on the
Elimination of All Forms of Discrimination against Women in China
..... Guimei BAI and Wen ZHOU

CEDAW, CRC and the Korean Family Law Jinsu YUNE

Status of women in the family: the balance between autonomy and protection
..... Atsushi OMURA
Hiroto DOGAUCHI

Closing Speech Masahito INOUE

The Global Centers of Excellence of the University of Tokyo

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«CONTENTS»

Introduction Masahiko IWAMURA 1

Changing Society and the Role of Law

2nd Annual BESETO Conference

Welcome Speech Hiroshi TAKAHASHI 4

Keynote Speech Emeritus Koya MATSUO 5

Session 1 Business Crime

(Development of Economy and Crime)

On the Crime of Taking Bribes in Chinese Criminal Law
—interpretation, Loopholes and it's complementarity— Genlin LIANG 7

Three Controversial Issues in Controlling Corporate Crime in Korea Kuk CHO 16

Developments in the Penal Protection of Trade Secrets in Japan —Protection by Unfair Competition Prevention Act—	Atsushi YAMAGUCHI	28
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**Session 2 Autonomy of Family and the Role of
State—Protection of women and children**
(Domestic Violence, Alimony, and Maintenance for Children)

An In-depth Study on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women in China	Guimei BAI and Wen ZHOU	35
CEDAW, CRC and the Korean Family Law	Jinsu YUNE	74
Status of women in the family: the balance between autonomy and protection	Atsushi OMURA Hiroto DOGAUCHI	86
Closing Speech	Dean Masahito INOUE	92

Introduction

Masahiko IWAMURA*

The project on “Soft Law and the State-Market Relationship: Forming a Base for Education and Research of Private Ordering,” which we have been proposing, has been adopted as a subject of the Global Centers of Excellence (COE) Program for fiscal year 2008. This project is an extension of the prior program, “Soft Law in the State-Market Relationship: Strategic Formation of a Base for Education and Research of Business Law”, which we undertook as part of the Twenty-First Century COE Program from fiscal year 2003 to fiscal year 2007. The current project seeks to extend and further develop the research undertaken and insights derived through the predecessor program.

The keyword of this project is “soft law.” We often define this word as a “set of rules that countries and companies find binding in the real economy and society in spite of the fact that such rules are not formulated by the government nor is their enforcement guaranteed by the government.” Soft law can be widely seen in every area, and it plays an important role in the modern economy and society. It is also significant as a global legal form well beyond the scope of the positive law in each country. In modern society, where soft law is becoming increasingly important, it is impossible to fully understand the legal world only by traditional legal education and studies based on positive law. In response to this new situation, we have launched the “soft law project” to develop the positive law studies in our country into an interdisciplinary form of social science based on demonstrative analysis through special education and research on soft law as part of the Twenty-First Century COE Program.

This “soft law project” as part of the Twenty-First Century COE program sought to establish an interdisciplinary methodology for soft law studies. In the process of the Twenty-First Century COE Program, we have constructed and open to the public a general-purpose, comprehensive database that is essential to basic soft law research. We also utilized the research assistant system and the project researcher system in an effort to nurture young researchers, as well as to coordinate project members’ lectures on soft law-related subjects. This project has won great acclaim, and we are proud that it is producing international cutting-edge results. As a matter of fact, other overseas universities have launched similar projects based

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on our example.

The Global COE Program is intended to boost both human resource development and academic research, building on the foundation established by the Twenty-First Century COE Program. These education and human resource development programs focus on incorporating soft law education in the curriculum of law and politics course and facilitating lectures and seminars by researchers in other related fields, as well as implementing the above-mentioned research assistant system and the project researcher system. The project also involves the participation of graduate school students and research associates in summer programs in the law and politics course and dispatching them to seminars held in overseas universities. In addition, graduate school students and other researchers will be dispatched to overseas law firms and international institutes as interns and trainees so that they can have on-site experience with soft law formation. These extensive programs seek to train young researchers in developing Japan's positive law studies into an interdisciplinary form of social science based on demonstrative analysis, as well as nurturing legal professionals who have a high level of legal knowledge based on theoretical studies on soft law and are also internationally competitive enough to contribute to formulating rules both domestically and abroad. In terms of focus areas, the Global COE Program includes the basic theory section, the public regulation section, the commercial transactions section, and the intellectual property section. We will continue with the construction and publication of a comprehensive database on soft law, following the Twenty-First Century COE Program. We will also conduct a demonstrative analysis of individual soft law cases that emerged from the previous project and enhance our collaboration with overseas research organizations and bases.

It is important for us to widely disseminate our study results. While we have published the "Soft Law Journal" (in Japanese) and "Soft Law Discussion Paper Series" since the Twenty-First Century COE Program, we have decided to place more energy into internationally publicizing our study results by bringing out English publications. The "UT Soft Law Review" is one of these efforts. We hope we can share the results of our research with foreign scholars through this new review and thereby further contribute to the development of international collaboration in this developing area.

Changing Society and the Role of Law

2nd Annual BESETO Conference

Conference

Sep. 19, 2008

Welcome Speech

Hiroshi TAKAHASHI*

My name is Hiroshi Takahashi. I am the Managing Director and the Executive Vice President of the University of Tokyo. On behalf of the University of Tokyo, thank you for allowing me this brief address. It is a great pleasure for me to extend this cordial welcome to our distinguished colleagues from the People's Republic of China and the Republic of Korea. It is truly a great honor for us to be able to have the second Beseto Conference here in Tokyo.

The Peking University Law School, the Seoul National University College of Law, and the University of Tokyo Graduate Schools for Law and Politics--these three institutions have played an important role in legal research in East Asia. It is of great significance that legal researchers from these three institutions are now together to discuss current important legal questions.

From the viewpoint of the University of Tokyo, these international exchanges among our three institutions are of great importance. In the fiscal year of 2007 [two thousand and seven], the University of Tokyo as a whole dispatched 921 [nine hundred and twenty one] researchers to China, and 613 [six hundred and thirteen] researchers to the Republic of Korea. The University of Tokyo also accepted 471 [four hundred and seventy one] researchers from China, and 541 [five hundred and forty one] researchers from the Republic of Korea. This is more students than we send to France and Germany. We send more students only to the United States.

I should like to end these words of welcome with an earnest prayer for the great success of the Second Beseto Conference today. Thank you for your kind attention.

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Keynote speech

Koya MATSUO*

Distinguished participants from China, distinguished participants from Korea, and my dear colleagues and attendants from Japan. I am extremely pleased to have this BESETO Conference entitled “Changing Society and the Role of Law” here in Tokyo. Until recently, we Japanese law professors have been paying much attention to the development of law in European countries and the United States. But now we are much more interested in what is happening in our neighboring countries than in the past.

Year by year, Japan changes, so does China, so does Korea. I visited China for the first time in 1979. On that occasion, I was invited by the Chinese Government because the Codes of criminal law and criminal procedure had been enacted after the lawless years of the so-called Cultural Revolution. The revival of the role of law was the first step for China to become a respected member of international society. Since then I have visited China several times. Whenever I meet with academic friends there I realize the level of legal research is rising rapidly. In my field of criminal procedure, my best friend is Prof. Chen Guangzhongk (陳光中), permanent professor of China University of Political Science and Law. He seems to be always confident regarding the vigorous development of Chinese Criminal Procedure Law.

In Korea, my close friend is Professor Emeritus Kim Jhong-Won (金鍾源) of Sungkyunkwan University (成均館大学). In 1983, Prof. Kim delivered a lecture at the annual meeting of the Japan Society of Criminal Law. I recommended him to be an honorary member of that Society. The Society has more than thirty honorary members, but almost all of them are from European countries or the United States. Actually, for many years Prof. Kim was the only scholar from Asia in the list of honorary members. But we were delighted that Prof. Shin Dong Woon (申東雲) of Seoul University attended the annual meeting of the Society this year, and delivered his lecture on modern aspects of Korean criminal procedure. Dean Inoue, currently the President of the Society, conferred honorary membership to Prof. Shin. His Treatise on Korean Criminal Procedure, which consists of 1,500 large pages, clearly demonstrates the high level of his academic achievement.

Talking about books, I would refer to the fact that Japan imported so many books from China in the Tokugawa Period. It is roughly estimated that around 8,000 books were brought into Japan during the 18th and the first half of the 19th century. At that time, Confucianism prospered in Japan and scholars in that field were able to read Chinese. Some of them were interested in law books from China and studied them minutely. The Penal Code of the Ming

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dynasty was annotated and published in 1843. By the way, the port Nagasaki welcomed Chinese ships much more frequently than Dutch ships.

The Tokugawa Period has been characterized as the era of national isolation of Japan (鎖国). But recently specialists of Asian history are seeking to show a somewhat different image of Japan of that era. They assert that Japan was not isolated from her Asian neighbors. From Korea, the Tokugawa Government accepted Trust- Exchange Missions (朝鮮通信使). The procession of the Mission from Nagasaki to Edo was always a big event and an opportunity for cultural contact between Japan and Korea.

As you know, the Tokugawa regime collapsed in 1868 under Western pressure. Then Japan underwent a rapid and sweeping change. Centralized government was established, based in Tokyo, the city formerly called Edo. A school system, postal system, and new currency system were started. A railroad was constructed in 1872. In the same year, the calendar was reformed from the lunar system to the solar system. Even the hair-style of the people quickly changed. In a word, westernization occurred swiftly. I think the same thing took place, more or less, both in China and in Korea.

Many years have passed since then and we now are living in the 21st century together. From now, when I say “we” I mean C-J-K, namely China, Japan and Korea. We have built up industrial society, we have developed information technology, we have successfully held Olympic Games. Absolute poverty has almost disappeared. Medical treatment of high standards is available to most citizens. College students who receive higher education are increasing in number. Honestly, what we have achieved is gigantic.

Nevertheless, when we solve social difficulties, new problems arise one after another. Corresponding to these new problems, the role of law takes on even greater importance. Two topics of this Conference are business crime and family problems. The development of the economy has fostered large-scale business crimes. Affluent family life is one cause of domestic violence and child abuse. We share these problems in common. Another thing we have in common is, I believe, the philosophy of Confucianism. Although we are usually not conscious of it, the sayings given by Confucius occasionally come to mind. The phrase that Japanese like most is “I have friends and they have come from far away. Great pleasure!” (朋あり、遠方より来る。また楽しからずや). I, once again, express my hearty welcome to the participants from Beijing and from Seoul. Thank you.

Session 1 Business Crime (Development of Economy and Crime)

On the Crime of Taking Bribes in Chinese Criminal Law
— interpretation, Loopholes and it's complementarity —

Genlin LIANG*

Abstract: This paper interprets the composition of the crime of taking bribes which is in Chinese current criminal law, and analyzes the loopholes that exist in the provision of crime of taking bribes. Further more, the author brings up his ideas and suggestions about how to properly interpret the existing provision of crime of taking bribes, how to improve the Chinese criminal law system about bribery, and how to make the criminal liability more strict from the angles of interpretation and legislation.

Key words: crime of taking bribes interpretation Loopholes complementarity:

Contemporary China is experiencing an unprecedented social transformation, but also facing serious corruptions. Corruption has affected China's social stability and political stability which attracts public attention. I think the basic reason of corruption including two aspects: First, there are serious loopholes in the criminal legislation, administrative regulations and the building of systems against corruption. Second is the criminal justice practice failed to crack down on crimes of corruption. The dark figure of corruption and bribery is too high, as a result of which most officials take the risk to corrupt. The phenomenon that "the crime deserves punishment escape from being punished" is cause both by the failure of judicial practice and the loopholes in the criminal law.

1. the object of crime of taking bribes— the extension of bribe

According to Article 385 of Chinese criminal law, state personnel who take advantage of their office to demand money and things from other people or if they illegally accept money and things from other people and give favors to the latter are guilty of the crime of taking bribes.

So in China, bribes specifically refer to money and goods with economic value. According to Chinese dictionary, the meaning of "bribe" refers only to property.

However, with the development of society, in practice there are a lot of forms of bribery which is not committed by directly trading "public power" with "private wealth". for example in the exercise of their duties, state personnel demand or receive illegal gains from their

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relative or a third party in the way such as setting claims, equity, waiving debt, offering free labor, free renovation of house, free tour to go abroad, reduction of loan interest, the right to use the provision of shelter, urban accounts, the personnel transfer, promotion, the chance to study abroad, entertainment consumption, or even to provide sexual services.

In the strict sense, these illegal benefits can not be directly equivalent to the Criminal Code on the “money and things”, so the above acts of state personnel are not crime of taking bribes. This is the legislative reason why so many officials can escape from the criminal punishment.

In fact, the vast majority of foreign countries in their legislative and judicial practice extend “bribe” to property, property interests and non-property interests. In today’s world of national and regional legislation, some generally define the object of the crime of taking bribes as “bribes” (such as Japan, South Korea), some define it as “interest” (such as Germany, Brazil), and some define it as “bribes or other improper benefits” (such as Taiwan). With such general legislation, in these countries and regions, it’s up to the judge to explain the specific meaning the bribes in a case. By comparison, China’s current Criminal Code lagging behind in today’s world of anti-corruption legislative and judicial practice and does no help to carry out the anti-corruption campaign.

I think according to this social reality that so many officials exchange the “public power” to property interests or non-property interests instead of “private property”, from a legislative point of argument, the Chinese Criminal Law should expand the scope of the object of the crime of taking bribes to property interests, particularly non-property interests. But before that improvement, we should address a pre-issue which is measuring criminal liability according to the amount of bribes. We should completely change this unreasonable rules and practices on crime of taking bribes in legislative and judicial practice.

The nature of the crime of taking bribes is the desecration of the principle that the official acts can not be bought. The value of property is impossible to reflect the whole picture that how the bribery acts do harm to society. And the non-property interests can’t be calculated. So the value of the bribes is only a factor that should be considered. Beside the amount of bribes, the means, the circumstances, the social impact and the extent of the damage to the integrity of the official acts need to be considered during the conviction.

Before the existing criminal law provisions on the crime of taking bribes being revised and improved, how to deal with the various bribery that not being included in the exist provisions? I think that in accordance with the principle of legality, the judicial practice can only deal with the bribery case under the existing legal provisions. The judges are not allowed to explain the word “property” beyond its literal meaning and the possible meaning otherwise it becomes the analogical explain. That means, before the provision is revised, the non-property interests can not be included in the object of the crime of taking bribes.

However, we also must acknowledge that the principle of legality does not exclude necessary explanations in order to apply criminal law, or even not absolutely reject expand explanation. Considering that the bribery should not be narrowly interpreted as direct giving and receiving money and things among people, the interests with the property value such as setting claims, equity, waiving debt, offering free labor, free renovation of house, free

tour to go abroad, reduction of loan interest, the right to use the provision of shelter, can be reasonably construed as the property. According to this interpretation, the act that state personnel betrayed the public to obtain the property interests can directly lead to criminal liability under the existing provision of crime of taking bribes.

2. The objective aspect of crime of taking bribes

According to Article 385 of Chinese criminal law, the objective aspect of the crime of taking bribes is taking advantage of their office to demand money and things from other people or illegally accepting money and things from other people and giving favors to the latter. There are some points to note:

First, the perpetrator must take advantage of their office. If the official simply illegally accepts money and things without take advantage of their office, then he does not commit a crime. But in fact, such conduct damages the integrity of the official acts and should be treated as bribery, but under the existing provision, it is not crime of taking bribes which can only be dealt with party and government discipline.

Second, the basic way to perpetrate the crime of taking bribes is A: to demand money and things from other people or B: if they illegally accept money and things from other people they should as well give favors to the latter. B requires two objective elements: demanding money and things and giving favors to people who provide the property. This is an improper regulation which can lead to absurd conclusion such as if the official accepts money from other people but not give favors to them they are not guilty. This regulation is also a legal barrier to investigating and prosecuting the bribery for the prosecutor must prove that the accused has using the advantage of his office to seek benefit for the trustor.

In recent years, in order to meet the shortfall of the provision of crime of taking bribes, scholars and judges suggest that the interpretation of the factor of “give favor to the briber” should be expanded as follows: “promise, start or has started in official practice to give favor to the briber” while the factor is still subjective.

I. think this is a reasonable and feasible way to meet the shortage of the law under the principle of legality. But it is not the perfect solution. I also advocated that the redesign of the crime of taking bribes should abolish the factor of giving favor to other people.

Third, there are other forms of bribery:

II. State personnel in their economic operation accept various kinds of kickback and handling fees for their personal use in violation of state provisions are also guilty of the crime of taking bribes and are to be punished accordingly.

III. State functionaries who help trustors to seek illegitimate gain, exact or accept articles of property from trustors by taking advantage of the facilities created by their authority of office or position, or through the action related to the post of other state functionaries, shall be dealt with according to the crime of accepting bribes.

3. The subject of crime of taking bribes

The subject of crime of taking bribes is national personnel. According to Article 93, the term “state personnel” in criminal law refers to all personnel of state organs. who are treated as state personnel are personnel engaged in public service in state-owned corporations, enterprises, institutions, and people’s organizations; and personnel which state organs, state-owned corporations, enterprises, and institutions assign to engage in public service in nonstate-owned corporations, enterprises, institutions, and social organizations; as well as other working personnel engaged in public service according to the law. Please note the following questions.

I. The meaning of “state organs” and “engaged in public service”.

The so-called “state organs” means the authorities that exercise state power according to the laws and regulations, including the national legislative, executive, judicial and the military authorities.

“engaged in public service” means to exercising public power in accordance with the laws and engaging in the administerial activities, rather than directly engaging in production and business activities. The key point to determine whether the personnel are state functionaries is whether they perform the public power.

According to legislative interpretation, when any of those persons who perform public services in the organizations that exercise the state administrative power according to the laws and regulations, those persons that perform public services in the organizations that are entrusted by the state organs to exercise the power on behalf thereof or those persons that are not state functionaries but perform public services in the state organs exercises his authorities on behalf of a state organ he shall be treated as national personnel.

II. The meaning and scope of state-owned corporations, enterprises, institutions and people’s organizations

The state-owned corporations include solely state-owned limited liability Companies and Joint Stock Limited Companies sponsored solely by state-owned corporations. State-owned enterprises refer to those economic entities, the properties of which belong to the State. The state-owned institutions are the science, education, cultural, health, sports, broadcast and publish undertakings which are established and managed by state. People’s organizations are financed by the nation and responsible for organizing and coordinating social and public affairs, such as the Communist Youth League, Trade Unions, Women’s Federations, etc.

III. The definition of “other working personnel engaged in public service according to the law”

That refers to staff elected or appointed according to the laws besides the personnel mentioned above whom engage in public service. According to legislative interpretation, when a member of a villagers’ committee or of any other village grassroots organization assists the people’s government to exercise the following administration tasks, he shall be regarded as “other working personnel engaged in public service according to the law” as mentioned in the

second paragraph of Article 93 of the Criminal Law:

- (1) The administration of funds and materials for disaster relief, emergency rescue, flood prevention and control, special care for disabled servicemen and the families of revolutionary martyrs and servicemen, aid to the poor, relocating people and social relief;
- (2) The administration of funds and materials donated by the public for public welfare undertakings;
- (3) The administration of operation and management of land, as well as the management of house sites;
- (4) The administration of the compensations for land requisition;
- (5) Withholding taxes;
- (6) The tasks relating to family planning, permanent residence, etc. ;
- (7) Assisting the people's government to exercise other administration tasks.

The article 163 is non-state personnel taking bribes. Any of the employees of any company or enterprise or any other entity demands any property by taking advantage of his position or accepts any money or property of any other person so as to seek any benefits for such person, and if the amount is considerably large. The main difference between this crime and crime of taking bribes is the different identity of the subject. The subject of the crime of taking bribes of non-state personnel must not the national personnel.

So where anyone who is engaged in public services in any state-owned company, enterprise or any other state-owned entity or anyone is delegated by any state-owned company or enterprise or any other state-owned entity to any non-state-owned company or enterprise or any other entity to engage in public services commits any of the acts as described in either of the preceding paragraphs shall be convicted and penalized according to provision of crime of taking bribes.

4. The criminal intention of crime of taking bribes

The intention to take bribes is required by the crime of taking bribes. The people must deliberately exchange public power for private wealth.

The bribery intention is not the intention to accept the items from the briber at the time to secure benefit for the latter but acknowledging that the benefit they seek by using their official status is the price of items they received. So not matter if they first accept the property then secure the profit or first secure the profit then accept the property or the two happened at the same time, it will not affect the existing of the bribery intention.

But if the presents for thanking the personnel were given secretly or were sent by force then the state functionary doesn't have the bribery intention. As regulated in the judicial interpretation- a state functionary who timely returns or surrenders an item after accepting the item from a person shall not be determined as an acceptance of bribes. The return or surrender of an item by a state functionary after acceptance of a bribe for the purpose of covering up the crime because of any investigation of him or her or a related person or matter shall not affect its determination as a crime of taking of bribes.

Whether or not the personnel are in office when they receive the property doesn't matter too. As regulated by the same interpretation- a state functionary who agrees to accept an item from a person after leaving office before or after securing the benefit of such a person by making use of his or her official status and accepts the item after leaving office shall be punished for the acceptance of bribes. Where a state functionary accepts items continuously from a person before and after leaving office in order to secure the benefit of such a person by making use of his or her official status, all items accepted before and after leaving office shall be counted in the amount of bribes.

5. The joint crime of taking bribes

A joint crime is an intentional crime committed by two or more persons jointly. So if the two state functionaries using their respective office to demand the bribes or illegally accept the bribes from other people and secure the benefit for him, they shall be punished for the joint crime of taking bribes. If the state functionary hints to the briber to give the relative items to a third party or the state functionary and the briber have a tacit agreement that the state functionary seek benefit for the briber using his official status and the briber give the relative items to a particular affiliate they also are guilty of joint crime of taking bribes. In practice, we find that some state functionaries accepting illegal gains through their spouse, relatives, friends or lovers while they act cleanly on the surface. In most cases, the state functionaries feign ignorance of such illegal action, but implying tacit encouragement or consent. Once the conspiracy was disclosed, the state functionary and his relatives agree in secret to insist that the functionary has no knowledge of the matter in order to avoid criminal prosecution. In response to this phenomenon, it must be stressed that the property as bribe is not necessarily be accepted by the national staff in person, even not be possessed by the national staff.

A state functionary who hints to a person to give the relevant item to a particular affiliate in order to secure the benefit of such a person by making use of his official status shall be punished for the crime of taking bribes.

Where a particular affiliate conspires with a state functionary in committing the crime of taking bribes, the particular affiliate shall be punished as an accomplice in the crime of taking bribes. Where a person other than a particular affiliate conspires with a state functionary for their joint possession of an item accepted by the state functionary from another person in order to secure the benefit of such another person by making use of his official status shall be punished as an accomplice in the crime of taking bribes.

The "particular affiliate" as interpreted in judicial Opinions refer to a person who has such a relationship as close relative, lover or any other common interest with a state functionary.

6. Distinction between crime of taking bribes and noncrime

6.1 The distinction between crime of taking bribes and the acceptance of legal gains, proper gifts and borrowing.

If the item is not a gift as it appears but in fact the bribes sending by the person who has a requirement, we should pay special attention to this phenomenon. We shall judge from the following aspects: 1) what's the relationship between the giver and the taker; 2) whether the giver asked for a favor, and whether the taker promised, start or has started to seek benefit for the giver; 3) whether the taker used his official statue; 4) if the action was conducted in secret; 5) the number and value of the items.

The legitimate reward is different from the bribes in that the latter is got by using the state functionary's office or it's illegal.

If the state functionary demand or accept the items in the name of borrowing he is also the suspect of the crime of taking bribes. These several things should be noted: 1) if there is any proper reason of the borrowing; 2) the use of the borrowing; 3) are there any economic exchanges between the two party; 4) if the lender ask the state functionary for any favor; 5) is the taker has any expression of intention or act of return; 6) is the taker has the ability to return the money; 7) the reason for not returning the money.

The failure to undergo the registration of entitlement change or the registration of entitlement change in the name of another person by a state functionary who accepts housing, automobile or any other item from a person in order to secure the benefit of such another person by making use of his or her official status shall not affect the determination of acceptance of bribes.

6.2 The distinction between the bribery in disguise and the business behavior and entertainment

The judicial interpretation prescribes that:

1) A state functionary who accepts an item from a person in any of the following forms of transaction in order to secure benefits for such a person by making use of his or her official status shall be punished for the of acceptance of bribes:

- (a) Purchasing any house, automobile or any other item from such a person at a price that is obviously lower than the market price;
- (b) Selling housing, automobile or any other item to such a person at a price that is obviously higher than the market price; and
- (c) Accepting illegally an item from a person in any other form of transaction.

The amount of bribe shall be calculated as per the difference between the local market price and the actual paid price at the time of transaction.

The market price as mentioned in the preceding paragraph shall include the minimum preferential price that is made in advance by a commodity dealer and is not intended for a particular person. The purchase of commodity at a preferential price according to the various

preferential conditions set forth in advance by a commodity dealer shall not constitute the acceptance of a bribe.

2) The free shares shall refer to the shares obtained without making contribution. A state functionary who accepts free shares offered by a person in order to secure the benefit of such a person by making use of his or her official status shall be punished for the acceptance of bribes. Where share transfer registration has been made, or the relevant evidence proves that the share has been actually transferred, the amount of bribe shall be calculated as per the value of shares at the time of transfer, and any bonus received shall be handled as the fruit from the bribe. Where the shares have been actually transferred, and the benefit is received in the name of a share bonus, the amount of benefit actually obtained shall be deemed as the amount of bribe.

3) A state functionary who “jointly” runs a company with his due contribution being made by a person or makes any other “joint” investment in order to secure the benefit of such a person by making use of his or her official status shall be punished for the acceptance of bribes. The amount of bribes shall be the amount of contribution made by such a person for the state functionary.

A state functionary who accepts “profits” in the name of jointly running a company or making any other jointly investment but does not make actual contribution and take part in the management and business operation in order to secure the benefit of the person by making use of his or her official status shall be punished for the acceptance of bribes.

4) A state functionary who accepts, without making contribution, “proceeds” in the name of entrusting a person with investment in securities or futures or any other financial management or accepts, though he actually makes his contribution, “proceeds” that are obviously higher than the proceeds receivable on the contribution in order to secure the benefit of such a person by making use of his or her official status shall be punished for the acceptance of bribes. The amount of bribes shall be calculated as per the amount of “proceeds” in the former circumstance; and as per the difference between the amount of “proceeds” and the amount of proceeds receivable on the contribution in the latter circumstance.

5) Pursuant to Article 7 of the Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate, a state functionary who accepts an item from a person in the form of gambling in order to secure the benefit of such a person by making use of his or her official status shall be punished for the acceptance of bribes.

In practice, attention shall be paid to distinguishing the acceptance of bribes from the gambling activity or entertainment. Specifically, in determination, the judgment shall be made mainly on the basis of the following factors: (a) background, place, time and number of gambling; (b) source of gambling stakes; (c) conspiracy with any other gambling participant; and (d) specific condition and amount of the money or material won or lost.

6) A state functionary who requests or accepts that a person arranges a job for a particular affiliate so that the particular affiliate collects the so-called wages or salaries without actual work in order to secure the benefit of such a person by making use of his or her official status

shall be punished for the acceptance of bribes.

7. The accusation System of Crime of taking bribes

Paragraphs I of Article 385 describes the basic act of bribery and article 388 describe acts of bribery in disguise. I think the existing criminal provisions of the crime of taking bribes count system are still difficult to cover the various forms of acceptance of bribes in reality.

- 1) It's not crime if the national staff simply accepting property or other illegal gains.
- 2) The bribes are limited in money and other things, not including lots of non-property interest.
- 3) It's not proper that seeking benefit for the briber is one of the constitutive elements of crime of taking bribes.
- 4) Not lay down clearly whether it is a crime if the national personnel deliberately separate the time to accept money and the time to seek benefit of the briber.
- 5) Not lay down whether it is a crime if the particular affiliate possesses the bribes.
- 6) Not separate the conditions that taking bribes with breaching the duty and not breaching the duty.
- 7) Not adopt the legislative to establish trading in influence as criminal offence. Trading in influence refers to acts such as the public official abuse his real or supposed influence with a view to obtaining from an administration or public authority an undue advantage for the instigator who promise, offering or giving to a public official or any other relative person an undue advantage.

So in order to complement the existing accusation System of Crime of taking bribes, I advocate of the legislation in the serious of crime and punishment. There are two kinds of such legislation- symmetry pattern and principal- subordinate pattern. The Japanese adopts the latter one which is the ideal method dealing with the crime of taking bribes that need to be adopted by China. If the trading in influence is introduced into the legislation, it will be a comparably perfect accusation system on crime of taking bribes.

Session 1 Business Crime (Development of Economy and Crime)

Three Controversial Issues in Controlling Corporate Crimes in Korea

Kuk CHO (曹國)*

Introduction

The Korean economy has grown rapidly and has accomplished a dramatic transformation, from one of the poorest countries in the world to a major economic power, in less than four decades. From 1962 to 2007, Korea's Gross Domestic Product (GDP) increased from US\$2.3 billion to US\$969.9 billion, with its per capita GNI soaring from \$87 to about \$20,045.¹ Companies and business leaders have certainly made significant contributions to the development. The more the develops, however, the higher the corporate crime rate becomes. In particular, there have appeared a number of scandals in which business conglomerates [= *chaebul*], including Samsung, Hyundai and SK, are involved.

It could be said that the origin and seriousness of corporate crimes in Korean society is somewhat distinguished from that of the other societies. The past regime which prioritized fast growth of the nation's economy implicitly tolerated substantial number of corporate crimes, employing protective policies for corporations. Also, there were some corrupt officials who turned a blind eye to the misconducts of those corporations. Regardless of the reason, corporate crime has now become a deeprooted problem with ceaseless outbursts of corporate scandals in Korean society and there is a serious call for reform in regulating these crimes.

Korean criminal law has faced a series of controversies regarding how to fight corporate crime. It is on debate whether or not it is legitimate for a number of special criminal acts to have provisions imposing a criminal fine on corporations; whether or not the crime of 'occupational breach of trust' in the Korean Penal Code is excessive intervention into business

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1 See http://www.korea.net/korea/kor_loca.asp?code=R01 (lastly visited in October 10, 2008).

judgment. Lenient sentencing and frequent pardons for corporate criminals are strongly criticized by the general public. This Article briefly reviews these three issues.

I. ‘Dual Punishment Provisions’ in Special Criminal Acts

1. Are They Desirable Legislations?

The Korean Penal Code does not provide a general provision to punish corporations. Instead, a number of special criminal acts have provisions to impose a **criminal** fine on corporations, besides the administrative fines on corporations and provisions to punish persons who have directly been involved in corporate crimes. These provisions are called the ‘dual punishment provision.’ (兩罰規定)² The nature of the duality of these provisions lies in the fact that such provisions punish the corporation itself as a fictitious person while the illegal act has been conducted by a natural person or persons.

Despite the ‘dual punishment provisions,’ the majority of Korean jurisprudence theoretically rejects to acknowledge the criminal responsibility of corporations, for they do not have a human personality, which is the basic premise to have criminal responsibility. Adhering to the traditional Continental legal principle of non-punishability of companies—“*societas delinquere non potest.*”—, they argue that although they are punished due to the ‘dual punishment provisions,’ corporate entities are still incapable of having either mens rea or the ability to act criminally. They further argue that criminal fines imposed on corporations should be repealed and replaced by **administrative** fines. They follow the German approach regarding the criminal responsibility of corporations.³

The minority of Korean jurisprudence including the Author contend that corporations have both the ability to act criminally and to receive punishment, at least in the sphere where the ‘dual punishment provisions’ are applied. They argue that the criminal responsibility of corporations is not a matter of ontology about corporations, but of **legal policy** about corporate crimes; it is necessary to attribute criminal responsibility to corporations, considering the weakness and ineffectiveness of the current civil and administrative sanctions for corporate misconducts under the Korean legal system. For instance, both the punitive damage system and class action system which is aimed at deterring corporate misconducts are alien to the Korean legal system. Even a high administrative fine is not much feared by the corporations for they can easily recover the financial damage by raising the commodity or stock price. Following the Dutch, French and Chinese Penal Codes,⁴ they argue that a general

2 This legislation adopted the Japanese legislation for punishing corporations and is equivalent to the Article 31 of the Chinese Penal Code.

3 Article 30 of the Order Breach Act [= *Ordnungswidrigkeitenrecht*] of Germany provides administrative fine, which is called “*Bußgeld*” in German, for corporate misconducts.

4 Article 52 of the Dutch Penal Code; Articles 131-37~131-39 of the French Penal Code; Article 30 of the Chinese Penal Code. The Committee of Ministers of the Council of Europe made a recommendation as follows: “To render enterprise liable, consideration should be given in particular to: applying criminal

provision to acknowledge the criminal responsibility of corporations should be stipulated in the Penal Code.

Personally, the Author furthers to argue that the imposing of a criminal fine is not enough to achieve effective deterrence on corporate crimes, and that various criminal sanctions such as dismantlement, close-down, and probation of corporations,⁵ should be established. Although Korean administrative law stipulates dismantlement and close-down of corporation as an administrative sanction, they have rarely been imposed on mischievous corporations for the administrative authorities do not have sufficient authority, resource, or the investigative capability to pursue corporate crimes. Further, because the offenders themselves are aware that the state depends on the business sector to deliver a stable economy which naturally leads to a lenient administrative sentencing, they use the corporation as the vehicle for the crime.⁶ Thus, criminally unregulated corporate behavior is bound to end in insider trading, antitrust violations, fraud involving the consumers, damage to the environment, exploitation of labor and the failure to maintain a fiduciary responsibility towards stockholders.⁷

2. Liability With Fault or Without Fault?

On the other hand, there is another hot debate going on regarding the nature of a 'dual punishment provision.' A group of special criminal acts with a 'dual punishment provision' explicitly provides that corporate liability in the act is 'liability with fault,' while other groups do not.⁸ Regarding the former group, no debate on the nature is necessary.

With regard to the latter group, however, debate is inevitable. There are competing trends of understanding in Korean jurisprudence on the matter of whether corporate liability of the latter group is liability with fault or without fault. It is logically evitable for the majority of Korean jurisprudence, who rejects the legitimacy of 'dual punishment provisions,' to explain the nature of corporate liability in the latter group as 'liability without fault.' It is paradoxical that those who prefer non-criminal sanction for corporate misconducts strict standard of liability.

The Korean Supreme Court has displayed inconsistent decisions on this issue. Although the Court adopted 'liability with fault' in some decisions,⁹ it recently held that a 'dual

liability and sanctions to enterprise, where the nature of the offense, the degree of fault on the part of the enterprise, the consequence for society and the need to prevent further offense so require; applying other systems of liability and sanctions, for instance those imposed by administrative authorities and subject to judicial control, in particular for illicit behaviour which does not require treating the offender as a criminal." [Council of Europe, Committee of Ministers, Recommendation no. R(88) 18, Art. I. 3 (20 October 1988)].

5 See Articles 131-39 of the French Penal Code; United States Sentencing Guidelines, Manual § 8B-8C.

6 See RUSSELL MOKHIBER AND ROBERT WEISSMAN. *THE CORPORATE PREDATORS : THE HUNT FOR MEGO-PROFITS AND THE ATTACK ON DEMOCRACY* (1999).

7 See DAVID M. ERMANN & RICHARD J. LUNDMAN EDS., *CORPORATE AND GOVERNMENTAL DEVIANCE : PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY* (6th ed. 2002).

8 It is necessary for the National Assembly to provide uniformity for 'dual punishment provisions.'

9 Decision of Sep. 14, 1982, 82Do1439 (The Korean Supreme Court).

punishment provision' should be interpreted by the standard of 'liability with fault.'¹⁰ The Korean Constitutional Court also held that it is against the principle of criminal responsibility to punish a freight company and a freight owner by use of a 'dual punishment provision' when the defendants were not negligent of selecting or supervising the driver who drove the overloaded truck;¹¹ it is against the principle of criminal responsibility to punish an owner of the dental laboratory by use of a 'dual punishment provision' when the defendant was not negligent of selecting or supervising the employee who practiced medical treatments without a license.¹² The American vicarious liability,¹³ which holds that corporate organizations may be held vicariously liable for their employees' crimes, is not adopted by Korean courts.

The Author has argued that 'liability without fault' violates the fundamental principle of burden of proof in criminal law. Criminal punishment of corporations should be imposed with the utmost caution, since the effect of the punishment could be deflected from the wrongdoer personally and distributed among all innocent parties who supply labor and the capital that keep the corporation solvent. Subsequently, discrete adjudication on the existence of fault is indispensable in due process. 'Liability without fault' imposes criminal liability on corporations for the actions of corporate employees, even in the absence of specific proof of corporate fault, thereby transferring the burden of proof regarding fault from the government to the defendant. What is more troubling is that corporations can be held vicariously liable even when an employee acts contrary to corporate policy or disobeys specific instructions. 'Liability without fault' also does not serve the legitimate concern of criminal law. Under this standard, the corporation cannot avoid liability by showing that it took all the proper actions to prevent criminal conduct by its employee or agent. Here criminal sanction on the company cannot further neither specific nor general deterrence, for the corporation is already doing exactly what society wants the corporation to do.

In this context of acknowledging the criminal liability of corporations, the Author has maintained that the corporation should be punished for its own negligence of selecting or supervising the individual who has directly been involved in corporate crimes; the Prosecution is given the burden of proving the corporation's negligence. Recently the Ministry of Justice announced that they will submit bills to reshuffle the 'dual punishment provisions' in special acts, following the principle of 'liability with fault.'¹⁴

10 Decision of Feb. 24, 2006, 2005Do7673 (The Korean Supreme Court).

11 Decision of Jun. 1, 2000, 99HeonBa73 (The Korean Constitutional Court).

12 Decision of Nov. 29, 2007, 2005HeonKa10 (The Korean Constitutional Court).

13 In its landmark decision *New York Central & Hudson Railroad v. United States*, 212 U.S. 481 (1909), the US Supreme Court rejected the common law notion that corporations were immune from criminal prosecution. The Court used the tort law concept of "*respondeat superior*" to hold the defendant, New York Central, criminally liable for the employee's conduct (Id. at 494).

14 See <http://www.lawtimes.co.kr/LawNews/News/NewsContents.aspx?kind=&serial=41421> (lastly visited in October 10, 2008).

II. The Crimes of ‘Occupational Embezzlement’ and ‘Occupational Breach of Trust’ in the Penal Code

The two basic provisions aimed at deterring corporate misconducts are the crimes of ‘occupational embezzlement’ (業務上 横領) and ‘occupational breach of trust’ (業務上 背任) in Article 356 of the Korean Penal Code. There are a number of special acts to punish corporate crimes such as the Act for Aggravated Punishment for Specific Economic Crimes,¹⁵ the Commercial Act,¹⁶ the Act for Capital Market and Business for Finance and Investment,¹⁷ and the Act for Inspection of Corporation.¹⁸

1. The Crime of ‘Occupational Embezzlement’

The crime of ‘occupational embezzlement’ in Article 356 of the Korean Penal Code punishes a person who, having the custody of another person’s *property* embezzles or refuses to return it in violation of one’s duty. The convicted person shall be punished by imprisonment of not more than five years or by a fine not exceeding fifteen million Won.¹⁹

The crime of ‘occupational embezzlement’ is applied to punish the “secret fund” (秘資金) making through “fake contracts” or “window dressing” (粉飾會計) in accounting, which has been a chronic problem in the Korean business community. The “secret fund” is used to bribe politicians, governmental officers, or bank staffs, and for the company owner’s private purpose. In the Baeksong Comprehensive Construction, for example, the defendant made a “secret fund” and consumed it for his private use. He was found guilty of ‘occupational embezzlement.’²⁰ In some others cases, the defendants were found guilty for they fabricated their spouse, parents-in-law, children as fictitious employees on document and paid salaries to them.

A director responsible for the embezzlement of corporate property is punished even if a general meeting of stockholders later approves the embezzlement. For instance, a CEO of a corporation, who paid his attorney fee with the corporation’s money, was found guilty of the crime of ‘occupational embezzlement,’ even though a general meeting of stockholders approved the payment.²¹

15 *Teukcheong kyeongche kachung cheopeol deung e kwanhan poepryul*, Law No. 3693, December 31, 1983, last revised on August 3, 2007 as Law No. 8635.

16 *Sang beop*, Law No. 1000, January 20, 1962, last revised on August 3, 2007 as Law No. 8582.

17 *Chabonsijang kwa keumyungtujaeop e kwanhan beopryul*, Law No. 8863, February 29, 2008.

18 *Chusikhoesa eui oibukamsa e kwanhan beopryul*, Law No. 3297, December 31, 1980, last revised on March 21, 2008, as Law No. 8984.

19 This provision is equivalent to Articles 271 of the Chinese Penal Code and Article 253 of the Japanese Penal Code.

20 THE PROSECUTION OFFICE, THE WHITE PAPER OF INVESTIGATION OF PUBLIC FUND MISUSE 347-48 (2003).

21 Decision of Feb. 23, 1990, 89Do2466 (The Korean Supreme Court).

2. The Crime of ‘Occupational Breach of Trust’

Article 356 of the Penal Code also provides the crime of ‘occupational breach of trust.’²² It punishes a person, who is in charge of administering another person’s business, obtains **pecuniary advantage** or causes a third party to do so from another in violation of one’s duty, thereby causing **pecuniary loss** to such person. The convicted person shall be punished by imprisonment of not more than five years or by a fine not exceeding fifteen million Won.²³ “Pecuniary loss” includes both ‘active loss,’ which means the decrease in existing assets, and ‘passive loss,’ which means the loss of future interests.²⁴

The crime of ‘occupational breach of trust’ protects another person’s pecuniary advantage, while the crime of ‘occupational embezzlement’ protects another person’s property. The former is conceptually broader than the latter, so the former is applicable only when the latter cannot be applied.²⁵

(1) An Effective Tool to Deter the Breach of Fiduciary Duties by Directors

The crime of ‘occupational breach of trust’ applies to several kinds of breach in fiduciary duties by directors. In the cases of the Kia Conglomerate and Saehan Conglomerate, for instance, the defendant lent money to affiliated companies that were almost broke or stood to guarantee them, then could not get the money back and assumed the payment liability, so the defendant was found guilty.²⁶ In the cases of the Daenong Conglomerate, the defendant purchased an affiliated company’s stocks at far higher price than market price to defend the company owner’s right of management in the company.²⁷ In cases of the Seongwon Construction and the Jindo, the defendant purchased the company owner’s stocks at a far higher price than the market price.²⁸ In cases of the Ssangyong Construction, the defendant sold the corporation’s real estate to the company owner’s elder sister at a far lower price than the market price.²⁹

Like the crime of ‘occupational embezzlement,’ the crime of ‘occupational breach of trust’ is also applied to punish the “secret fund” making. In the Daewoo Automobile Sales

22 This provision is equivalent to Articles 247 of the Japanese Penal Code. It is also similar to Article 272 of the Chinese Penal Code, which is unique in that it does not punish the defendants if they return the abused money in three months. Article 169-1 of the Chinese Penal Code also criminalizes serious breach of fiduciary duties by directors.

23 The Korean Commercial Act also provides the crime of “special breach of trust.” Arts. 622-623.

24 Decision of Jun. 23, 1981, 80Do2934 (The Korean Supreme Court).

25 The crime of ‘occupational breach of trust’ is stipulated under the different chapter from the crime of ‘occupational embezzlement’ in the Japanese Penal Code. The Korean Penal Code provides two crimes under the same chapter.

26 THE PROSECUTION OFFICE, *supra* note 20, at 55.

27 Decision of Jun. 25, 1999, 99Do1141 (The Korean Supreme Court).

28 Decision of Aug. 11, 2005, 2004 KoHap414 (The Seoul Central District Court).

29 Decision of Mar. 16, 2005, 2004 KoHap1338 (The Seoul Central District Court).

Corporation case, for example, the defendant overpaid the construction fee and the difference was returned, with which the defendant used to make a “secret fund.” He was found guilty of ‘occupational breach of trust’ for he caused pecuniary loss to the corporation when he overpaid.³⁰ In the Hyundai Electronic case, the defendant drew checks on the bank by using a fake document, under the disguise of purchasing foreign currency, and laundered the checks to make a “secret fund.”³¹

(2) Too Much Interference In ‘Business Judgment’

The crime of ‘occupational breach of trust’ has been criticized for excessive interference in ‘business judgment’ in the private sphere. The Korean Supreme Court has expanded the scope of the crime by interpreting that it is enough to cause a **risk** of “pecuniary loss” to constitute the crime.³² This interpretation comes from a consideration that it takes a long time to confirm whether or not the “pecuniary loss” occurs in reality, therefore preemptive intervention is necessary.

Following this interpretation, the crime of ‘occupational breach of trust’ can be constituted even in the case where such a risk is removed after it has already taken place. For instance, in the case that the defendant, who is a President of the Buddhist Broadcasting, lent donation money for the company to his close friend, a sincere Buddhist, without security, the defendant was found guilty even though his friend paid interests in time and reimbursed the principal amount.³³

The Court also held that ‘leverage buyout’ (=LBO) may constitute the crime of ‘occupational breach of trust.’ Leveraged buyouts allow financial sponsors to make large acquisitions in the target company’s equity without committing all the capital required for the acquisition through leverage which the company being purchased is obligated to repay. So directors in the target company assume a risk of losing the asset provided as a security for the bank. The Court held that the directors are guilty even if the shareholders of the company agree with the leveraged buyout, **unless** financial sponsors have provided security for the target company.³⁴ Although in this LBO case the financial sponsor used the loaned money to pay the target company’s debt out and as a result its financial structure improved, the Court focused on the target company’s possible risk when the LBO was done.

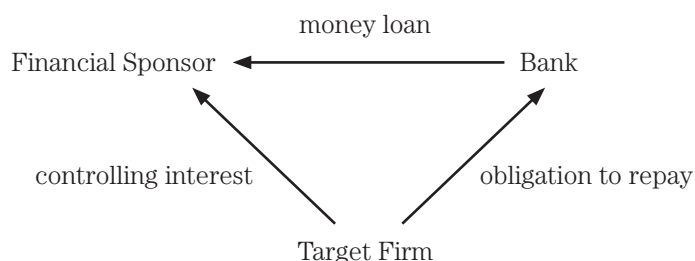
30 THE PROSECUTION OFFICE, *supra* note 20, at 19.

31 Decision of Apr. 28, 2005, 2005 KoHap64 (The Seoul Central District Court).

32 Decision of Apr. 11, 2000, 99Do334 (The Korean Supreme Court).

33 Decision of Feb. 8, 2000, 99Do3338 (The Korean Supreme Court).

34 Decision of Nov. 9, 2006, 2004Do702 (The Korean Supreme Court).



It is a formalist approach to decide on the crime of ‘occupational breach of trust’ solely depending on whether or not financial sponsors have provided security for the target company. It is necessary to further analyze the scale of the loan, the schedule and possibility of repayment, and the money flow of the target company.

For these reasons, business corporations and some criminal law and corporate law scholars argue that the crime of ‘occupational breach of trust’ in Article 356 is a peculiar provision resulting in over-criminalization of disputes in the civic society. The Supreme Court’s extensive interpretation of “pecuniary loss” may violate *lex stricta* which prohibits the use of analogy. It uses analogy beyond the possible meaning of language of the legal provision, allowing room for the judge to create law by extending the scope of punishability.

(3) Repeal of the Crime of ‘Occupational Breach of Trust’?

Highlighting this strict and extensive interference concerning the crime of ‘occupational breach of trust,’ some academics argue that the crime should be abolished.³⁵ The Author agrees with this abolitionist argument in that business judgment need to be respected by the courts and criminal law should play a role as *prima ratio*, not *ultima ratio*, to control corporate misconducts. To cite a US court’s decision, “The judges are not business experts.”³⁶

However, not all business judgment should always be automatically exempted from criminal sanction. Rather, possible abuse of business judgment should be carefully checked. The **relevant institutional surroundings** in the United States where the ‘business judgment rule’ is working are not available in Korea. For instance, both the punitive damage system and the class action system, which is utilized to deter corporate misconducts, are alien to the Korean legal system. It is also necessary to remember that **the ownership of corporations is not separated from their management in a number of Korean companies**. These are the reason why the Author does not agree with the adoption of the US ‘business judgment rule’ in Korean criminal law, which establishes a presumption that “in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”³⁷

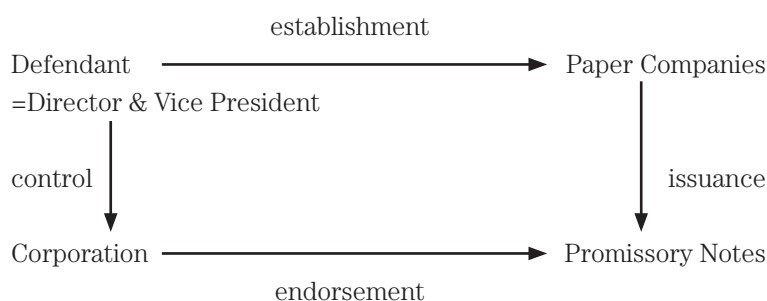
35 See SANG-DON LEE, YUNRI KYONGYOUNG KWA HYEONGBEOP [Ethical Business Management and Criminal Law] 68-71 (2005).

36 *Dodges v. Ford Motor Co.*, 170 N.W. 668, 685 (Mich. 1919).

37 *Aronson v. Lewis*, 473 A.2d 805 (Del. Sup. Ct. 1984).

The abolitionists also argue that the crime of ‘occupational breach of trust’ should not be applied to the director accused of consuming corporate money, if stockholders have agreed with the consumption.³⁸ The rationale is that the corporation is a property of the stockholders, and therefore the consent of stockholders negates the illegality of the director’s conduct.

Under this theory, however, the interests of the minority shareholders are not protected at all. Let me pick up a few examples. The defendant issued promissory notes under the name of two paper corporations that he rushed to establish in order to acquire the fund. Then he made a corporation endorse the notes. He and his brothers own the majority of stocks of the corporation and he is director and vice president of the corporation. The board of the directors approved the endorsement, knowing that the paper companies did not have enough assets to pay the promissory notes.³⁹ Under this problematic context of Korean corporate business, the crime of ‘occupational breach of trust’ still has to play its own role.



In the same context, the defendant, who is a director of a school corporation and principal of the school and whose wife is a president of the corporation, was found guilty for consumption of the school donation money for his and his wife’s private purpose, although the board of directors had approved it.⁴⁰

Although the crime of ‘occupational breach of trust’ is still necessary to fight corporate crimes, it is necessary not to forget that the judicial interpretation of the crime of ‘occupational breach of trust’ has often resulted in excessive intervention with corporate activities. In this sense, the Author makes two arguments that the crime of ‘occupational breach of trust’ should be **redefined** to deter its abuse. First, only **grave and serious** breach of trust should be criminalized. For example, the scope of the crime should be limited to apply to the directors who pursue **illegal purposes or their private interests that are not allowed by law or the article of incorporation**, or those who **violate the essential procedure for decision-making**. Article 169-1 of the Chinese Penal code is a notable reference in that it criminalizes the directors who have committed serious breach of fiduciary duties and caused grave financial damage to the corporation. Second, **actual** pecuniary damage, not risk of pecuniary damage, should be required to constitute the crime.

38 See SANG-DON LEE, *supra* note 35, at 68-71.

39 Decision of May 26, 2000, 99Do2781 (The Korean Supreme Court).

40 Decision of Mar. 14, 2000, 99Do457 (The Korean Supreme Court).

III. Lenient Sentencing and Frequent Pardon— “With Money Not Guilty, Without Money Guilty!”

Recently a number of Korean tycoons who control giant company conglomerates were convicted for several counts of corporate crimes. In 2007, for instance, Chung Mong-Koo, the chairman of the Hyundai-Kia Motors, was convicted of ‘occupational embezzlement.’ In 2006 he was accused of embezzling 100 billion Won (\$110 million USD) from Hyundai to create slush funds that were used for illegal political donations. Despite a travel ban, Chung left South Korea in April 2006. Chung was arrested on 28 April 2006 on charges related to embezzlement and other corruption. On February 5, 2007 he was convicted of embezzlement and breach of fiduciary duty, and was sentenced to three years in prison but remained free on bail. In the appeal court, on September 6, 2007, his three-year imprisonment was suspended after he agreed to donate almost \$1 billion.⁴¹ Three other officials at the firm were also convicted but their imprisonments were also suspended. In August 15, 2008 Mr. Chung got pardoned.

In 2008 Lee Kun-Hee, the former chairman of the Samsung Electronics, was once again convicted. In 1996 Mr. Lee was convicted of bribing politicians, but his two-year imprisonment sentence was suspended and in 1997 he was pardoned. In 2007 a public accusation by Kim Yong-Chul, a former chief legal counsel at the company, triggered the investigation of Mr. Lee’s crimes. A special prosecutor was appointed by the National Assembly to investigate the claims. On April 22, 2008, after a three-month investigation, Mr. Lee and nine other senior Samsung executives were accused of hiding 4.5 trillion Won (\$4.95 billion USD) in stock accounts held by Samsung executives and evading at least 112.8 billion won in taxes on profits from those accounts. They are also accused of ‘occupational breach of trust’: involvement in arranging for Samsung subsidiaries to sell stock to his son, Lee Jae-Yong, at a discount price so that the son could take over management control of the Samsung conglomerate. On July 16, 2008 Mr. Lee was convicted of tax evasion and securities law violations and sentenced to a three-year imprisonment with a five year suspension, and charged with the fine of 110 billion won (\$121 million). The charge of ‘occupational breach of trust’ was cleared of. He was not included in the list of pardon as of August 15, 2008 because he is still on trial. On October 10, 2008 the Seoul High Court reaffirmed the suspended prison sentence and the guilty verdict handed down to Mr. Lee.

These cases are not new to Korea. The Korean criminal justice system has been criticized for being too lenient in handling white collar crimes including corporate crimes. A report by the Judicial Watch under the People’s Solidarity for Participatory Democracy [*Chamyeoyeondae*, 參與連帶], which is the most influential non-governmental organization in Korea, shows that since 2000, more than 80% of defendants in embezzlement and breach of trust cases had been given suspension of sentences by courts.⁴²

41 The Supreme Court overturned the condition for the suspension and ordered a new trial.

42 See <http://blog.peoplepower21.org/Judiciary/12313> (lastly visited in October 10, 2008).

Although the business leaders of company conglomerates are often accused and convicted of serious corporate crimes, rarely do they serve imprisonment. This kind of leniency is hardly ever displayed in blue collar crimes. The convicted business leaders have easily been granted with pardons under the name of “reviving the economy.” On August 15, 2008, President Lee Myung-Bak pardoned a total of 74 business executives including Chung Mong-Koo. Under the previous “progressive” Kim Dae-Jung and Roh Moo-Hyun governments, presidential pardons were also frequently given to convicted business leaders. There is no significant control system to deter the possible abuse of presidential pardons. Just after receiving the pardon, many of these business leaders easily come back to rule the companies as if nothing had happened. Although the Korean government often emphasizes the “business friendly” policy, it is more likely to turn out to be “business crime friendly.”

In this context, the business leaders are often called untouchable above the law. This reminds us of George Orwell’s famous satire: “All animals are equal, but some animals are more equal than others.”

Complaining that such a biased sentencing favors the rich, Chee Kang-Hun, a habitual thief who broke out of prison in 1988, resentfully cried out before being shot to death at his scene, “With money not guilty, without money guilty!” [*yucheon muchoe mucheon yuchoe*, 有錢無罪 無錢有罪]. Mr. Chee’s outcry soon became a popular maxim and still has social and legal implications in Korea. After reviewing the sentences in fraud, embezzlement, and breach of trust cases in the Seoul Central District Court from October to December, 2006, Judge Seol Min-Soo critically concluded: “Sentencing depends on the financial ability of the defendants.”⁴³ A judge came to agree with a thief’s argument.

Until very recently, the Korean government and judiciary have not listened sincerely to a critical voice that such “softness” on corporate crimes will violate the rule of law, weaken the transparency of Korean companies, obstruct the reform of corporate governance and eventually threaten the long-term growth of the Korean economy. On July 8, 2008 the Sentencing Committee, which was established in 2007 under the Supreme Court, made a decision that the sentencing guideline for six felonies including embezzlement and breach of trust should be made in 2008. This guideline is hopefully expected to remove the inequality and bias in sentencing.

Conclusion

The most fundamental step in order to fight corporate crimes effectively is to attribute criminal responsibility to corporations and develop various criminal sanctions for them. Criminal sanctions represent formal public disapproval, and could possibly reinforce social values and show the state’s willingness to uphold those values in a trial, the effects that could never be achieved through administrative regulation. Korean jurisprudence and legislature need to abort from the German approach and refer to the French and Dutch models.

43 See <http://www.lawtimes.co.kr/LawNews/News/NewsContents.aspx?kind=&serial=25205> (lastly visited in October 10, 2008).

However, the attribution should not lead to acceptance of the standard of 'liability without fault,' which is another version of the American vicarious liability rule, for it could infringe the principle of burden of proof in criminal law and could not serve for the deterrence of illegal corporate misconducts. Severe penalties in order to efficiently restrict illegal acts of corporations could only be justified through overcoming the higher burden of proof necessary to establish criminal liability. Despite criticism on the crime of 'occupational breach of trust,' it still has its own role to play in the problematic surroundings of Korean business. However, it should be modified to prevent its abuse and excessive intervention with corporate activities. The Korean government and judiciary should listen to criticism on lenient sentencing and frequent pardons for corporate criminals and change their standard and practice.

Session 1 Business Crime (Development of Economy and Crime)

Developments in the Penal Protection of Trade Secrets in Japan

— Protection by Unfair Competition Prevention Act —

Atsushi YAMAGUCHI*

I. The Situation before the 1990's

1. As the topic of my paper I have chosen penal protection of trade secrets in Japan, on which I have been working for the past 20 years. My presentation is based on the experiences that I have had during the past two decades. I will explain the Japanese situation relating to the legal protection of trade secrets from the 1960's to the present and thereafter touch upon some problems and tasks the Japanese criminal law faces today.

2. In Japan, legal response to the incidents of trade secret infringements has been an issue since the 1960's. Although at that time there were no special penal provisions for the violations of trade secrets, they were nevertheless punished as property crimes under the Penal Code. When a person unlawfully takes out a document recording a trade secret and gives it to another, he is punishable as having committed theft (Art.235) or aggravated embezzlement (Art.253 embezzlement in the course of business), depending upon whether he had a possession of that document before committing the criminal conduct. Moreover when a person takes a secret document out of a company for the purpose of duplication and transfers the duplicate to a third party, he is guilty of theft or aggravated embezzlement, even if he returns the original document very soon. This conclusion is made possible by extended interpretation of a subjective element of theft and embezzlement, intent of unlawful appropriation. On the other hand if an employee of a company discloses an intangible trade secret to a third party without transferring a secret document or its copy, for example by giving a photo of a secret document he has taken with his own camera in the office, he is only punishable as a crime of trust breach (Art.247), on the condition that he is in charge of managing the secret. Therefore there was a clear limit to punishing a person disclosing trade secrets to another, if an original secret document or its copy was not given to that person.

3. At that time, along with punishing infringements of trade secrets as property offenses by the criminal courts, attempts were made by the Government to introduce new special penal provisions for trade secret violations. The outcome of such attempts was the proposed penal provision punishing disclosure of trade secrets in the Draft Revision for the Penal Code in 1974. The Draft Revision was the final product of works made for years aimed at the total revision of the Penal Code promulgated back in 1907. According to the proposed provision,

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an officer, an employee, a former officer or a former employee of a company who unlawfully discloses to another a technical secret, such as manufacturing methods, shall be punished with imprisonment of not more than 3 years or a fine of not more than 500 thousand yen. In case of an officer or an employee, such disclosure has to be made without justifiable reason. And as for a former officer or a former employee, disclosure is only punishable when done in breach of a legal obligation of confidentiality.

This proposal met with strong criticisms. The following are the reasons presented by the critics. Firstly, the concept of a secret is too vague to be used as a constituent element of a crime. Secondly, punishing disclosure of a former employee is not appropriate, as it unduly restricts workers' freedom to change jobs. Thirdly, punishing an employee for disclosing secret hinders whistle-blowing by workers and investigation by media relating to anti-social activities of a company. Because of these reasons the majority view at that time was opposed to the proposed provision. Japanese developments in the penal protection of trade secrets cannot be fully understood without knowing this attitude prevailing from the 1970's to the 1990's.

II. Introduction of Special Civil Remedy in 1990

1. In the 1980's, the importance of trade secrets for industry and the need for legal protection came to be stressed domestically as well as internationally. This realization led to the reform of Unfair Competition Prevention Act to protect trade secrets by introducing civil remedy in 1990. Unfair Competition Prevention Act as amended in 1990 regards infringement of trade secrets as unfair competition which is subject to injunction provided for in the Act. But the Act of 1990 introduced civil remedy only. Introducing special penal provision for trade secret violation was considered to be out of the question at that time.

2. One of the important points relating to the 1990 Act was that the concept of a trade secret was defined by a special provision. According to the provision, trade secret as used in the Act means technical or business information useful for commercial activities such as manufacturing or marketing methods that is kept secret and that is not publicly known. Unless the following three requirements are met, proprietary information, however important, cannot be protected as a trade secret by the Act.

First requirement is that the information in question has to be kept secret by protective measures taken by the holder of such information. This requires that access to such information is restricted and a person trying to get access to such information can recognize that it is a trade secret. Practically speaking, this requirement is very important, as even the most important proprietary information is not protected as a trade secret by the Act, when this condition is not met. Therefore it is a very important and highly controversial issue to what extent protective measures have to be taken for the information to be protected as a trade secret. Some say that if strict measures are always required, important proprietary information which should be duly protected as a trade secret falls outside the realm of legal protection.

Second requirement is that the information in question has to be useful for commercial activities. Information, when utilized, has to lead to reduction of business costs or enhancement of efficiency of business. In this connection I have to point out that information relating to anti-social activities such as tax evasion or unlawful discharge of hazardous material is not a protected trade secret, as it is not useful information for lawful commercial activities protected by law. Therefore whistle-blowing relating to such anti-social activities of a company is not subject to legal remedy including punishment as it is not a violation of a protected trade secret.

Third requirement is that the information is not publicly known. It is a matter of course that information which was disclosed to a person by the holder of such information can still be a trade secret if the person to whom the information is disclosed is bound by the legal obligation of secrecy.

III. Introduction of Penal Provisions in 2003

1. It was ten years after the revision of Unfair Competition Prevention Act in 1990, which introduced civil remedy to protect trade secrets, strengthening the legal protection for trade secrets was strongly voiced especially among those engaged in business activities. This led to the revision of Unfair Competition Prevention Act in 2003, which introduced special penal provisions for the violations of trade secrets.

2. But not all of the infringements the 1990 Act defined as unfair competition were criminalized by the 2003 Act. Infringements of trade secrets as unfair competition included negligent conduct, which was excluded from punishment. It was because negligent conduct should only be punished in so far as it infringed limited range of precious legal interests such as life or bodily integrity. Criminal punishment is the most severe sanction provided for in the law, which should only be resorted to when absolutely necessary. In addition, until that time penal protection of secret information in general was extremely limited in the Japanese criminal law, which required prudence in applying criminal penalty to this new area. It was because of these considerations that only such acts as were highly illegal and clearly deserved repression by criminal sanctions were criminalized.

The scope of the new penal provisions was quite limited, taking into consideration the criticisms against the proposed provision for trade secrets in the Draft Revision of the Penal Code of 1974. New provisions had to answer these critical comments.

Firstly, it was alleged that the concept of trade secret was vague. But considering the court practice for more than ten years relating to the civil remedy to protect trade secrets, this criticism had virtually lost its importance.

Secondly, it was said that punishing disclosure of trade secrets led to undue restriction of whistle-blowing by workers and freedom of gathering information by media. As I have already pointed out, information relating to anti-social activities of a company is not a trade secret protected by Unfair Competition Prevention Act. Therefore we can say that this problem is solved by the concept of trade secret itself. But this understanding is based on the

interpretation of the provision defining the concept of trade secrets and might not be clear on the face of the provision. This consideration led to the requirement of a special subjective element, a purpose of unfair competition. This purpose means a purpose or a specific intent on the part of the perpetrator to give a competitive advantage to a specific competitor. This subjective element makes it clear on the face of the provision that conduct done for lawful purposes shall not be punished.

Thirdly, critics said that punishing disclosure of trade secrets by a former employee led to unjustifiable restriction of workers' freedom to change jobs. Because of this consideration, only such conduct by a former employee as was highly unlawful and clearly unjustifiable was subject to punishment. In other words, in case of a former employee, the scope of punishment is extremely limited. By the same token, a person to whom a trade secret is lawfully disclosed according to a contract is not punished, because it is feared that by punishing such a person a chilling effect might be caused to making such contract as the boundary of an obligation to secrecy imposed by the contract might not be clear enough.

3. The scope of a trade secret which should be protected by criminal sanctions could be an issue. In fact some argued that in case of penal protection the scope of a trade secret should be narrower than in case of civil protection. To be concrete, it was argued that more strict measures for keeping secrecy should be required, or that only technical secret should be protected by punishment just as in the Draft Revision of the Penal Code in 1974. But these ideas were not adopted. It was because the requirement of protective measures for civil remedy was strict enough. Strengthening such requirement further could remove important proprietary information out of the penal protection and might render penal provisions virtually meaningless. And a business secret is equally as important as a technical one. Therefore it was decided that the scope of a trade secret as protected by punishment should be the same as that protected by civil remedy.

4. According to the 2003 Act, only four types of conduct are subject to punishment.

Firstly, using or disclosing, for a purpose of unfair competition, a trade secret acquired unlawfully is punished. Unlawful acquisition as a condition of punishment should be done with a purpose of unfair competition and is limited to the following two cases. First, acquiring a trade secret is done by deceiving, assaulting, or intimidating a person. And second, acquisition of a trade secret is made by stealing a document or a data storage medium containing a trade secret (hereinafter referred to as a medium containing a trade secret), trespassing on a facility where a trade secret is kept, making an unauthorized access, or violating the control of a trade secret maintained by its holder in any other way with a purpose of unfair competition. It should be noted that under this provision unlawful acquisition of a trade secret is not in itself punished. Use or disclosure of such an unlawfully acquired trade secret is needed for punishment. In very limited cases only, on which I will talk shortly, illegal acquisition of a trade secret itself is subject to criminal penalty.

Secondly, acquiring a trade secret unlawfully for use or disclosure with a purpose of unfair competition is punished. In this case, mode of acquisition is quite limited. A trade secret has to be acquired either by acquisition of a medium containing a trade secret under the control

of a trade secret holder or by reproduction of information in such a medium. Acquiring a trade secret in any other way is punishable only when such trade secret is actually used or disclosed with a purpose of unfair competition.

Thirdly, using or disclosing a trade secret, with a purpose of unfair competition, by a person to whom such trade secret was lawfully disclosed by its holder is punished. In this case use or disclosure of a trade secret has to be done after having acquired a medium containing a trade secret or having reproduced information contained in such a medium under the control of the holder. This is an area where an element of lawful acquisition and that of unlawful acquisition are blended, and a former officer or a former employee is exceptionally punished.

Fourthly, using or disclosing, for a purpose of unfair competition, a trade secret by an officer or an employee of a trade secret holder from whom a trade secret has been disclosed is punished when it is done in breach of the duty to keep safe custody.

It is to be noted here that a person who knowingly acquires a trade secret which was unlawfully used or disclosed is punishable as an accessory to the crime concerning the unlawful use or disclosure.

5. The offenses mentioned above may not be prosecuted without a complaint by a victim of such offense. The Constitution of Japan requires public trial, through which lawful interest of a trade secret holder might be further jeopardized. Therefore the victim should decide whether or not the case is prosecuted.

And the penal provisions of Unfair Competition Prevention Act shall not preclude application of penal provisions under the Penal Code. Therefore a person can be guilty not only of offenses under the Unfair Competition Prevention Act but also of theft or aggravated embezzlement under the Penal Code for the same conduct.

IV. Expansion of Penal Protection in 2005

1. As I pointed out earlier, the scope of the penal provisions introduced by the Act of 2003 was quite limited. Therefore the following problems remain thereafter. The first problem is that criminal conduct done outside Japan is not punishable. The second one is that the scope of punishment in case of unlawful use or disclosure by a former officer or a former employee is too narrow. The third is that a company is not criminally liable even when criminal conduct is done in the course of a business activity by its officer or employee.

In 2005 Unfair Competition Prevention Act was revised to solve these problems to a certain extent.

2. The penal provisions introduced by the 2003 revision were not applicable to conduct done outside Japan, as there were no special provisions enabling extra-territorial application of the provisions, therefore only domestic criminal conduct could be punished according to the general principles of the Japanese criminal law. According to the Unfair Competition Prevention Act of 2003, using or disclosing a trade secret outside Japan might not be punished even though such trade secret was acquired inside Japan, because only use or disclosure of a trade secret which was done outside Japan constituted a criminal conduct.

Moreover unlawful acquisition or reproduction of a medium containing a trade secret might not be punished either when a purpose of unfair competition inside Japan was lacking. This means that unlawful outflow of trade secrets to foreign countries could not be punished, which could diminish competitive power of Japan's industry. Some measure had to be taken to remedy this situation.

A new provision was introduced by the 2005 revision to enable extra-territorial application of the penal provisions. On the other hand the new provision excludes from punishment cases where no Japanese interest is involved, such as using outside Japan a trade secret which is kept by a foreign company outside Japan. In other words, only in case of trade secrets kept inside Japan use or disclosure done outside Japan is penalized.

3. The penal regulation of use or disclosure of a trade secret by a former officer or a former employee is a very important problem and a difficult one. As I mentioned earlier, according to the 2003 Act the scope of penal provision punishing a former officer or a former employee was quite limited, taking into consideration workers' freedom to change jobs and mobility of labor. The 2005 revision of Unfair Competition Prevention act expands the scope of punishment applicable to a former officer or a former employee by punishing the following case. When an officer or an employee of a trade secret holder from whom a trade secret has been disclosed, for a purpose of unfair competition, offers while in office to disclose it in breach of the duty of confidentiality or receives while in office a request to use or disclose it, and uses or discloses it after leaving the job, he is punished. If an officer or an employee uses or discloses a trade secret unlawfully while in office, he is criminally liable even by the 2003 Act. But In case he had the intent while in office but actually used or disclosed a trade secret after leaving the job, he could not be punished even though his intention to evade punishment was evident. In this case punishment is a necessity, especially because such a person cannot be expected to enter non-disclosure agreement with the trade secret holder when leaving the job.

Punishing a former officer or a former employee who uses or discloses a trade secret in breach of a non-disclosure agreement as proposed in the Draft Revision of the Penal Code of 1974 was an option. But such a provision was not introduced because the practice of such an agreement was not yet established at that time.

4. Infringement of trade secret such as unlawful acquisition of trade secret could be done in the course of business activities. In this case, in addition to punishing an individual offender, punishment of a company which the offender works for is needed as an effective deterrent to committing such offenses. In Japan, a company or a juridical person is punishable by a special provision called provision of dual punishment. This provision inflicts a fine on a juridical person in addition to punishing an individual offender who committed the offense. But, for example, in case a person to whom a trade secret was lawfully disclosed by a company uses or discloses the secret unlawfully, such a company is a victim of the offense. Therefore it cannot and should not be punished. Excluding from punishment such cases and other cases where adverse effects might be expected, punishing a juridical person is a viable and effective option. Therefore the 2005 revision introduces the punishment of a juridical person in limited cases. When an officer or an employee of a juridical person, with regard to the business of

the juridical person, (1) unlawfully acquires a trade secret and uses or discloses it unlawfully, (2) unlawfully acquires or reproduces a medium containing a trade secret, or (3) uses or discloses a trade secret which was disclosed illegally, a juridical person is punished with a fine of not more than 300 million yen.

V. Remaining Problems

1. Even after the revision of 2005 and the revision of 2006 which increased the penalty provided for in the Act, the scope of punishment under Unfair Competition Prevention Act is still limited. Especially, unlawful acquisition of a trade secret is punishable only when a medium containing a trade secret is unlawfully acquired or information contained in such a medium is illegally reproduced. Punishment is mainly directed to unlawful use or disclosure, which is quite difficult to prove in a criminal trial, as these conducts are done behind closed doors far away from the trade secret holder. On the other hand, unlawful acquisition is relatively easy to prove, but it is subject to punishment only in quite limited cases.

Punishment of a former officer or a former employee is rather limited, because workers' freedom to change jobs is taken into consideration. An officer or an employee who uses or discloses a trade secret after leaving the job is not subject to punishment if while in office no offer to disclose a trade secret is made on the part of an officer or an employee, or no request is received by such a person while in office. Expanding the scope of punishment without jeopardizing workers' freedom could be considered.

2. Up until now, with respect to infringement of trade secret not a single case has been prosecuted. This is partly because it is difficult to prove use or disclosure of a trade secret. In addition, the principle of public trial, which is a constitutional requirement, is another reason. A victim is reluctant to make a complaint because secrecy of the trade secret might be jeopardized further during the public trial. Without limiting the principle of public trial through either by court practice or a law reform, the protection of trade secret might be of no practical use. Some measure has to be devised to remedy this situation.

Session 2 Autonomy of Family and the Role of State–Protection of women and children (Domestic Violence, Alimony, and Maintenance for Children)

An In-depth Study on the Implementation of the Convention on the Elimination of All Forms of Discrimination against Women in China

Guimei BAI* and Wen ZHOU**

Introduction

1. Signature, ratification, acceptance of amendment and reservation

The Convention on the Elimination of All Forms of Discrimination against Women was signed and ratified by People's Republic of China on July 17, 1980 and November 4, respectively.⁽¹⁾ The amendment of Article 20(1) dealing with the time and duration of the annual meeting of the Committee on the Elimination of Discrimination against Women (CEDAW), was accepted by the Chinese government on October 7, 2002. The Chinese government made a reservation both upon signature and ratification to Article 29(1), on dispute resolution.

2. Initial and periodic reports

Since 1982, China has submitted four reports to CEDAW: the initial report, the second periodic report, the combined third and fourth report, and the combined fifth and sixth report. Please see the appendix on the reporting status of China under the Convention. The deadline for the seventh report was September 3, 2006.

3. Structure of the present report

The present report is composed of three chapters: chapter 1, legislative and other measures taken by China to implement CEDAW; chapter 2, activities of governmental institutions to implement CEDAW; chapter 3, analysis, comments and recommendations from the perspective of a scholar. The structure of this report is modeled after CEDAW's substantial

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(1) See the website of UNHCHR, at http://www2.ohchr.org/english/bodies/ratification/8_b.htm, visited on Jan. 20, 2009.

provisions. Discussions herein follow the order of previous concluding recommendations by the Committee on the Elimination of Discrimination against Women (hereinafter the CEDAW Committee), particularly in regard to areas of principal concern and recommendations within the Chinese context. Therefore not all provisions or rights provided for in the Convention are covered by this report.

Chapter 1 Legislative and Other Measures Taken

by China to Implement CEDAW

In order to implement CEDAW and to promote the realization of equality between men and women, the government of the People's Republic of China has promulgated and enforced a number of laws and policies. Since the ratification of CEDAW in 1980, a system of laws protecting women's rights and interests and aiming to promote equality between two sexes has developed, the core of which is the Law of the People's Republic of China on Protection of Rights and Interests of Women (hereinafter LPRIW), the fundamental law on women's rights.

This report is composed on the basis of a thorough review of existing Chinese national laws and important legislation and policies on women's rights promulgated since 1990. According to the 2000 Law on Legislation of the People's Republic of China, the Chinese national laws are composed of laws (including interpretations of laws), administrative regulations, regulations promulgated by the National People's Congress (NPC), the Standing Committee of the NPC, and departments of the State Council. Due to the fact that certain documents, such as the judicial interpretations by the Supreme People's Court and the Supreme People's Procuratorate, important documents of the Chinese Communist Party, important working papers of All-China Women's Federation and other normative internal regulations of the ministries, are also considered to have the force of law, our survey also covers an analysis of these "soft laws".

It should be noted that gender perspective was not found in any of the Chinese laws, even those concerning women's rights and interests, except for a small number of provisions in the Constitution, the LPRIW, the Labor Law and in the documents promulgated by the Working Committee on Women and Children of the State Council and the All-China Women's Federation. Thus discrimination based on sex or gender is not emphasized, though the general clause on equality for all citizens is commonly seen in most of the laws in China. Chinese legislation is general, abstract and non-operative.

This chapter is divided in nine parts where the rights provided for by CEDAW are analyzed in relation to Chinese laws, arranged in the same order as the CEDAW from Article 1 to 16, but each part may cover more than one CEDAW article.

I. Legal protection of the equal status of women and men (CEDAW Articles 1-5)

Articles 1 to 5 of the CEDAW in general, discuss women's status and state parties' obligations. Article 1 defines discrimination against women, providing the only definition of all international human rights conventions. Articles 2 and 3 require state parties to take all appropriate means and without delay to formulate a policy of eliminating discrimination against women. Article 4 provides that temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention. Article 5 requires state parties to modify men and women's social and cultural conduct patterns, with a view of achieving the elimination of prejudices and all other customary 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.

In 1992 the NPC promulgated the Law on Protection of Rights and Interests of Women, a special basic law on women's rights and interests. Due to various factors, since the promulgation of LPRIW in 1992, the law was always criticized for its inefficiency and the lack of feasibility in practice. In order to adapt this law to the Beijing Declaration and the Plan of Action and to the fast changing Chinese society, the LPRIW was modified by the Standing Committee of NPC in August 2005. Ever since the amendment to LPRIW was included in the Five-year Legislative Plan of the NPC, the All-China Women's Federation has conducted surveys all over China to collect relevant suggestions and opinions for the amendment. Experts' Drafts have been worked out by specialists in this field, in which the definition of discrimination against women and several other breaking-through provisions were added, such as the wording of "women's human rights", the quota for women candidates to all levels of people's congress, a nation-wide cover of women employees' maternity assurance, the right of women organizations and groups to give opinions concerning gender perspective during law-making process, etc. But since the law-making process is always a process of compromise, although the amended LPRIW was a big progress for the promotion of gender equality in China, the above mentioned provisions were not approved by the legislators. Given the important role of this law, the following analysis of Chinese laws will rely heavily on the 2005 amendment to LPRIW.

1. Equality between women and men

The principle of equality between women and men has been written into the Chinese constitutions since 1954, when the first constitution was promulgated. Article 48 of the 2004 amended Constitution ensures that women enjoy equal rights with men in all spheres of life, in political, economic, cultural, social and family life. Moreover, the state protects the rights and interests of women, applies the principle of equal pay for equal work to men and women alike and trains and selects cadres from among women.

The 2005 amendment to LPRIW showed the determination of the government to promote

gender equality in China. Article 2 recognizes the realization of equality between women and men as basic state policy, and provides that the state shall take appropriate measures to eliminate all forms of discrimination against women.

The Development Plan for Women in China (1995-2000) was promulgated in 1995, which was then followed by a new ten-year plan, i.e., the Development Plan of Women in China (2001-2010) which established 6 development fields of priority: women and economy, women and decision-making and administration, women and education, women and health, women and law, women and environment, with the promotion of women's advancement into the mainstream. The main purpose is to carry out the basic state policy of equality between women and men, to promote the participation of women in economic and social development and to realize equality between women and men in various aspects of political, economic, cultural and family life.

However, it must be pointed out that the most important factor lacked in the Chinese legislations is the definition of discrimination against women, which makes it very difficult to implement the already abstract laws and regulations.

2. Policy measures

Article 4 of the 2005 LPRIW provides that "(t)he protection of women's lawful rights and interests is a common responsibility of the whole society. State organs, public organizations, enterprises and institutions as well as urban and rural mass organizations of self-government at the grass-roots level shall, in accordance with the provisions of this Law and other relevant laws, protect women's rights and interests."

As mentioned above, the two Development Plans for Women in China (1995-2000) and (2001-2010) were considered important policy tools for the advancement of women in China. The 2005 amendment to LPRIW made development programs for women a regular-based mechanism. Article 3 provides that "(t)he State Council shall work out a program for the development of Chinese women and shall incorporate it into the plan on the national economy and social development. Each local people's government at the county level shall, according to the program for the development of Chinese women, work out a plan on the development of women within its own administrative area".

The 2005 amendment to LPRIW also provides women in difficulties with legal aid. Article 52(2) demands local legal aid institution and the people's court to help women in need of legal aid because of actual financial difficulties and to provide them with legal aid or judicial aid under the law. It should be mentioned that not all of the needs in this context will be met for they are subject to provisions of the Regulation of Legal Aid promulgated by the State Council in 2003. Furthermore, governmental funding only goes to legal aid institutions in the Ministry of Justice. Those organized by the Women's Federation and other institutions cannot get funding from the government.

3. Institutions that protect women's rights and interests

(1) Working Committee on Women and Children of the State Council

It is clear that governments at all levels are responsible for the protection of women's lawful rights and interests, and shall attach importance to and strengthen the protection of rights and interests of women.⁽²⁾ The State Council Working Committee on Women and Children and its counterparts at all government levels are delineated as special organs concerned with women's and children's issues. It is a pity that the amendment to LPRIW didn't clarify the legal status of the working committees on women and children. However, Article 6(2) provides that governmental organs responsible for the work of women and children at and above the county level shall organize, coordinate, guide and urge the relevant departments to conduct well the protection of the rights and interests of women. We can conclude that all relevant government organs are responsible for promoting women's rights and interests.⁽³⁾

(2) Women's federations and other social groups

Article 7(1) of the 2005 amended LPRIW defines the function of the All-China Women's Federation and of its counterparts at different governmental levels as responsible for representing and preserving the rights and interests of women of all nationalities and of all socio-economic positions. In contrast to the LPRIW of 1992 which states that women's federations are to "ensure" women's rights and interests, the wording of the current law uses "represent and preserve", which determines the status and role of the women's federation as an NGO. Thus the federation is not supposed to "ensure" the rights and interests of women, as that traditionally is one of the functions of the government.

Article 7(2) of the 2005 LPRIW provides that other social groups, such as the trade unions and the Communist Youth League, should, within the scope of their own work, strive for women's rights and interests.

II. Legal Status (CEDAW Articles 9, 13 and 15)

1. Nationality

Article 9 of CEDAW provides that States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality of the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. It also provides that States Parties shall grant women equal rights with men with respect to the nationality of their children.

Although no specific provisions exist in Chinese law granting women equal rights with men to acquire, change or retain their nationality, these rights are implied by the 1980 Law of Nationality of the People's Republic of China. Acquisition of nationality, according to the

(2) Article 4 and Article 6(1) of the 2005 amended LPRIW.

(3) See the Reply of the Ministry of Justice to the Decision on "Note to Set Up Hebei Province Legal Aid Center Sponsored by the Government" (1998).

Law, is based mainly on the *jus sanguinis* principle. Article 4 provides that “(a)ny person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.” Article 5 provides that “(a)ny person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.” The *jus soli* principle is applied to stateless persons. Article 6 thus provides that “(a)ny person born in China whose parents are stateless or of uncertain nationality and have settled in China shall have Chinese nationality.” These provisions have shown that women have equal rights with men to acquire nationality. Furthermore, the Law does not make any distinction between women and men in regard to naturalization and renouncement. Finally, there are no provisions in the Law affecting women’s nationality upon marriage.

2. Equal legal rights

Article 15 of CEDAW provides that State Parties shall accord women and men equality before the law. This article also provides that State Parties shall accord women, in civil matters, legal capacity and opportunities to exercise it identically to men. In particular, they shall grant women equal rights to conclude contracts and to administer property. State Parties shall accord men and women the same rights with regard to laws relating to the movement of persons and the freedom to choose a residence or domicile.

Although the Chinese Constitution and other laws do not have specific provisions emphasizing women’s equality with men before the law, the Constitution does state that all citizens of the PRC are equal before the law, thus granting women equal status with men. It can be gleaned from this statement that women do have equal legal capacity with men to make contracts and to administer property.

Article 37 of the 2005 LPRIW prohibits violations to women’s personal freedom. Furthermore, it provides that Unlawful detention or deprivation or restriction of women’s freedom of the person by other illegal means shall be prohibited; and unlawful body search of women shall be prohibited. Article 48 protects women’s equal right to ownership of a domicile at the time of divorce. And the disposition of the house shall follow the principle of showing consideration for their child (children) and for the rights and interests of the wife. The 2001 amended Marriage Law contains similar provisions, whereas other laws are lacking in this area. There are no Chinese laws on the freedom of choice of domicile.

3. Equal rights to legal remedies

(1) Legal remedies before the courts

Article 15(2) of CEDAW reads that States Parties shall treat women and men equally in all stages of a court’s or tribunal’s procedure. In the three procedural (civil, criminal and administrative) laws, there are provisions to ensure the equal litigant rights of all citizens. For instance, Article 8 of the 2007 amended Law of Civil Procedure provides that “(i)n civil proceedings, the litigants shall have equal litigant rights.” In handling a civil case, the People’s Court shall ensure and make it convenient for the litigants to exercise their litigant rights;

in the application of the law, the litigants are deemed as equals. The other two procedural laws contain similar provisions from which one may derive equal litigant rights for men and women.

In this context, Article 52(1) of the 2005 LPRIW provides that “(w)hen a woman’s lawful rights and interests are infringed upon, she has the right to require the competent department for settlement, or file an application with the arbitration institution for arbitration or bring a lawsuit in a people’s court”. Article 56 provides that “(w)here a violation of this law damages the lawful rights and interests of a woman, if any other law or regulation provides any administrative punishment against it, this law or regulation shall be followed. If such violation causes any property losses or any other damages, the violator shall bear civil liabilities. If any crime is constituted, he shall be subject to criminal liabilities”, from which we infer that the implementation of LPRIW has to depend upon other laws. Though the LPRIW provides for civil, criminal and administrative responsibilities for violations of women’s rights and interests, these responsibilities are of a general character. The lack of independence makes the LPRIW difficult to be actually operative.

(2) Role of women’s federations

There are two new provisions in the 2005 amendment to LPRIW on the role of women’s organizations in supporting claims of violations of women’s rights and interests. Article 53 provides that, “(w)hen a woman’s lawful rights and interests are infringed upon, she may file a complaint with a women’s organization, which shall require the relevant department or entity to investigate and deal with the case. The relevant department or entity shall do so in accordance with the law and give the woman a reply.” Article 54 provides that, “(a) women’s organization shall support the women victims who need help in litigation. With regard to an act infringing upon the interests of a particular group of women, the women’s federations or the relevant women’s organizations may expose and criticize it through the public media and may be entitled to require the relevant department to investigate and punish it”. The amendment in 2005 did not include the proposition in the Experts’ Draft on the role of women’s federations in public interest litigations.

III. Political Rights (CEDAW Articles 7 and 8)

Article 7 of CEDAW provides that State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country. In particular, parties shall ensure that women, on equal terms with men, have: the right to vote; to participate in the formulation of government policy and the implementation thereof; to hold public office and perform all public functions at all levels of government; and to participate in non-governmental organizations and associations concerned with the public and political life of the country. Article 8 provides that State Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

The purpose of these two articles is to ensure women's political rights both on the national and international levels and to emphasize non-discrimination against women. However, in fact women do not have equal political rights with men in the public domain; there are many obstacles barring women from participating in public affairs. For this reason, CEDAW Committee adopted General Comments No. 25 to call on State Parties to implement Article 4(1) and to take temporary special measures in order to speed up the realization of equal rights for women in this context. Besides, General Comment No. 23 emphasizes that "political and public life" as provided in Article 7 include not only participation in parliaments and governments but also in various aspects of civil society.⁽⁴⁾

1. Right to vote and to stand for election

The Constitution and the 1995 amended Electoral Law of the PRC for the National People's Congress and Local People's Congresses at all Levels (Electoral Law), grant citizens of the PRC who have reached the age of 18 the right to vote and to stand for election regardless of their ethnic nationality, race, sex, occupation, social origin, religious belief, education, status of property ownership, or length of their period of residence.⁽⁵⁾ Article 11 of the 2005 LPRIW provides that "(w)omen shall enjoy equal rights with men to vote and stand for election", meaning Chinese laws expressly protect women's political rights on an equal standard with men. However these provisions are too abstract to be applied and enforced in practice.

Both the Electoral Law and the LPRIW, state with almost identical wording that "(a)mong deputies to the National People's Congress and local People's congresses at various levels, there shall be an appropriate number of women deputies, and the proportion thereof shall be raised gradually." Phrases like "appropriate number" and "be raised gradually" are too vague to be enforced in actual practice. According to statistics, the proportion of female representatives in the National People's Congress has for a long time been approximately 21% since 1983. This figure was 20.24% at the 10th National People's Congress and 21.33% at the 11th, which is 1.09% higher than before.⁽⁶⁾

Having taken into consideration this situation and in light of the temporary special measures provided by Article 4(1) of CEDAW, the Experts' Draft of the amendment to LPRIW proposed to specify the proportion of female delegate candidates to the NPC and local people's congresses to be no less than one third. However, this provision of quota was not accepted by the legislators. But it should be noted that in 2007, the NPC adopted the Decision on the Number and Election of Delegates to the 11th National People's Congress which provided that the women delegates to the present Congress should be no less than 22%, thus for the first time the measure of quota was used to guarantee women's political participation at national level.

(4) See CEDAW A/52/38, CEDAW General Recommendation No. 23, paragraph 5.

(5) Article 34 of the Constitution, amended in 2004.

(6) Statistics of the delegates to the 11th National People's Congress, available at http://news.xinhuanet.com/ziliao/2008-03/03/content_7708230.htm, visited on June 25, 2008.

The Chinese People's Political Consultative Conference (CPPCC) is the most important institution in China for multi-party cooperation and political consultation, where the role of women should be particularly emphasized. However, the Charter of CPPCC, as amended in 1994, does not mention the equal voting and electoral rights for women and men and does not require the proportionality of female to male candidates and members. It has been suggested that the Charter of CPPCC should be amended to this effect.

In order to participate in political and public life women must have access to the relevant capacities and qualifications; due to a variety of obstacles, men, in comparison to women, have benefitted from superior opportunities in this respect. So as to rectify this situation, governments should annually arrange for special training sessions and aid. The Program for the Development of Chinese Women, together with the Ministry of Science and Technology and the Ministry of Education, have undertaken, for the period 2001-2010, a project aiming to enhance women's ability to participate in government, in science, in technology and in a variety of other fields. This project includes training female delegates to people's congresses and to the CPPCC and other female cadres in order to enhance their ability to participate in government.

2. Female representatives in residents' committees and villagers' committees

The residents' committees are community mass organizations in cities and towns while the villagers' committees are mass autonomous organizations in rural areas. Both are vital forms of mass organizations that deal with public affairs in China. Therefore, women's role in these organizations is very important.

Both the 1990 Organic Law of Urban Residents Committees and the 1998 Organic Law of the Villagers Committees provide that citizens who have reached the age of 18 have the right to vote and to run for election regardless, *inter alia*, of their sex. The 2005 amended LPRIW has a vague provision to call for an appropriate number of women members among the members of the residents' committees and villagers' committees.

However, the proportion of women that take part in villagers' committees is very low, despite the fact that villagers' committees play a much more important role than their urban counterparts in the decision-making processes concerned with land administration, the collective economic system, the distribution of outcomes and even movement of villagers' *Hukou* (permanent residency system in China), etc. For example, in Anqing, a city of Anhui Province, the proportion of female members in villagers' committees is only 21%, compared to a 70% female member proportion in the residents' committees in the same city.

3. Right to hold office in governmental organizations

Article 48(2) of the Constitution as amended in 2004 provides that women cadres shall be trained and promoted. The amendment to LPRIW in 2005 even further provides that an appropriate number of female cadres for the leading posts should be ensured. Unfortunately, no concrete criteria for proportion exist, making the Law difficult to apply.

Various governmental institutions have included in their charters some provisions

specifically relevant to female cadres, for example the 2002 Regulations on People's Conciliation by Ministry of Justice, the 1998 Announcement on Organic Construction of the Two Levels of the *People's* Procuratorates issued by both the Chinese Communist Party Central Organic Department and the People's Supreme Procuratorate, and the 1999 Five-Year Work Plan of People's Procuratorates. Unfortunately all of these laws and regulations are too abstract to be enforced.

4. Right to join NGOs and mass organizations

(1) Parties

The Chinese Communist Party is the party in power. Female Party cadres have access to decision-making and political control. Article 33 of the 2007 amended Charter of the Chinese Communist Party provides that particular emphasis shall be put on training and promoting female cadres. Other Party documents also contain similar regulations, but at high Party levels, women constitute only a very small minority.

(2) NGOs and associations

Article 13 of the 2005 amended LPRIW provides that "(t)he All-China Women Federation and the women's federations shall, on behalf of the women, actively participate in the democratic decision-making, management and supervision of the state and social affairs. Women's federations at various levels and their member organizations may recommend female cadres to state organs, public organizations, enterprises or institutions".

Some NGOs and associations are specifically dedicated to women, such as Women's Association for Female Judges and the Home for Female Migrant Workers. But in most part, other social groups and associations have not included women's participation in their constitutive documents.

(3) Enterprises

There are three aspects to women's participative and administrative rights within enterprises: participation in the management, participation in the Employees' Assembly and participation in trade unions.

There is no provision concerning women's participation in management positions in enterprises in the existing laws. However, some individual enterprises or institutions have promulgated internal regulations to that same effect. For instance the 2001 System of Personnel of the Chinese Bank of Agriculture states in Article 21 that emphasis will be placed on training women cadres. Unfortunately, discrimination against women does exist within the Bank of Agriculture, in particular dealing with age limitations for promotions and retirement from a leadership position.⁽⁷⁾

Due to the economic reform in China, the system of Employees' Assembly is dying away; an alternative system has not been established yet. The 2005 amended Company Law has some provisions on workers' representation, but without any specific perspectives on gender

(7) According to Article 22 of the 2001 System of Personnel of the Chinese Bank of Agriculture, the maximum age for promotion for women is 2 to 5 years less than men, which means that women must retire from their position as cadres 2 to 5 years earlier than men.

concerns.

Women's rights in the trade union are protected by the Law of Trade Unions, amended in 2001. Article 10 provides that if the number of female employee is relatively large in an entity, a trade union committee for female employees may be established under the leadership of the equivalent level trade union; if the number of female employee is relatively small, female employee member shall be included in the trade union committee. Accordingly, the Regulation on Trade Union Committee for Female Employees was promulgated by the All-China Federation of Trade Unions in 1999. Unfortunately, in practice few committees for female employees have been set up.

5. Representation in international institutions

There is no legislation in China ensuring women's equal access to international institutions. Neither has the Chinese government taken any special measures, as required by the General Comment No. 8 of CEDAW, in order to enhance the proportion of women in international institutions.

IV. Economic Rights (CEDAW Articles 11 and 13)

1. Equal right to employment

Article 11 of CEDAW provides that State Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on the basis of the equality of men and women, the same rights, in particular the right to work, the right to the same employment opportunities, the right to freely choose a profession or employment, etc. This article also requires that State Parties take appropriate measures to prevent employment discrimination against women due to marriage or maternity.

Article 13 of the Labor Law and Article 22 of the LPRIW clearly guarantee that women enjoy the same labor and social security rights as men do. It must be noted that the Labor Law does not cover public servants, persons working in institutions with status equivalent to that of public establishments, farmers, army men or civil servants, etc. Public servants are regulated by the 2005 Public Servants Law, which replaced the 1993 Regulation on State Public Servants. So far there is no law specially protecting migrant workers employed by enterprises. However it has drawn the attention of Chinese legislators. Some regulations jointly promulgated by the Ministry of Labor and Social Security and the Ministry of Health in 2004 demand enterprises that employ migrant workers to buy work-related injury insurance. In addition, migrant workers are protected by the 2003 Regulation of Work-Related Injury Insurances.⁽⁸⁾

There is a legal vacuum in regard to the protection of rights and interests of employees in informal sectors. CEDAW Committee adopted General Comments No. 16 and 17 to encourage and recommend State Parties to take measures to ensure the social security and social

(8) See the Announcement on the Matter of Migrant Worker Buying Work-Related Injury Insurances by the Ministry of Labor and Social Security (June 1, 2004).

benefits of unpaid women workers of family enterprises and to value the unremunerated domestic activities of women. As such, the Chinese government should take appropriate legislative measures.

In recent years, several new laws related to labor protection were promulgated by the NPC. The Labor Contract Law was promulgated in June 2007 which was considered as a landmark step for the protection of labor rights in China. The law prohibits employers from dismissing a female during her pregnancy, confinement, or nursing period. Women employees' rights and interests should be considered when signing collective contract.

The Employment Promotion Law was promulgated in August 2007, with the objective of promoting employment and implementing active policies to increase employment. For the first time, there is a whole chapter dealing with "Fair Employment" in a law. According to this law, governments at all levels engage to create an environment for fair employment and to eliminate employment discrimination. The state shall ensure that women enjoy labor rights equal to those of men. The prohibition of discrimination in recruitment is emphasized. It is forbidden to refuse to recruit women under the excuse of sex or set up a higher requirement for women. It is not allowed to restrict female employees from getting married or bearing child in the labor contract.

The Law on Labor Dispute Mediation and Arbitration came into force last year to replace the 1993 Regulation on the Resolution of Labor Disputes in Enterprises. Compared with the former Regulation, the application scope enlarged to cover disputes arising from the confirmation of a labor relationship. Thus the law filled in the blank that gender discrimination in recruitment could not be sued. Article 5 of this law describes a basic procedure of labor disputes, that "(w)here a labor dispute arises, if a party does not desire a consultation, the parties fail to settle the dispute through consultation, or a party does not execute a reached settlement agreement, any party may apply to a medication organization for mediation; if a party does not desire a medication, the parties fail to settle the dispute through medication, or a party does not execute a reached medication agreement, any party may apply to a labor dispute arbitration commission for arbitration; and a party disagreeing to an arbitral award may bring an action in the people's court". Yet a special anti-discrimination law does not exist in China. Up to now there are very few precedents for legal remedies to gender discrimination in employment.

2. Equal pay for equal work

Article 24 of the 2005 LPRIW ensures that women enjoy the equal pay for equal work with men, as well as the enjoyment of welfare benefits.

In practice, clear gender segregations do exist in the Chinese labor market with women usually working in the lower-pay posts. Legal and administrative measures have been taken to eliminate this gender discrimination.

A related problem is the Chinese retirement system, which is marked by serious discrimination against women. There is at least a five-year gap between the legal retirement

age of men and women: women retire at 50 whereas men do so at 55, with the exception of female cadres who retire at 55 as well. Yet even in this latter case there is a five year age gap, with men retiring later than their female counterparts.⁽⁹⁾ Whether to abolish this age gap or not has raised lots of discussion during the drafting of the 2005 Public Servants Law. But in the end, the new law didn't clearly provide the exact retirement age for public servants, instead, put forth a very vague article saying that "(a) civil servant shall retire when he (she) reaches the age of retirement as provided for by the state or where he (she) loses his (her) working ability completely".⁽¹⁰⁾ In practice, the five-year age gap provided for in the 1993 Temporary Regulations on the State Public Servants continues to function all over the country.

However, compared to ordinary female workers or cadres, women who occupy high professional positions enjoy a different type of treatment. According to the 1990 Announcement on the Matter of Retirement of High Experts put forth by the Ministry of Personnel, female high experts in good health and at their own will, can retire at the age of 60; a minimal number of female high experts who have already reached 60 years old can, for the sake of work, postpone the age of retirement.

The regulation that women retire earlier than men is definitely a violation of gender equality. Furthermore, early retirement also affects women's promotion to higher positions and the retirement pension they are eligible to receive.

3. Special protection for women workers

The 1995 Labor Law, the 1988 Regulation on the Labor Protection of Female Workers, the 1993 Regulation on Healthcare of Female Workers, the 1990 Regulation on the Scope of Prohibitions of Labor for Female Workers and the LPRIW all have concrete regulations on the special protection of women at work. For example, Article 27 of the 2005 amended LPRIW provides that no employer is allowed to lower a woman employee's salary, dismiss her or unilaterally rescind the labor contract in cases of marriage, pregnancy, obstetrical period and nursing period.

However, in practice, the special protection for women constitutes a major reason for enterprises to avoid employing women since it brings considerable financial burden to employers.

Furthermore, CEDAW requires the State Parties ensure that men and women share their family responsibilities; yet Chinese legislation has placed this burden entirely on women. This is another important reason why Chinese enterprises prefer not to employ women.

4. Social security

Article 28 of the LPRIW provides that "(t)he state shall develop social insurance, social relief, social welfare and health care causes so as to ensure women enjoy the rights and interests in the aspects of social insurance, social relief, social welfare and health care. The

(9) See Articles 78 and 79 of the Temporary Regulations on the State Public Servants (1993).

(10) Article 87, Public Servants Law (2005).

state promotes and encourages the public welfare activities aiming to help women”.

In addition, Articles 70 and 73 of the Labor Law provide that maternity assurance makes part of social security. In order to implement these provisions, the Ministry of Labor adopted in 1994 the Temporary Regulation on Maternity Assurance for Workers Employed in Enterprises, thus relieved the burden on employers. Unfortunately, this regulation has been enforced only in several provinces.

The maternity assurance, however, applies only to workers from cities and townships but not to rural women. This poses a major problem because rural women constitute approximately 80% of China female population. Furthermore, the Regulation on the Question of whether Unwed Mothers Enjoy Labor Protection does not extend these types of benefits to unwed mothers; this regulation should be eradicated for the reason of discrimination based on marital status.

V. Right to Education (CEDAW Article 10)

Article 10 of the CEDAW indicates that State Parties shall take all appropriate measures to eliminate discrimination against women, so as to ensure equal rights for men and women in the field of education.

Article 9 of the 1995 Law of Education provides that citizens of the People's Republic of China shall have the right and obligation to receive an education. This article further provides that all citizens, regardless of ethnic group, race, sex, occupation, property status or religious belief, shall enjoy equal opportunities to education, according to law. The 1986 Compulsory Education Law and the 1996 Vocational Education Law both have provisions preventing sexual discrimination. Yet the 1999 Higher Education Law doesn't have such a provision.

However, the 2005 amended LPRIW does supplement detailed provisions on women's right to education. Article 16(2) provides that women shall not be refused enrollment and that the admission standards shall not be altered only on the basis of sex.

Taking into consideration that Chinese girls, especially in rural areas, are confronted with great difficulties in the field of education, Article 18(3) of the amended 2005 LPRIW provides that the government, society and schools shall take effective measures to solve the actual difficulties for the female children of the right age of schooling to receive education and shall create chances to ensure the female children of the right age of schooling among the poor, disabled and migrant population to finish the compulsory education. However, there is a considerable gap between written law and actual practice.

VI. Right to Health (CEDAW Article 12)

Article 12 of CEDAW provides that State Parties shall take all of the appropriate measures in order to eliminate discrimination against women in the health care field thus ensuring, on the basis of the equality of men and women, access to health care services, including those related to family planning. Notwithstanding the Paragraph 1 of this article, State Parties shall

ensure that women have access to appropriate services dealing with pregnancy, confinement and the post-natal period and granting necessary services free of charge, as well as adequate nutrition during pregnancy and lactation.

An equivalent provision of the 2005 amended LPRIW can be found in Article 38(1), providing that women's right to life and health is inviolable. Thus the law prohibits abandoning children or committing infanticide by drowning female babies; discrimination against or maltreatment of women who mothered female babies or of sterile women; cruel treatment of women resulting in injury or death due to superstition; and maltreatment or abandonment of sick, disabled and aged women. The right to health is intimately related to the right to life, family planning concerns and medical care.

1. Right to life

Article 38 of the 2005 LPRIW declares that women's right of life and health is inviolable. Drowning, abandoning or cruel infanticide in any manner of female babies shall be prohibited; discrimination against or maltreatment of women who gave birth to female babies or who are barren shall be prohibited; cruel treatment causing injury even death of women by superstition or violence shall be prohibited; maltreatment or abandonment of sick, disabled and aged women shall be prohibited.

Illegal identification of the sex of fetuses, infanticide and the forsaking of female babies are still prevalent practices, in particular due to the continuing popularity of the traditional idea of men superiority in rural areas; women who gave birth to female babies or who are sterile continue to suffer from discriminatory treatment and are generally maltreated in some regions of the Republic.

There are several laws and regulations that prohibit fetal sex identification and optional abortions, for instance, the 2002 Law on Population and Family Planning, the 2002 Regulation on the Prohibition of Sex Identifications and Optional Abortions Not Based on Medical Needs jointly promulgated by the National Family Planning Committee, the Ministry of Health and the National Medicine Monitoring Administrative Agency, and the 2003 Announcement on the Monitoring of the Thorough Implementation of the Former Regulation.

2. Family planning and other health services

Article 51(3) of the 2005 amended LPRIW asserts that the state, in order to develop the cause of mothers' and babies' health, should provide for pre-marriage, pregnancy and confinement health care system. The government, at all levels, should ensure that women can enjoy family planning services so as to improve women's reproductive health.

(1) Family planning services

Family planning is a basic state policy in China, which has been reaffirmed by the 2002 Law on Population and Family Planning. This law provides that the state establish a pre-marriage, pregnancy and confinement health care system with the goal of preventing and eliminating birth defects and of improving babies' health. The Family Planning Law requires the government, at all levels, to take measures ensuring citizens' enjoyment of family planning

services. Detailed provisions can be found in the Administrative Regulations on the Services of Family Planning issued by the State Council in 2001.

(2) Women's medical care and health

Special Chinese laws and regulations include the 1994 Law on the Health of Mothers and Babies and its detailed implementation regulations, the 2002 amended Working Rules for Pre-Marriage Health Treatment and the 2002 Administrative Means on Diagnoses before Birth, etc. The purpose of these laws and regulations is to ensure the health of pregnant mothers and to reduce the death rate of babies, in particular in disadvantaged areas.

3. Prevention of infectious diseases

The prevention of infectious diseases is an important aspect of women's health. In this regard, preventive measures against HIV/Aids and sexually transmitted diseases may be of primary importance. Regulations brought forth by the State Council and the Ministry of Health include the 1991 Administrative Means on the Prevention of Sexual Diseases and the 2004 Announcement on Strengthening the Work of Preventing Sexually Transmitted Diseases. Related to this issue and of particular note is that the illegal status of prostitution in China is one of the root causes for the increasing number of sex workers suffering from sexually transmitted diseases.

VII. Right to Marriage and to Have a Family (CEDAW Articles 5(2) and 16)

Article 16 of CEDAW provides that State Parties shall take all the appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on the basis of equality of men and women, the right to enter into marriage; the right to freely choose a spouse and to enter into marriage only of their free and full consent; and other rights and responsibilities relevant to family life.

The Chinese constitution and various other laws protect the right to marriage and to have a family.

However, it must be pointed out that there is a conflict between the CEDAW and the 2002 Chinese Law of Population and Family Planning. Article 16(e) of CEDAW provides that the State Parties shall ensure women and men have the same rights to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable citizens to exercise these rights. Yet Article 18 of the 2002 Law on Population and Family Planning provides that, in order to stabilize the existing family planning policy, late marriage, late child birth and the one couple/one child policy are all encouraged.

The purpose of the Chinese family planning policy is to control population growth. Therefore, in China couples do not have the right to decide how many children they may want to have; law or policy makes that decision. The only decision couples may make is if they wish to have fewer children than required by law or not to have any at all.

Another issue related to women's family rights deals with divorce compensations. As mentioned above, the distribution of possessions should follow the principle of showing consideration for the child (children) and for the rights and interests of the wife. Besides, the 2001 amended Marriage Law provides that domestic violence shall be considered as one of the major factors responsible for the breakdown of mutual affection between two parties (Article 32(2)). When a divorce is caused by domestic violence, the innocent party shall be entitled to claim damages (Article 46(3)). These provisions are beneficial for women as they usually are the victims of domestic violence.

VIII. Violence against Women (CEDAW Article 6)

Violence against women is the most serious form of discrimination. Since violence against women is not mentioned in CEDAW's definition of discrimination against women nor in any article of the Convention, the CEDAW Committee adopted General Comment No. 19 to call on State Parties to include violence against women in the definition of discrimination in Article 1 of CEDAW. The Committee, in the General Comment, specified that Articles 2, 5, 6, 11, 12, and 16 are all relevant to violence against women. Accordingly, the Chinese government should take all appropriate measures to implement this general comment.

Since CEDAW does not include *per se*, a definition of violence against women, the Declaration on the Elimination of All Forms of Violence against Women adopted by the General Assembly in 1993 might be used here as the basis for discussion on this issue. The definition of violence against women in this declaration reads as follows:

"For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life (Article 1)."

1. Prostitution

In China, prostitution is prohibited by law. Article 41 of the 2005 amended LPRIW reaffirmed that prostitution shall be prohibited. It is prohibited for anyone to organize, force, seduce, shelter or introduce a woman to engage in prostitution or employ or shelter a woman so that she may engage in obscene activities with others. Criminal laws and public security regulations prohibit such conduct as well.

Article 66 of the 2005 Law on Public Security Administration Punishments provides that prostitution shall be prohibited and violators shall be detained for 10 to 15 days and in addition shall be fined for less than 5000 RMB; if the circumstances are relatively lenient, he (she) shall be detained for less than 5 days, or be fined not more than 500 yuan.

Article 358 of the 1997 amended Criminal Law provides that those organizing others for or forcing others into prostitution are to be sentenced to 5 to 10 years in prison, in addition to having to pay a fine. Certain categories of serious crimes may be sentenced to 10 years or more in prison or given a life sentence, in addition to a fine or confiscation of property. If the

case is especially serious, the criminal may be given to a life sentence or sentenced to death, in addition to confiscation of property.

Those helping others organize people for prostitution and those harboring others engaging in prostitution or seducing or introducing others into prostitution are all facing imprisonment and capital punishment. Those engaging in prostitution or visiting a whorehouse knowing that they are suffering from sexually transmitted diseases are criminals too. Those who visit young prostitutes under the age of 14 are to be sentenced to five years or more in prison in addition to paying a fine.⁽¹¹⁾

Given these laws and regulations, women that engage in prostitution in China are considered criminals. This status seriously affects women's rights in a variety of arenas, in particular the right to health. The Chinese government should take into serious consideration CEDAW Committee's recommendations on this matter. Chinese legislators should re-evaluate the illegality of prostitution.

2. Abduction of and trafficking in women

Article 39 of the 2005 LPRIW provides that "(a)bduction of and trafficking in, or kidnapping of women shall be prohibited; buying of women who are abducted and trafficked in, or kidnapped shall be prohibited; and baffling the rescue of women who are abducted and trafficked in, or kidnapped shall be prohibited. The people's governments at all levels and the relevant departments shall timely take measures to rescue women who are abducted and trafficked in, or kidnapped, and shall properly deal with the problems arising thereafter. The women's federations shall make cooperative efforts to complete the relevant work. Nobody may discriminate against any woman who is abducted and trafficked in, or kidnapped". This law can only be implemented in conjunction with other Chinese, particularly criminal, laws and regulations. Relevant Chinese laws as such are relatively well established. The problem is not in creating new legislation but in properly implementing existing laws.

3. Rape and other sexual crimes against women

China, like many other countries, prosecutes in accordance with the law, rape and other sexual crimes. However, marital rape is not yet criminalized by the Chinese legal system, as such making the pertinent laws ineffective in protecting women against domestic violence.

Another related issue concerns girls under the age of 14. The People's Supreme Court has made several judicial interpretations, one of which is particularly detrimental to the rights' protection of girls younger than 14, i.e., the Supreme Court Judicial Interpretation on Whether It Is Rape When the Actor Is Unaware the Girl Is Younger than 14 Years Old and the Sexual Intercourse Is Mutual (issued in January 2003). According to this interpretation, this situation is considered a crime only when it is intentional or gives rise to misconduct on the part of the actor. This is inconsistent with standard judicial practice on this issue. Women's organizations protested against this interpretation because they feared that it leads to serious violations of young girls' rights and subsequently leave the criminals unpunished.

(11) Articles 359 and 360, Criminal Law, 1997 amended.

Consequently, this interpretation was laid aside by the Supreme Court in August 2003.

4. Sexual harassment

The 2005 amendment to LPRIW was the first legislation on sexual harassment in China. Article 40 clearly prohibits sexual harassment against women. The victims are entitled to complain to the workplace or the relevant organs. However, the amended law fails to define the term “sexual harassment”, making it difficult to implement the law. As to legal remedies, Article 58 provides that the conduct “constitutes a violation of the public security administration, the victim may require the public security organ to give the violator an administrative punishment or may initiate a civil action in the people’s court”.

One of the difficulties in combating sexual harassment is the lack of relevant provisions in other laws. Another difficulty lies in the burden of proof and some scholars have suggested that the burden of proof should be overturned.

It is to be noted that some local legislations give detailed provisions on sexual harassment. For example, the Implementation Measures for LPRIW in Shanghai defines five specific forms of sexual harassment. It is prohibited to use language, words, image, electronic message and physical gestures to sexually harass women. Employers should take appropriate measures to prevent and hinder from sexual harassment against women.

IX. Rights of Minority and Rural Women (CEDAW Article 14)

1. Rural women

Article 14 of CEDAW provides that State Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas. It also provides that State Parties shall take all the appropriate measures to eliminate discrimination against women in rural areas in order to ensure that they participate in and benefit from rural development, including assuring the right to participate in elaborating and implementing development planning at all levels; the right to have access to adequate health care facilities; the right to benefit directly from social security programs; etc.

Although plenty of legislations exist, the right to education for rural girls and the right to health of rural women remain the most serious problems. Besides, violations to women’s land-related rights and interests appear to be very common in the process of contracting land. Women often suffer from discrimination and their contracts are even terminated upon marriage. Thus it is extremely important to protect rural women’s land rights and interests. The 2003 Law on the Contracting of Rural Land ensures, in Article 6, that women have equal rights with men in contracting rural lands and that women’s lawful rights shall be protected. No institution or individual is allowed to deprive or violate women’s rights to contracted management of rural land. The 2005 amended LPRIW has extended detailed provisions

(Articles 32 and 33) on women's rights and interests dealing with land.

2. Minority women

China has 5 regions where minority nationalities are concentrated. In accordance with Article 19 of the 2001 amended Law on Regional National Autonomy, national autonomous regions have rights of autonomy in the sense that they have the power to make local regulations according to the political, economic and cultural characteristics of their region. For example in Tibet one of the sensitive issues is family planning. So far, in Tibet, there is no autonomous regulation dealing with family planning. The only regulation on this issue applies to migrant populations to Tibet but not to Tibetans in general.

Chapter 2 Activities of governmental institutions to implement CEDAW

Section 1 Introduction to the Relevant Governmental Institutions

1. National Working Committee on Women and Children under the State Council (NWCWC)

NWCWC, founded on February 22, 2000, is the coordinative organ under the State Council responsible for issues dealing with women and children. Though it is one of the committees under the State Council, it is headquartered in the All-China Women's Federation (ACWF) building.

The Committee has 32 member units, which include 15 ministries, 3 national committees, 8 national agencies and several national NGOs, such as the ACWF, the All-China Federation of Trade Unions, etc.

The chairperson of the Committee is currently Ms. Liu Yandong, State Councilor. Members of the Committee are deputies of the ministries, national committees and national agencies. This network ranks highly in the governmental hierarchy which should prove beneficial for the implementation of CEDAW in China. Furthermore, there are committees on women and children at provincial level. Given this highly developed network of committees on women at different levels all over China, obstacles to implementing CEDAW and other international human rights conventions should be minimal.

2. Functions of the Committee

As the title indicates, the Committee has double functions, one on women, and the other on children. In regard to women, it:

- coordinates and promotes, among all relevant governmental organs, the protection of women's rights and interests;
- coordinates and promotes, among all relevant governmental organs, the making and

implementation of programs on women's development;

- coordinates and promotes, among all relevant governmental organs, the provision of necessary personnel, finance and materials for the cause of women's development; and
- guides, monitors and reviews the work of provincial working committees on women, including committees for the autonomous regions and municipalities directly under the central government.

3. Relationship between the Committee and its member units

The Committee is an institution for discussing and coordinating official business concerning women and children. Therefore it is not a superior organ to its member units. Rather, member units work under the Committee's coordination.

The Committee, as part of the State Council, is headed by an official at the level of Vice Prime Minister or State Councilor, currently Ms. Liu Yandong, State Councilor. Though it cannot give orders, it does have the power to make policies and initiate programs or projects in order to exercise its function of promoting the protection of women's rights and interests. The member units, i.e., various ministries, may work independently or jointly with other member units as required by the programs' or projects' topics. The member units themselves can also initiate their own programs or projects or carry out programs with other ministries or even with their foreign counterparts.

4. Committee's division of functions and coordination methods

Functions are divided among most of the member units. Every member unit has its own scope of functions related to a relevant field or profession; for example, the functions of the Ministry of Public Security are to fight against the abduction of women, prostitution and to rescue female victims.

The units have liaison persons, who actually are section chiefs or deputy ministers of the member units. The Committee issues working plans each year and in turn, the member units are required to submit a working report annually.

In order to promote women's development the Committee may initiate programs or projects, to be completed by one or more member units. The liaison persons of the relevant member units will hold a meeting to discuss the program or project. Then the liaison persons will go back and report to their leader for approval. Usually the member units will approve the program, which subsequently will be carried out according to the proposal made by the Committee.

5. Relationship between NWCWC and ACWF

1) Relationship in terms of administration

In terms of administration, the relationship between NWCWC and ACWF is quite simple: the former is not a body of high authority but one for coordination purposes, while the latter is simply one of the former's member units. The relationship is the same as that shared by other member units, such as the All-China Federation of Trade Unions, the Ministry of

Education, etc.

2) Relationship in terms of protecting women's rights

In terms of the Committee's function, NWCWC and ACWF's relationship is very special. ACWF is the only member unit whose function focuses entirely on women. It is therefore, not surprising to find the NWCWC's headquarters in the same building with ACWF. In general, it is very easy for even the most experienced in this field to confuse the two institutions. ACWF, under NWCWC's authorization, has carried out a great deal of work on behalf of the National Working Committee. For instance, ACWF was responsible, as authorized by NWCWC, for drafting the initial and the later periodical reports on CEDAW implementation. In short, NWCWC is the key governmental institution responsible for the implementation of CEDAW and in turn, ACWF has been NWCWC's key member unit in the Convention's implementation process, though other member units are also important in this regard, particularly the National Population and Family Planning Commission, the Ministry of Education and the Ministry of Public Health, etc. Given this fact, this part of the report will focus on activities conducted by NWCWC, ACWF and some other relevant member units of the National Working Committee.

Section 2 Implementation Actions Reflected in the Chinese Periodic Report to CEDAW Committee

1. Implementation actions reflected in China's latest (combined 5th and 6th) report (hereinafter "the Chinese Report")

China submitted its latest periodic report, *i.e.*, combined 5th and 6th report in Feb. 2004. The Report was reviewed by the CEDAW Committee in August 2006. Below is a brief introduction to the main actions China has carried out to implement CEDAW.

- In General

Legislative, judicial and administrative measures: amending some related laws, monitoring the implementation of the 1992 LPRIW, establishing more than 3000 tribunals on the protection of women's rights and interests, setting up a National Task Force on the protection of women's rights and interests, setting up of the Leading Group Monitoring the Implementation of the National Programmes for the Development of Chinese Women.

Technical improvement: statistics system with gender perspectives established. For instance, the database of gender statistics was set up by the National Statistics Agency.

- Violence against women

Rescuing abducted women: the Chinese government has taken legislative and administrative measures to fight against the abduction of women. Emphasis has been put on rescuing abducted women; over ten thousand of them were rescued during one rescuing action in 2000.

Punishing prostitution: due to the fact that prostitution is outlawed in China, Chinese government continues to take legislative and administrative measures prohibiting prostitution in the same way as it has been done ever since the founding of the People's Republic of

China. No actions have been taken to legalize prostitution as recommended by the CEDAW Committee.

Measures taken to eliminate domestic violence against women: since the new Marriage Law prohibits domestic violence against women, measures have been taken to implement the Law, including making relevant local regulations, holding symposia on this topic, setting up associations for protecting women's rights and interests and establishing hotlines for battered women, etc.

- Political rights

Meetings were held to train and select women cadres in 2001 and subsequently recommendations adopted requiring the government, at all levels, to put this work into their agenda.

In 1999, the Ministry of Civil Affairs adopted the Observations on Making Efforts to Guarantee a Certain Quota of Female Members in the Villager's Committee. Some Provinces, Hunan for instance, have taken measures to implement the observations.

ACWF has played an important role in training and maintaining a pool for recommending women cadres to relevant governmental organs.

- Right to Education

The "*Shuangxue Shuangbi Huodong*" ("Campaign of Two Kinds of Learning and Two Kinds of Competition")⁽¹²⁾ in rural areas organized by the Ministry of Agriculture, the Ministry of Education and Ministry of Science and Technology respectively with ACWF: the campaign to eliminate illiteracy of women in rural areas with learning skills, carried out for about 10 years, turned out to be very successful. As a result, 20 million women are no longer considered illiterate.

ACWF set up "*Jinguo Saomang Jiang*" ("the Award for Women Working to Eliminate Illiteracy") in order to praise institutions or individuals who have made significant contributions to eliminating female illiteracy.

- Right to Employment

Measures were taken to promote women's reemployment, such as granting priority to laid-off women when opportunities for work existed, tax write-offs for units employing laid-off women, training laid-off women for reemployment, etc.

The government has made efforts to create jobs for unemployed women, particularly jobs in the service sector and in community service networks. In 2000, women took 70% of the jobs available in communities.

- Family planning

Since 1995, the National Committee on Family Planning has implemented a program of important reproductive health services. Among a variety of other issues, this program emphasizes the elimination of forced abortions, based on the principle of free will and safety. The program also prohibits selective abortion on the basis of sex, in order to solve the problem of the unbalanced sex rate at birth.

(12) Two kinds of learning are learning literacy and learning technology; the two kinds of competition consist of competing in scores and competing in contributions.

The government, during its project distributing contraceptives, encourages men to take measures of contraception in order to eliminate prejudices against condoms or vasoligation.

- Rights of rural and minority nationality women

The high suicide rate among rural women: symposia were held to study the causes of and the ways to solve the problem. Relevant research institutions, governmental organizations, NGOs and UN agencies in China were involved in the symposia.

The “*Shuangxue Shuangbi Huodong*” (“Campaign of Two Kinds of Learning and Two Kinds of Competition”) has helped eliminate illiteracy among rural women. While learning how to read and write, rural women have also learned agricultural skills. This is the result of several projects, including the Cross-the-Century Training Project for Yong Farmers, the agricultural broadcasting schools and correspondence schools, organized jointly by the Ministry of Agriculture and other relevant ministries with ACWF. Since 1999, 5.37million rural women have eradicated illiteracy; however there is no source for these statistics.

No specific measures were mentioned in the Chinese Report dealing with minority women’s poverty levels, let alone relevant to Tibetan women.

2. Analysis of Measures Taken by the Chinese Government

1) General analysis

Thanks to Mao Zedong’s famous slogan, “Women can hold up half of the sky”, the Chinese public, since 1949, has been more familiar with the concept of equality between men and women than with that of human rights, though the two are inextricably connected. Therefore, it is natural that CEDAW was one of the first human rights conventions signed and ratified by China, just a couple of years after she started *Gaige Kaifang Zhengce* (the Reform and Open-door Policy). However, over time, CEDAW, as well as other human rights conventions, have not become deeply ingrained within Chinese society. One of the primary reasons for this negative outcome can be explained by the Chinese government’s attitude and the measures it has taken to implement CEDAW in China.

- Chinese government’s general attitude towards CEDAW

China, as part of diplomatic actions reflecting the Reform and Open-door Policy⁽¹³⁾ initiated by the then acting Premier Minister Deng Xiaoping, participated intently in the process of negotiation and drafting of CEDAW. Therefore, the government’s general attitude is quite positive.

- Dichotomy between “internal” and “external” implementation of CEDAW

Commonly, countries divide governmental and bureaucratic affairs into two categories: internal and external, and China is no exception. In terms of international human rights conventions, negotiations or any of the drafting and signing activities, might be correctly regarded as “external affairs” since a majority of these acts are usually conducted abroad by

(13) Under the Reform and Open-door Policy, from the end of 1970s to the beginning of 1980s China sent delegations to participate in negotiating international treaties, such as the 1982 UN Convention on the Law of the Sea and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as CEDAW.

diplomatic representatives. It would be problematic, however, if these treaties' implementation processes would also be considered part of "external affairs" and as such, would be carried out by the international or foreign affairs departments of the relevant governmental institutions. As has been presently observed in the context of CEDAW and its implementation by the relevant institutions, including NWCWC and ACWF, this is what is currently happening in China.

- Lack of special mechanisms to implement human rights conventions in China

A significant number of countries have established national human rights institutions, most of which often called "national human rights commission". One of the functions of those institutions is to coordinate the work of implementing human rights conventions to which the respective countries are parties. China does not have such an institution and therefore the implementation of CEDAW, as well as of other human rights conventions, remains a problem. The process of drafting national reports is a perfect example; the ACWF has been coordinating this task under the authorization of NWCWC. As an NGO, it is difficult for ACWF to coordinate the different relevant ministries and governmental organs, when efforts should be made jointly by a variety of governmental institutions. During research for the present analysis, it was gladly noticed that some ministries or departments, in conjunction with ACWF, conducted joint projects aiming to promote women's rights. But these cooperations occurred occasionally and were often sponsored with foreign funding. So far, a systematic network coordinated by a national level governmental institution does not exist in China. This may be clearly glimpsed from the following in-depth analysis with regards to the main problems observed by the CEDAW Committee.

2) Violence against women

Measures taken in this respect by the Chinese government may be roughly divided into three aspects: fighting against the abduction of women and rescuing abducted women, punishing prostitutes and those that sponsor it, and prohibiting domestic violence against women.

In regard to the abductions the focus should not be entirely on rescuing women. Some of the abducted women have had children and as a result do not wish to return to their previous domicile; thus the rescue will not help and may cause new problems for them. The priority should be given to protecting the rights and interests of the abducted women and their children, rather than simply completing a rescuing. Furthermore, rescuing solves the problem only on a case by case scenario. If abductors cannot be punished or forced marriages cannot be prohibited, more and more women will continue to be abducted.

Campaigns attacking prostitution and any of those that support them are often carried out according to the "*Yanda*" (severe strike or punishment) strategy. But they are not at all effective, in particular in economically more developed areas. As prostitution is closely related to China's many other social problems, for instance, HIV/Aids, continuing abductions of women, the poor health of prostitutes, etc., the CEDAW Committee suggested that the Chinese government legalize prostitution in order to eradicate some of these problems. The Chinese government has not responded to this suggestion.

Sexual harassment against women is not mentioned in the Chinese Report though it is a common phenomenon in China. Very few female victims of sexual harassment have won their cases before the court. The key problem is the lack of evidence as almost all of the failed cases are compromised by this factor. Some victims have even been countercharged for libel by the men, usually bosses or higher level officials. The first winning case since the LPRIW regulated sexual harassment took place in Chengdu, Sichuan Province. A human resource manager forcibly kissed a woman employee and caused her minor injury. In June 2008, the local court found him guilty and sentenced him to 5 months' criminal detention for the crime of forced molestation of women.⁽¹⁴⁾

Although some legislative measures have been taken in the fight against domestic violence, in particular by amending existing laws (for instance the amended 2001 Marriage Law, the amended 2005 LPRIW), no serious efforts have been made by the Chinese legislature to create a special law on the elimination of domestic violence against women.⁽¹⁵⁾ There has been no response from the Chinese government to CEDAW Committee's suggestion of adopting a comprehensive law on violence against women to ensure that all forms of violence against women and girls, both in the public and private spheres, constitute a crime punishable under criminal law.⁽¹⁶⁾ Part of the reason for the delay is the legislature's lack of attention to this issue. Compared to laws on violence against women in the public sector, legislation dealing with the private sector has lagged far behind. One of the underlying reasons can be attributed to the traditional thinking of "*Qingguan Nanduan Jiawushi*" ("Even an upright official finds it hard to settle a family quarrel"). Furthermore, it must not be overlooked that the proportion of female representatives to the NPC is very low, thus directly affecting the development of legislation in favor of women. This aspect strongly underlines that guaranteeing women's political rights, especially the right to participate in the law-making process, is very important in guaranteeing their other human rights.

3) Political rights

Statements in the Chinese Report regarding the proportion of female high-ranking governmental officials are very vague and no updated statistics have been provided. This is mainly due to the fact that there has been no progress made in this respect.

The few women appointed leaders of high-level governmental organs are almost all deputies. This "deputy phenomenon", as Ouyang Hexia called it, still exists in China and causes of this problem are many-fold.⁽¹⁷⁾ The traditional thinking regarding the roles of men and women is still influencing people's (both men's and women's) mentality, *i.e.*, "*Nan*

(14) Further information can be found at <http://news.163.com/08/0715/08/4GSL6D1O0001124J.html>, visited on Jan. 18, 2009.

(15) Some scholars have studied on the issue and some others have made a draft of law on anti-domestic violence.

(16) *Concluding comments of the Committee on the Elimination of Discrimination against Women: China*, paragraph 22, CEDAW/C/CHN/CO/6, Aug. 25, 2006.

(17) See OUYANG Hexia, "Review of the Four Debates in the Chinese History on Whether Women Should Go Back to Take Care of the Family", Vol. 15, *Journal of Women's College*, No. 3, 2003.

zhunei, Nu zhuwai” (“Men control the public sectors, with women remaining in the private sectors”). This traditional mentality has a stronger influence on people living in rural areas, which explains the low proportion of female members of villagers’ committees.

In contrast to the proportion of women in high-level government organs, the proportion of women taking part in residents’ committees is very high, up to over 70%. This is a typical effect of the traditional thinking “*Nan zhunei, Nu zhuwai*” and as a result, is increasing gender segregation. Unfortunately and ironically, this phenomenon is described in the Chinese Report as an achievement in strengthening the women’s role.

4) Right to education

Countrywide statistics of the proportion of girl students in school masks the problem of high rates of dropout among girls in rural areas, particularly in both middle schools and high schools. Separate statistics should be assembled dealing only with the rate of rural girl students enrolled in school.

Though certain programs have been carried out to eliminate female illiteracy, particularly in rural areas, and some 20 million women are no longer considered illiterate, there are still many more illiterate women in the rural areas.

Rural girls’ right to education is of great significance for China not only because they constitute a large proportion of all girls in China, but also because their rights are often abused for a variety of reasons. The Chinese Report, however, did not attach enough attention to this issue. The “*Chunlei Jihua*” (Spring Bud Plan) helping girls enjoy their right to education was mentioned only in two sentences. Though some of the measures mentioned in the Chinese Report promote children’s right to education in general, no special attention was paid to girls’ rights. In short, the Chinese report, when dealing with right to education, lacks gender perspective.

5) Right to employment

China’s economic reform process has caused unemployment of a large number of women (“*Xiagang*”). Measures have been taken to create new jobs, in particular in private sector and informal sector, or to train these women for reemployment. However, CEDAW Committee’s observation on gender segregation in employment remains a huge problem for China. The Chinese government is facing a serious dilemma concerning this aspect. New jobs created for women who have been laid off are mostly cooking, house cleaning, child care and other domestic work, and these positions are not well paid. On the one hand, if the government continues with this practice, gender segregation will only be aggregated. Yet on the other hand, many of the laid-off women will continue to remain jobless because they do not possess the qualifications necessary for any other kind of work. In this transition period of economic reform, the priority for most unemployed women is to get a job, so as to be able to survive. The government should guarantee this prior interest for unemployed women. However, this is only a temporary solution and in the long run, the gender segregation issue should be taken seriously.

Sex discrimination in the field of employment is common in China, resulting in difficulties for female university students in finding jobs upon graduation. One of the main causes for this

type of discrimination is the heavy burden employers have to bear when paying for maternity leaves. Although the government has taken notice of this problem and has started finding ways to solve it, it was not highlighted in the Chinese Report. The most important step taken in solving this problem was to establish a system of maternity assurance. Progress has been made in half of the cities in China. However, according to the Development Plan for Women in China (2001-2010), more than 90% of the employees in city should be covered by maternity assurance by 2006, yet it's a pity that this goal has not been reached yet.⁽¹⁸⁾

6) Family Planning

According to Article 17 of the 2001 Law on Population and Family Planning, spouses bear common responsibility for family planning. In fact, family planning measures are usually taken by women rather than by men; the government only "encourages men to take contraceptive measures", as described in the Chinese Report. This phrasing is not consistent with Article 17, thus raises legal issues in implementing this article. If the government does not take serious account on this discrepancy, the equality of men and women in bearing birth control responsibilities will be jeopardized by the inability in implementation.

Another related issue is the imbalanced sex ratio at birth of recent years. Advanced technology makes it possible to identify an unborn child's sex, resulting in a disproportionate number of abortions of female fetuses. This imbalance in the sex ratio at birth has been getting increasingly worse over the past few years. According to statistics from the 2000 National Population Census, the ratio between men and women is 106.74 : 100.⁽¹⁹⁾ The State Council has passed regulations prohibiting sex selective abortions. Private clinics, out of governmental control, have made the enforcement of these regulations difficult.

In regard to the use of violence by family planning governmental officials, the Chinese Report simply reiterated the principle of restraining governmental officials from violating people's lawful rights and of punishing them when their actions constitute crimes. In short, the Report, only focused on what should be done; there was no mention of what had been done in order to control this type of official abuse. China's family planning policy and laws are effective; the manner in which these policies have been enforced and carried out has been ineffective, thus tarnishing China's image in the international arena. Therefore, strict enforcement of family planning policies and of penalties for official abuse should be taken seriously by the Chinese government.⁽²⁰⁾

7) Rights of rural and minority nationality women

As has been previously mentioned, 80% of Chinese women live in rural areas, thus the issue of women's rights in China is essentially that of Chinese rural women's rights.

The Chinese Report mentioned the high incidence of suicide. However its scope was

(18) See National Bureau of Statistics, *Social Progress in China: 2006*, Beijing: National Bureau of Statistics, 2006, pp. 35-41.

(19) See the National Bureau of Statistics, *Public Report on the Fifth National Population Census in 2000*.

(20) Family planning officials use violence against women due to their fear of losing their job if there are excesses in the planned births within their jurisdiction.

narrow, focusing on only one symposium, held in Mar. 2000 and the causes established by the analysis of the statistics sample survey. Follow-up measures must be taken and the affordable and quality mental health and counseling services for rural women should be made available.

The proportion of rural women who continue to be illiterate is still quite high.⁽²¹⁾ Statistics included in the Chinese Report on the progress made in eliminating illiteracy among women do not reflect the multitude of rural women who still cannot read and write. One of the most important issues for China is linked to ensuring rural women's right to education and within this context in particular, that of young girls. Elevated levels of illiteracy among young girls and their high tendency of quitting from school are of urgent concerns.

Rural women's right to land was mentioned in the Chinese Report. In China, the issue of land-related rights is closely related to the poverty of rural women.

Chapter 3 Analysis, Comments and Recommendations

from a Scholar's Perspective

Section 1 Analysis and Comments

1. Women's Rights as Human Rights: the Human Rights Atmosphere in China

"Women's rights are human rights" was the slogan for the Fourth World Women's Conference at the beginning of the 1990s.⁽²²⁾ This slogan was first accepted at the 1993 World Human Rights Conference in Geneva and then later, at the 1995 Fourth World Women's Conference in Beijing. Because human rights were considered to be a sensitive issue in China at that time, Chinese women were unfamiliar with this slogan. A decade has passed and though this slogan has not been popularized throughout China, the concept of human rights has been brought into the Chinese constitution.⁽²³⁾ Although human rights are no longer regarded as sensitive an issue as they were 15 years ago, it remains a politically complicated issue which Chinese governmental officials treat with caution. Therefore it might be wise not to include women's rights issues into the general human rights discourse in China; in this way more progress could be accomplished towards promoting women's human rights. Ironically,

(21) According to the Second Statistics Sample Survey on the Chinese Women's Social Status, in 2001 the proportion of illiterates out of the total population of women 18 to 60 years old was 11.1 %, see *Report on the Main Statistics of the Second Statistics Sample Survey on Chinese Women's Social Status*. Due to the lack of specific statistics on rural women, the number of illiterate rural women cannot be provided.

(22) See Rebecca Cook (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994.

(23) *Article 33, paragraph 3* of the revised Chinese Constitution (2004) provides that, the State respects and preserves human rights.

CEDAW has been on the list of human rights conventions ratified by the Chinese government. Much of the decision to ratify this convention was prompted by interests in improving China's image, rather than by genuine human rights concerns.

Fortunately, due to the influence of Chairman Mao's idea of "women can hold up half of the sky", women's rights are not a sensitive issue in China and therefore can be openly promoted, studied and published. Women NGOs have been established, such as the Association of Women Judges, the Association of Women Prosecutors, the Association of Women Lawyers and many others.⁽²⁴⁾ However, there are other human rights topics which are sensitive even today, for example, freedom of expression, freedom of religion, etc.; the controversial opinions both nationally and abroad make progress difficult to achieve in regard to any of these types of human rights concerns.

This analysis will focus on the women's rights addressed by the CEDAW Committee as primary areas of concern in the Chinese context, thus not all the rights are going to be analyzed.

2. Chinese Government's Approach to Implementing CEDAW

The CEDAW Committee, while reviewing the combined 3rd and 4th Chinese Reports, was concerned with the Chinese government's protective approach to implementing the Convention. The Committee recommended the Chinese government re-examine its approach to realizing gender equality, with an emphasis on CEDAW's human rights framework and on women's empowerment.

The government's protective policy towards female employment has its roots in the state planned economy. In spite of the fact that women's right to work was protected equally to that of men, the protective policy towards women was well systemized. Under the state planned economic system everything was deliberate and controlled. The government assigned graduates' positions, without any leeway for students to protest or alter assignments. According to the protective policy, women were assigned positions suited to their "nature", oftentimes resulting in stereotyped professions.⁽²⁵⁾ Women, unlike men, could not challenge the systemization of the protective policy because their choices were severely limited by both bureaucracy and tradition.⁽²⁶⁾

During the current transition period of economic reform, while the deeply rooted protective policy still strongly influences China's decision makers, the planned economy system that in the past guaranteed women a workplace, is now withering away. With the collapse of the "Iron bowl", women in the year 2000 totaled 57.5% of all laid-off Chinese, while the percentage of women reemployed during that same year was only 38.8, 18.8% lower than

(24) Thanks to the 1995 Fourth World Women's Conference in Beijing, many women NGOs were set up a couple of years before the conference was held. However, those women NGOs turned to be less active after the Beijing Conference. In contrast to women NGOs, there are no human rights NGOs in China.

(25) Jiang Yongping, "The Employment of China's Urban Women Under Two Systems", Vo. 50, *Collection of Women's Studies*, No. 1, Jan. 2003, at p. 16.

(26) *Ibid.*, at p. 16.

the re-employment rate experienced by men. The protective policy towards women and the consequent gender segregation in employment developed since 1950s have put women at a disadvantage. Women, under the state planned economic system, became too dependent on the state and its working units. As a result, women are currently not as competitive as men in the Chinese job market.

The Chinese government is experiencing a dilemma. On the one hand, if the government takes the Committee's recommendation seriously and thus takes measures to empower women, an extended period of time will pass before laid-off women can be reemployed. However, this may prove problematic for families with both income earners unemployed; if a family is dependent on the female income-earner, then the empowerment policy will have to be overlooked. Conversely, gender segregation will be further aggravated if the government first takes measures to create jobs in order to employ laid-off women, limited to positions in the private sectors.

Chinese women's empowerment is a difficult task, of long duration. The NWCWC may prove an effective coordinative authority for improving the structure and resources of the Chinese national machinery pertinent to female empowerment.

3. Definition of Discrimination against Women in Chinese Laws

In its concluding comments, the CEDAW Committee overly expressed its concern in regard to the absence of definition of discrimination against women in the Chinese legal system.⁽²⁷⁾ In fact, Chinese law does not define discrimination of any kind. The existing Chinese legislation only includes the notion of equality, in which the bases of discrimination are indicated. For example Article 34 of the Constitution provides that "(a)ll citizens of the People's Republic of China who have reached the age of 18 have the right to vote and stand for election, regardless of nationality, race, sex, occupation, family background, religious belief, education, property status, or length of residence, except persons deprived of political rights according to law". Article 12 of the Labor Law provides that "(l)aborers shall not be discriminated against in employment due to their nationality, race, sex, or religious belief".

While the necessity of including a definition of discrimination against women is highly recognized by academia, governmental officials have an opposite opinion, simply because it is viewed as a human rights issue.⁽²⁸⁾ Consequently, as mentioned above, the Experts' Draft for the amendment of the LPRIW in 2005 contains a definition of discrimination against women,

(27) See paragraph 10, *Concluding comments of the Committee on the Elimination of Discrimination against Women: China*, CEDAW/C/CHN/CO/6, Aug. 25, 2006; and paragraph 283, *Concluding Observations of the Committee on the combined 3rd and 4th report*, CEDAW A/54/38/Rev.1 (1999).

(28) To the knowledge of the authors of this report there is very little literature on this issue in China. There are only a couple of articles discussing about cases of discrimination and the possibility of making a law of anti-discrimination in employment. For example, see "The Law of Anti-discrimination in Employment Should Be Made", <http://news.sina.com.cn/o/2004-06-30/12122950239s.shtml>, and see also discussions about the first case of discrimination against people with hepatitis B, <http://www.southcn.com/news/community/shzt/yg/ygtop/200405310321.htm>.

which is the same as in CEDAW, but finally it was not accepted by the legislators.

4. Legalization or Decriminalization of Prostitution in China

The prostitution issue remains one of the principal areas of concern for the CEDAW Committee on the combined 5th and 6th Report of China. The Committee pointed out that “the continued criminalization of prostitution disproportionately impacts on prostitutes rather than on the prosecution and punishment of pimps and traffickers. It is also concerned that prostitutes may be kept in administrative detention without due process of law.”⁽²⁹⁾

Nevertheless, it seems that the possibility of the decriminalization of prostitution in the near future is firmly denied by the government side. Given China’s cultural environment, this negative response can easily be understood, since the majority of the Chinese people take it for granted that prostitution is illegal. According to a sample survey conducted in 1998 in Wuhan City, 87.0% of people polled did not believe prostitution should be legalized and 73.3% of them insisted that prostitution should be severely prohibited. Only 3.7% held the opposite opinion and 9.3% took a middle position. Therefore, it is very clear that the Chinese general public is opposed to legalizing prostitution, thus making it impossible for the Chinese government to take any legislative measures towards legalizing prostitution.⁽³⁰⁾

On the other hand, the recommendations by the CEDAW Committee are reasonable. It is a generally well known fact that prostitution takes place throughout the country. For instance, it was reported in 2004 that over 60 prostitutes and their patrons were arrested by the police in Kunming, Yunnan province. The police investigated and gathered evidence for approximately 20 days. The evidence proved that there was a large prostitution network operated by an underground organization composed of bosses and triggermen. Most of the prostitutes were cheated or abducted before they started prostituting; they were seriously exploited and their life was fully controlled by their bosses.⁽³¹⁾

In recent years, the legalization or decriminalization of prostitution in China has been a very contentious topic among Chinese legal professionals and scholars, and opinions continue to be divided. Those supporting this measure give the following five main reasons. First, prostitution is an ancient profession in both China and other countries, which has not been totally eliminated in any country since it has emerged. Second, from the perspective of Reform and Open-door Policy, the prohibition of prostitution will affect the foreign

(29) See paragraph 19, *Concluding comments of the Committee on the Elimination of Discrimination against Women: China*, CEDAW/C/CHN/CO/6, Aug. 25, 2006.

(30) Liu Xinhui and Ma Li, “Investigation on the Attitude of People in Wuhan City towards Prostitution”, Vol. 15, *China Health Education*, No. 9, 1999.

(31) Hu Jianfang, “Disclosing the Underground Network of Prostitution in Dachang Village” (“Jiedi Dachangcun Maiyin ‘Chanye’ Heilian”), in *Spring City Evening Paper* (“Chuncheng Wanbao”), see the website of Yunnan Daily (“Yunnan Ribao Wang”) <http://www.yndaily.com>, Oct. 9, 2004, visited on Oct. 9, 2004. See also “A Large Prostitution Chain Was Destroyed”, <http://www.worldbbs.info/cgi-bin/topic.cgi?forum=25&topic=4164>, visited on Oct. 9, 2004. It was reported that the youngest prostitute was an abducted girl of only 15 years old.

investment environment. Third, as a type of transaction in an open market, prostitution can be a solution to the unemployment problem some Chinese women are experiencing. Fourth, prostitution can alleviate some sexual crimes, such as rapes resulting from sexual impulse. Fifth, by legalizing prostitution and setting up red-light districts, it may effectively control prostitution, as well as some other relevant crimes, such as the trafficking of women and it may help preventing HIV/Aids and other sexually transmitted diseases.⁽³²⁾

There are several arguments leveled against legalizing prostitution. First, from a philosophical point of view, prostitution has no rationale because it sullies humanity. Second, ethically prostitution is not legitimate, for it thoroughly destroys ethics and morality. Third, because prostitution has caused instability in society and is one of the prevalent ways of spreading disease, it cannot be justified from a sociological perspective. In short, prostitution is a general harm to the society. "It not only ruins the societal environment, results in crimes and provides a hotbed of bribery and corruption, but also spreads diseases, AIDS, affects people's physical and mental health, brings harm to families and to the society."⁽³³⁾ Therefore religion, philosophy, morality, human rights and feminism should condemn it.⁽³⁴⁾

Given this analysis, it is too early to discuss legalizing prostitution because this idea is not yet culturally and socially acceptable in China. Those who strongly support this idea are mostly elites composed of sociologists or economists and their manner of thinking is regarded as too critical and not representative of China. Presently, the Chinese government should study the problems brought about by prostitution in order to devise solutions that could be applied under the existing legal system, in particular sex workers' right to health.

Corruption among local officials strongly ties in with prostitution. Oftentimes, corrupt local officials are involved in the trade in women or receive payments from prostitutes. Such corruption stems from the inadequate punishment of those responsible for instituting prostitution. Prostitution in China is penalized in either one of two ways: one is to fine the prostitutes and the other is to detain them for education. Most of the cases are punished with fines, an easy way of supplementing funds for public security organs whose funding is not guaranteed. The fines are used for the organs' working expenses, such as for detection or investigation, in spite of the fact that the law requires them to submit it to the state treasury.⁽³⁵⁾ Statistics have shown that in one city alone, 555 cases of prostitution were caught, with 1247 people involved, 1094 of whom were fined, representing 87.7% of the

(32) Li Yinhe, "Some Thoughts on Difficulties in the Total Prohibition of Prostitution", Vol. 18, *People's Police*, 2000, p. 9.

(33) Wang Gang and Wang Yuanxin, "On the Present Situation of Prostitution and Measures to Deal with the Problems", Vol. 53, *Journal of Adult Education of Gansu Political Science and Law Institute*, No. 2, Jun. 2004, p. 99.

(34) Fan Shenbing and Wang Feng, "Studies in Sexual Crimes (Part I): On Prostitution", *Special Issue for Legal Theory and Practice for the Journal of Guangxi Administrative Cadre Institute of Politics and Law*, August, 2002, p. 30.

(35) See Article 53 of the *Administrative Punishment Law of the People's Republic of China*, which was promulgated on Mar. 17, 1996 and came into force on Oct. 1, 1996.

total. Oftentimes, policemen hold on to some of the fines, for personal use. For example, the journal *Law and Life* reported that four policemen made RMB200,000 by making traps to catch prostitution patrons by colluding with prostitutes. They were tried in 2001 for crimes of misuse of authority and sentenced to 2 to 3 years' imprisonment.⁽³⁶⁾

The process of implementation for the Administrative Punishment Law is problematic not only when dealing with public security but also in other fields, such as traffic and commercial administration. The monitoring mechanism for enforcing this law needs to be strengthened, especially concerning prostitution cases.

5. Political Rights

The Second Statistics Sample Survey on Chinese Women's Social Status in 2001 shows that the proportion of women cadres at the provincial and ministerial levels has grown to 8.0%, only 1.8% higher than that of 1990. Over the past 20 years, the proportion of women representatives in the NPC has been approximately 21%; whereas the proportion of women councilors is over 30% in Denmark, Norway, Sweden and the Netherlands. Furthermore, given the number of women in China, their contributions and their role in the process of social development, this comparison clearly illustrates that women are not properly recognized within the Chinese society, an issue brought on by the old tradition of gender prejudice.

It is ironic to find a female deputy at all levels of government leadership positions. Such quota setting for women representatives is only a temporary measure, reflecting flaws for the process of improving women's status in society. "*Wu Zhi Shao Nv*" has been the criteria for promoting women to higher decision-making positions. According to these criteria, women qualified for higher level positions should be first, not a member of the Communist Party ("*Wu*"); second, an intellectual ("*Zhi*"); third, of minority nationality ("*Shao*"); and fourth, a female ("*Nv*").⁽³⁷⁾ This quota approach has made women a decoration for the man-controlled political platform. Women's participation in political life is fairly limited.

Chinese women's limited ability of participating in the political process is only part of a broader issue. The women-go-home debate at the beginning of the 21st century reflected the other side of this broader issue. As this debate is more closely related to women's rights to work, it will be discussed later on in this report. However, it is important to point out at this juncture that women's enjoyment of political rights directly affects their economic rights, particularly the right to employment.

6. Right to employment

- Problem of reemployment of laid-off female workers

The transition from a centrally planned economy to a market economy has brought about

(36) Zheng Xiaowei *et al*, "In Setting Traps for Prostitution Patrons, Four Policemen Gained 200 Thousand Yuan", Vol. 12, *Law and Life*, 2001, pp. 15-18.

(37) The meaning of "*Wuzhi Shaonv*" in Chinese is an innocent young girl. Due to the fact that women cadres are not selected on the basis of their ability or qualification for the position, this jingle was created to this employment phenomenon.

a variety of challenges for Chinese female workers, the most serious and difficult of which is unemployment. Neither the government nor the employees were prepared for the drastic changes brought on by the economic reforms. ACWF played a very important role in dealing with this sudden problem. The Federation conducted investigations into the situation of women with employment problems, organized training courses and created jobs for unemployed women. For example, in June, 2002, ACWF carried out investigations in regard to 38 items, issued 4000 questionnaires in Chongqing, Wuhan, Harbin, Shenyang, Xi'an, Hohhot, Taiyuan and Nanjing, and 3633 questionnaires were returned constituting 90.82% of those issued. The investigations and questionnaires proved helpful, as they revealed some of the problems women experienced.⁽³⁸⁾

In order to solve this problem, the government must take measures in regard to certain aspects, including reforming the social security system, organizing training courses for reemployment etc.

- Issues in regard to employment for female university graduates

Statistics have shown that 55.8% of female students met with sex discrimination when trying to find jobs. 21.7% of these students wished to work for governmental institutions and 18.6% of them hoped to be public servants. These rates of desired positions are similar to those of the men's, but in reality, only 8.7% and 6.3% of the female applicants actually received offers, while 11.7% and 9.1% of the men were given offers. It was disclosed that though no discriminative requirements against women could be found in the advertisement, some additional conditions, for instance the ability to play football, were brought up during the interviews in order to exclude female applicants from the relevant job.⁽³⁹⁾ Due to the vagueness of laws and the lack of effective remedies in case of violation, almost no case has been successfully brought to court by female students facing discrimination. As a result, Chinese employers continue to avoid offering jobs to female students without fear of being sued. Furthermore, this is the reason for the increasing number of female students at Master phase or higher level, who remain in school in order to avoid unemployment.

The root of this phenomenon is not that female students are less qualified than their male counterparts, but that women are viewed as a heavier burden for employers to pay for

(38) First, many laid-off women's working skills are poor. Their former work constituted of physical labor (41.6% of the total). Second, women with higher education levels are increasingly getting laid-off. Though 83.3% of laid-off women have a middle-school or high-school education, the number of women with higher education is increasing. Third, most of the reemployment training courses are in the private sectors, such as cooking, cleaning and other domestic work. Fourth, most of the women are dissatisfied with their new jobs because of the bad working conditions, long hours, heavy work load and low salary. However, due to their low education levels and poor skills, they have to accept this reality. Fifth, a low percentage of unemployed women receive social security: basic compensation for survival, 30.4%; medical care, 11.4%; housing, 6.5%; old age compensation, 21.3%. See Development Department of ACWF, "Statistics and Analysis of the Re-employment Status of Laid-off Women in 8 Cities", <http://www.women.org.cn/allnews/02/70.html>, Sept. 16, 2002.

(39) See "Difficulties for Female University Students in Finding Employment", *News Morning Newspaper*, July 3, 2004.

maternity leaves. Therefore, China urgently needs to reform its social security system that turns the financial burden of employers into an assurance shared by the whole society, *i.e.*, the maternity assurance system. Moreover, the changing of stereotyped view of female social function is a fundamental task for the government as well as for the whole society.

7. Right to education

As may be understood from the previous discussion, women's educational level directly influences their ability to enjoy other rights provided for by CEDAW and other human rights conventions. First, in regard to employment, a limited amount of education will limit women's options and ability to work in positions other than physical labor. The unemployment Chinese women are experiencing constitutes an important lesson in this regard. Second, higher education will increase women's awareness of the participation in public and political life. Third, it will, in general, grant women more freedoms.⁽⁴⁰⁾ The freedom of choice in marriage is a good example; the following chart presents the results of an investigation on a group of Chinese women's first marriage. In the chart, lower, middle and higher, refer to the level of education women received.⁽⁴¹⁾

	Parents' decision	Parents' decision, with own opinion	Own decision	Own decision, with parents' advice	Others
Lower	8.9%	20.0%	32.9%	37.8%	0.4%
Middle	3.5%	7.9%	49.1%	38.6%	0.9%
Higher	0.0%	0.0%	53.7%	43.9%	2.4%

Women's education is important not only for their personal development, but also for the progress of the entire nation and is particularly relevant to present-day China. In spite of the fact that Confucius taught that "fathers are responsible for sons' disobedience", it is mothers who spend more time with their children and as a result, children are more influenced by their mothers. The higher an education a mother receives, the better will her children develop. Therefore, in the long run, it benefits a nation's development to invest in higher education for women.

Some schools of feminist thought may disagree with this argument because it is founded on the gender segregation of family responsibilities or as it is thought of in China, "*Nan zhune, Nv zhuwai*" (Men control the public sector with women remaining in the

(40) Zhao Yinghe, "Some Points on Effects of Women's Education on Women's Development", in *Women and Education*.

(41) Xu Chuanxin and Wang Ping, "Research in Women's Rights in Family in 'Diploma Society': Analysis of Diploma's Impacts on Women's Rights in Family by a Case Study in Wuhan", Vol. 14, *Journal of China Women's College*, No. 1, Feb. 2002. Their study also tells us that the situation is similar in some other aspects of family life, for instance in domestic work and sex life with husbands, see charts, *ibid.*, pp. 27 and 30.

private sector). However, a lack of advanced education for women will only worsen gender segregation. A well-educated mother will not allow her daughter to be illiterate or to quit school. Since 80% of Chinese women live in rural areas, improving their education is of great importance.

However, the Chinese government has not yet paid enough attention to ensuring rural women's education. The statistics included in the Chinese Report on the percentages of illiterate women contain no information on rural women. This issue will be explored later in this report.

8. Rights of rural and minority nationality women

Countless accounts of Chinese rural poverty have been given, but an article on *Nanfang Daily's* (*Nanfang Weekend*) website was particularly striking. It focused on girls' education in Gansu Province and it mentioned that, "...women are subordinates in the local culture. They get married at about 14 or 15 and their lifetime mandate is to reproduce and raise children. Obviously it is extremely difficult work." Further on, the article introduced a program sponsored by the British government, "Education Experiment in Western Mountainous Areas". The program's goal was to realize justice and equality in education and as such, it put great emphasis on increasing opportunities for girls. "In the end, statistics show that 70% of the program's funding was given to girls".⁽⁴²⁾

The right to education is one of the most important rights for rural women. Therefore it should, beyond any doubt, be the priority in any of the plans and programs promoting human rights and development in rural areas.

"*Chunlei Jihua*" (Spring Bud Plan) has been functioning in China under the guidance of ACWF China Children and Teenagers' Fund (CCTF) since 1989. This program's long-term mandate is to help Chinese girls in impoverished areas to receive the nine-year compulsory education; its focus is primarily on supporting girls who have dropped out of school in finishing their education. Funding for *Chunlei Jihua* comes from private donations from both China and abroad, mostly given through the internet. Each girl needs less than 200 *yuan* per year; so far, 500 billion *yuan* have been donated which have gone to support 135 thousand girls.⁽⁴³⁾ Unfortunately this program is not sponsored by the Chinese government.

As a State Party to both CEDAW and the International Covenant on Economic, Social and Cultural Rights, the Chinese government has an obligation to take effective measures to respect, promote and fulfill the right to education of all individuals within its jurisdiction. Thus far, the Chinese government has focused its efforts on a variety of other reforms and has been less than forthcoming about investing in rural women's education.

(42) Sun Yafei, "Education Experiment in Western Mountainous Areas", *Nanfang Weekend*, Jan. 9, 2004. This article inspires a variety of feelings – shame, sadness and inspiration.

(43) Websites for some local women's federations have "*Chunlei Qiao*" (Bridges for Spring Bud) posted, which shows list of the girls who need help, sometimes with photos. Donors can send an email, contact the relevant organization and start the procedure of donating.

Section 2 Conclusions and Recommendations

- Dissemination of CEDAW

Informing the Chinese people of CEDAW is of vital importance to raise public awareness. The dissemination should be started with those in leadership positions, many of whom have limited awareness with CEDAW. Meanwhile, China's latest periodic report to the CEDAW Committee and the Committee's concluding comments should be disseminated among all levels of public servants, judges, the academia and women's NGOs.

- Bridge-building

Build bridges between international human rights standards and Chinese national laws, between UN human rights institutions and the relevant Chinese governmental and non-governmental institutions, and between Chinese NGOs and the relevant Chinese governmental institutions. The gaps between these institutions result in miscommunication and inefficient work, all of which may be avoided with effective bridge-building.

- Establishment of a national human rights organ

It is suggested to set up networking and communication channels for government officials, CEDAW experts, and women's rights NGOs, so that they can have more regular contacts. The possibility of establishing a national human rights institute or a women's rights institute should be explored in order to encourage research on women's rights.

- Combating violence against women

Special laws should be enacted based on national discussions and consultations, (such as those that took place in the new Marriage Law drafting process). It is necessary to study sexual harassment issues and to take preparatory steps to introduce an anti-sexual harassment law. A network of urban residents' committees and rural villagers' committees, police stations, hospitals, and shelters should be established in order to prevent domestic violence and give support to victims of domestic violence.

- Right to employment

A maternity assurance system should be created to ensure that female employees are not discriminated against due to their family responsibilities. The rights' situation of female migrant workers, especially those doing domestic work, should be studied further. Men and women's retirement age should be the same and amendments to existing Chinese laws and regulations should take this into consideration.

- Political Rights

Surveys conducted by national authorities should regularly include statistics on women occupying high ranking government positions. Studies should be performed on the actual role women play in decision-making processes, especially at the higher levels. The example of Hong Kong deserves further study by virtue of its large proportion of women occupying high-ranking positions and its relative cultural similarity to mainland China.

- Rural women

Development plans or programs, such as the National Program for the Development of

Chinese Women, should consider the rights of rural women as a priority. The rural girls' right to education and the Government's obligations under CEDAW should be emphasized. Funding for rural girls' education and its operation should be actively supported by the Government. Government statistics should include special indicators on rural women. For example, surveys on girls' rate of enrollment in school should have disaggregated data on girls living in rural and urban areas.

**Appendix: Reporting Status of the People's Republic of China
under the Convention on the Elimination of All Forms of
Discriminations against Women**

Reporting Round	Due (dd/mm/yyyy)	Received	Document No. of the Report	Examined	Document No. of the Concluding Observations
Initial	03/09/1982	25/05/1983	CEDAW/C/5/Add.14	29/03/1984	CEDAW A/39/45 (1984)
Second periodic	03/09/1986	22/06/1989	CEDAW/C/13/Add.26	23/01/1992	CEDAW A/47/38 (1992)
Third periodic	03/09/1990	29/05/1997	CEDAW/C/CHN/3-4 Corr.1 & Add.1	01/02/1999	CEDAW A/54/38/Rev.1 (1999)
Fourth periodic	03/09/1994				
Fifth periodic	03/09/1998	04/02/2004	CEDAW/C/CHN/5-6	25/08/2006	CEDAW/C/CHN/CO/6 (2006)
Sixth periodic	03/09/2002				
Seventh periodic	03/09/2006	/	/	/	/
Eighth periodic	03/09/2010	/	/	/	/

Source: United Nations Treaty Body Database,
<http://www.unhchr.ch/tbs/doc.nsf/NewhvVAllSPRByCountry?OpenView&Start=1&Count=250&Expand=36.3#36.3>, visited on 20 Jan. 2009.

Session 2 Autonomy of Family and the Role of State-Protection of women and children (Domestic Violence, Alimony, and Maintenance for Children)

CEDAW, CRC and the Korean Family Law

Jinsu YUNE*

I. Introduction

The Republic of Korea is a state party of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**) and the Convention on the Rights of the Child (**CRC**). In Korea, CEDAW has entered into force on January 26, 1985 and CRC on December 20, 1991. Korea has also ratified the Optional Protocol to CEDAW and 2 Optional Protocols to CRC.¹ These two conventions are very important in Korean family law. Especially, recent changes of the Korean family law can be understood as an effort to comply with these conventions. In this sense, CEDAW and CRC can be seen as mirrors for change in Korean family law.

In this paper, I will review the recent changes and the present state of the Korean family law in light of CEDAW and CRC.

II. The Status of CEDAW and CRC in the Korean legal system

Before entering into details, status of CEDAW and CRC in the Korean legal system must be examined. A treaty may be either self-executing or non-self-executing, depending upon whether domestic legislation must be enacted in order for the treaty to enter into force. Self-executing treaties are applied as part of the supreme law of the land without the need for

* Professor, College of Law, Seoul National University. I extend my gratitude to Yeonga Park, LL. B. student, Seoul National University, for helping me in writing in English. This article is based on my two articles written in Korean with the necessary update: *女性差別撤廃協約과 韓國家族法* (*Yeoseongchabyeolchye olpyehyeopyakgwa hangukgajokbeop*, CEDAW and the Korean Family Law), *서울大學校 法學* (Seoul Law Journal) Vol. 46 No. 3, 2005, pp. 76 ff.; *兒童權利協約과 韓國家族法* (*Adonggwonrihyeopyakgwa hangukgajokbeop*, CRC and the Korean Family Law), *國際人權法* (International Human Rights), Vol. 8, 2005, pp. 1 ff.

1 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

further action. Whether a treaty is deemed to be self-executing depends on the intention of the signatories and the interpretation of the courts. The problem of whether the CEDAW and CRC are self-executing or not is not settled yet.

The precedents of French cour de cassation have repeatedly declared that Article 12 paragraph 2 of CRC, which prescribes the right of the child to be heard in any judicial and administrative proceedings affecting the child, could not be invoked before the court, that CRC created no obligation except the duty of state parties and cannot be applicable as a domestic law.² The Korean judicial precedents are not so clear on this matter, but seem to suggest that CEDAW became part of the Korean Law system.³

At first glance, these two conventions seem to belong to the category of non-self-executing treaties. Most provisions of CEDAW and CRC have taken forms of requiring the state parties to take appropriate measures and do not confer concrete rights upon individuals. But these Conventions do not exclude the adjudication by the court to determine appropriate measures. In my opinion, the answer to the problem must be differentiated between individual provisions of CEDAW and CRC. If there are various measures conceivable to achieve the purpose of individual provisions, then the choice of which measure to take should be reserved to the legislatures, and courts should not apply the provisions without legislative implementation. In this case, the corresponding provisions are non-self-executing. But if there were no such necessity for the intervention of the legislature, then courts could apply the provisions directly; these provisions are self-executing.

Apart from this problem, the importance of CEDAW and CRC for the Korean family law is obvious. Moreover, these 2 conventions can be the means for interpreting the Constitution. See *infra* III 3, 5, 6, 7.

III. CEDAW and the Korean Family Law

1. The Reservation and Withdrawal of the Reservation

Upon signing CEDAW, Korea made reservations to article 9 and subparagraph (c), (d), (f), and (g) of paragraph 1 of article 16.

2 Cour de Cassation 1re civ., 10 mars 1993, N°91-11310, Bull. 1993 I N° 103 p. 69 D. 1993, J. 361; 1re civ., 15 juillet 1993, N° 91-18735, Bull. 1993 I, N° 259 p. 178; 1re civ., 4 janvier 1995, N°92-20682, Bull. 1995 I, N° 2 p. 1

3 The decision of the Korean Constitutional Court on December 23, 1999, case no. 98heonma363, 헌법재판소판례집 (Heonbeopjaepansopanryejip, Constitutional Court Decisions Reports) vol. 11 no. 2 pp. 770, 789 f.: "In the light of the CEDAW and other international conventions, and the above provisions of the Constitution and system of rules, the prohibition of the discrimination against women and the disabled should be deemed as firmly settled basic orders in our legal system." Compare also the plenary decision of the Korean Supreme Court on July 21, 2005, case no. 2002da1178, 판례공보 (panryegongbo, Official bulletin of the Supreme Court decisions) 2005, 1326.

Article 9:

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Article 16:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:
 - (c) The same rights and responsibilities during marriage and at its dissolution;
 - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
 - (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
 - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;.

Especially article 16 is very much related to the family law. But reservation to subparagraph (c), (d), and (f) of paragraph 1 of article 16 was withdrawn on April 15, 1991, and the reservation to article 9 was withdrawn on August 24, 1998. So the only remaining reservation is to subparagraph (g) of paragraph 1 of article 16.

2. The Reform of the Family Law in 1990

The reason for the withdrawal of reservation to subparagraph (c), (d), and (f) of paragraph 1 of article 16 was the reform of the family law included in the Civil Code on January 13, 1990. The major points of change are as following:

(1) Discrimination in relation to the scope of relatives according to gender was abolished. Formerly, paternal blood relatives up to the eighth degree were deemed as relatives in the legal sense, while maternal blood relatives beyond the fourth degree were not. The new law recognizes blood relatives up to the eighth degree as relatives in the legal sense, with no distinction of paternal or maternal relatives.

(2) The so called head (or master) of the family (**hoju**) system was **not** abolished. In principle, only male members of the family were eligible to become the **hoju**, and female members were qualified for the position of **hoju** only under exceptional circumstances. In other words, the **hoju** system was a symbol of gender inequality. Through the reform, the power of the **hoju** was weakened considerably. For example, the **hoju** could no longer

designate the place of living for a family member, and were no longer entitled to become guardian of a child based on the status as *hoju*.

(3) The responsibility of custody of the child at divorce should be decided by agreement between the spouses, and in case of no agreement, the family court should decide. Formerly, the father would bear the responsibility in case of failure to reach an agreement.

(4) Regarding the rearing of the child, the family court should decide the matter in case of disagreement between the parents, while according to the former law the opinion of the father had prevailed over that of the mother.

(5) In the realm of inheritance law, there was much advancement towards gender equality. For example, the inheritance share of sons and daughters became equal. Formerly, a married daughter was entitled to only one-fourth of the inheritance share of a son.

Apart from the points mentioned above, this reform has created the institution of division of property regarding divorce and has expressly stipulated the visitation right of the non-custodial parent.

These changes were great advancements in light of CEDAW. Accordingly the Korean Government decided to withdraw reservations to subparagraph (c), (d), and (f) of paragraph 1 of article 16. However, this withdrawal was somewhat premature. For example, the *hoju* system, which symbolized male supremacy over female, was not abolished completely. And in the area of private international act, discrimination between men and women still existed, which this paper will further explain below.

3. The Reform of the Nationality Act in 1997 and CEDAW

As explained above, Korea had made reservation to article 9 of CEDAW. The reason was that the former Korean Nationality Act was heavily male-oriented. According to the former Nationality Act, an alien woman who had married a Korean man automatically acquired Korean nationality. When an alien man had naturalized in Korea, his alien wife could become a Korean as well. However this was not the case for an alien man who had married a Korean woman. Similarly, an alien wife of an alien man could naturalize in Korea only with her husband. Moreover, a child of a Korean man acquired Korean nationality at the time of his or her birth irrespective of her mother's nationality, while a child born of a Korean woman and an alien man was not. These provisions were obviously in contravention of article 9 of CEDAW.

The Nationality Act was amended on December 13, 1997. The new law was changed in favor of gender equality. First, a spouse of a Korean, either man or woman, does not become a Korean automatically through marriage, but can naturalize under mitigated conditions. So can a spouse of an alien who later becomes naturalized as a Korean. Second, unlike the former law, a child whose father or mother is a Korean becomes a Korean at the time of his or her birth. The withdrawal of reservations to article 9 of CEDAW on August 24, 1999 was the result of this reform.⁴

4 The decision of the Korean Constitutional Court on August 31, 2000, case no. 97heonga 12, 헌법재판소 판례집 (Heonbeopjaepansopanryejip, Constitutional Court Decisions Reports) vol. 12, no. 2, 167 ff. has confirmed that the reform of the Nationality Act was a reflection of the wish to withdraw the reservation to

Additionally, it must be remembered that the Korean Constitutional Court, in its decision of August 31, 2000,⁵ declared that the former Nationality Act regarding the nationality of a child born of a Korean woman was unconstitutional. In this case, a man born of a Korean mother and a Chinese father on 1955 had asserted the unconstitutionality of the former Nationality Act, because under the former Nationality Act he could not become a Korean. While this case was pending on the Constitutional Court, the Nationality Act was amended as aforementioned, so that a child born of a Korean mother and an alien father could gain Korean nationality. However the dispute was unresolved, because the addenda to the new law had limited the retroactive application of the new rule to the children born of a Korean mother up to 10 years before the enactment of the new law. The man was already 42 years old, so his status was not changed by the new law.

There were 2 important findings in the decision. Firstly, the old law treated the child born of a Korean father and an alien mother and the child born of a Korean mother and an alien father differently in the matter of acquiring nationality, resulting in an adverse effect to the Korean mother and her child. This discrimination was constitutionally impermissible, because it is against the principle of gender equality prescribed in Article 11 paragraph 1 of the Constitution and the principle of gender equality in family life prescribed in Article 36 paragraph 1 of the Constitution. From the perspective of the child, this discrimination was against the constitutional principle of equality.

Secondly, the limitation of retroactive application of the new law to children born of a Korean mother up to 10 years before the enactment of the new law was also against the constitutional principle of equality, for this time limit of 10 years before the enactment of the new law was not a proper criterion.⁶

4. The Reform of the Private International Act in 2001

The Korean Private International Act⁷ was totally changed in 2001. One reason for this change was that the old international family law included in the former International Private Law was heavily male-centered.

Subsequently, the Act was changed to become more gender-neutral like the following:

(1) The order of law that governs the general effect of marriage is (a) the law of the common native state of both spouses, (b) the law of habitual residence of both spouses, and (c) the law of the place which is most closely related with both spouses. Formerly, the governing law was the law of native state of the husband (article 37).

(2) The law which governs matrimonial property was changed from the law of the native state of the husband at the time of marriage to the law designated in article 37.

the article 9 of CEDAW.

5 Fn. 4.

6 As a result of this decision, the addenda to the new Nationality Act was amended on December 19, 2001, thereby extending the time limit of retroactive application of the new law to 20 years before the enactment of the new law.

7 Before the amendment in 2001, its name was “涉外私法 (*Seoboesebeop*, Foreign Relations Private Act)”.

(3) The law which governs divorce was changed from the law of the native state of the husband at the time of the occurrence of the ground of divorce to the law designated in article 37.

(4) The law which governs the formation of filiation of a child born in wedlock was changed from the law of the native state of mother's husband at the time of birth to the law of the native state of either the mother or the mothers' husband.

(5) The law which governs other problems concerning parental relationship is (a) the law of the common native state of parents and the child, and (b) in the absence of such law, the law of the habitual residence of the child. Formerly, it was the law of the native state of the father and, in the absence of such law, that of the mother.

Thus, unequal treatment of man and woman in the area of the private international act was removed.

5. The Incompatibility Decision of the Constitutional Court on the *hoju* System

On February 3, 2005, the Korean Constitutional Court had declared that the *hoju* system was incompatible with the Constitution.⁸ Until that time, there was much controversy over the constitutionality of the *hoju* system, and at last the Constitutional Court had settled this problem.

According to the majority opinion, the *hoju* system was against the principle of gender equality prescribed in Article 36 paragraph 1, because the *hoju* being a man as a general rule, and the system was the means of continuing the masculine lineage. The majority opinion opined that the system is against the dignity of the individual also, as it forced a certain type of family relation based on the traditional concept of family to individuals, irrespective of the wish or welfare of the members of the family.⁹

However, the majority opinion chose to declare the provisions of the *hoju* system as "incompatible with the constitution" rather than "simply unconstitutional" because the declaration of "simple unconstitutionality" could create a vacuum in the family register system. In contrast, a decision of "incompatibility" would allow the temporary application of the *hoju* system for as long as it is needed to reform the family registry system.¹⁰

8 The decision of the Korean Constitutional Court on February 3, 2005, case no. 2001heonga 9 et al., 헌법재판소판례집 (*Heonbeopjaepansopanryejip*) vol. 17, no. 1, 1 ff.

9 One interesting point in this decision was the role of tradition in the constitutional discourse. The dissenting opinion justified the *hoju* system based on the tradition, while the majority opinion denied that tradition could be a ground to uphold the constitutionality of the system. See, Jinsu Yune, Tradition and the Constitution in the Context of the Korean Family Law, in: Lynn D. Wardle and Camille S. Williams ed., Family Law: Balancing Interests and Pursuing Priorities, William S. Hein & Co., Inc. Buffalo, New York, 2007, pp. 145 ff. Additionally, there is controversy over whether the *hoju* system was based on tradition.

10 According to the precedents of the Constitutional Court, a declaration of simple unconstitutionality leads to the instant invalidation of the law which is found unconstitutional, while in case of a decision of incompatibility, the law which is found unconstitutional does not lose its validity, but should not be applied from the time of the decision. The Constitutional Court sometimes orders the temporary application of the 'incompatible' law as in this case.

This decision did not mention CEDAW directly, but the majority opinion referred to the universal value of mankind as an important factor in understanding the contemporary meaning of tradition. And the universal value of mankind may imply the basic principle of CEDAW, specifically that of gender equality.

6. The Reform of the Family Law in 2005

On March 31, 2005, the Korean Family Law was changed again in many important aspects. In relation to CEDAW, two points are worth mentioning. The first is the abolition of the *hoju* system, the symbol of gender inequality. It was a logical result of the Constitutional Court's decision.¹¹ As a matter of fact, at the time of the Constitutional Court's decision, the parliamentary work of abolishing the *hoju* system was at the last stage, so the decision was only a nail in the coffin of the *hoju* system.

Another important change was the modification of the paternal family name rule. Formerly, the child should assume the family name of the father in almost all cases except when the father of the child was unknown or the child was born of a Korean woman and an alien man. In these two cases the child should assume the family name of the mother. In reality there was no possibility of change in the family name. Only when an unknown father had affiliated the child born out of wedlock, then the child's family name would change from mother's to father's. This strict adherence to the paternal family name rule was the reason of reservation to subparagraph (g) of paragraph 1 of article 16 CEDAW.

The new law still kept the paternal family name rule, but allowed exceptions to the paternal family name rule in several occasions. First, the child may follow the family name of the mother when the spouses have agreed on that at the time of marriage. Second, the child born out of wedlock may retain the former family name, that is, the family name of the mother, even after the affiliation of the father in case of agreement between the parents or following a court order. Third, if necessary for the interest of the child, the child's family name may be changed upon court order.

Then could the reservation to subparagraph (g) of paragraph 1 of article 16 be withdrawn? That is doubtful. Although there is now room for a wife to give her child her family name, it is not the general rule and requires the husband's consent. Otherwise, the child should assume the family name of the father. So the wife does not have equal personal right to choose the family name as the father.¹²

11 Supra 5.

12 France has made a reservation to subparagraph (g) of paragraph 1 of article 16 CEDAW, because it had adopted the paternal family name principle. In 2002, the French Code Civil regarding the family name was amended. Article 311-21 prescribes that at the time of the child's birth, the parents shall choose the family name of the child (either the father's name, the mother's name, or both names coupled in the order they choose). If there is no joint declaration to the officer of civil status mentioning the name chosen for the child, the latter shall take the name of the parent with respect to whom his parentage has first been established and the father's name where his parentage has been established simultaneously with respect to both. This rule is similar to the Korean rule and in some sense more gender-neutral than the Korean rule,

In addition, it must be remembered that after the reform, the Korean Constitutional Court has declared the old Article 781 paragraph 1 of the Civil Code, which prescribed an almost unexceptional paternal family name rule, as incompatible with the constitution.¹³ The majority opinion regarded the paternal family name rule itself as constitutional. Nevertheless, it found the provision at hand as incompatible with the Constitution, because it does not leave room for exceptions in cases where the use of the father's family name may be unfair and in contrast to the interest of the child. For example, a child could not assume the family name of the mother even if the mother reared the child by herself. Furthermore, a child could not change his or her family name to the family name of the stepfather in case of the mother's remarriage, or that of the adoptive father in case of an adoption. Adherence to the paternal family name rule even in such cases violates the dignity of the individual. The majority opinion concluded that a declaration of incompatibility rather than simple unconstitutionality was appropriate and ordered temporary application until December 31 2007, as a declaration of simple unconstitutionality is tantamount to the denial of the paternal family name rule itself, and an improved law was already enacted and would enter into force on January 1 2008.

In contrast, the concurring opinion of this decision regarded the paternal family name rule as unconditional in itself, but raised no objection to the new family name rule, as it concurred to the majority opinion on temporary application of the old law until December 31 2007.

This decision is also remarkable in that it paid attention to the interest of the child as a constitutional value.

7. The decision of the Korean Supreme Court on the female membership of *Jongjung*

On July 21 2005, the plenary bench of the Korean Supreme Court had declared that women should also be a member of *jongjung* (agnatic descent group), overruling its former precedents.¹⁴ Although this case is not directly related to the family law, it is worth dealing in this paper, as this decision refers to CEDAW.

Jongjung is a group consisted of all descendants of a male ancestor. The primary function of *jongjung* is to provide the ritual of worship for ancestors. The matters regarding *jongjung* were regulated by customary law. The former precedents of the Supreme Court declared repeatedly that according to the customary law, only adult male descendents could be

but France still keeps the reservation. The Committee on the Elimination of Discrimination against Women has at the fortieth session (January 14 -February 1 2008) evaluated the new French law as still retaining gender-based discriminatory aspects such as the veto right of the father to oppose the transmission of the mother's family name in cases of no joint declaration or when the parents do not agree. See Concluding observations of the Committee on the Elimination of Discrimination against Women: France, CEDAW/C/FRA/CO/6/, para. 34.

13 The decision of the Korean Constitutional Court on December 22, 2005, case no. 2003heonga 5, 6, 헌법재판소판례집 (*Heonbeopjaepansopanryejip*, Constitutional Court Decisions Reports) vol. 17, no. 2, 544 ff.

14 Fn. 3. There is a Japanese article on this decision. 権 澈, 韓国における宗中をめぐる議論の動向, ジュリスト No. 1345, 2007, pp. 37 ff.

members of *jongjung* and women were excluded.

However, the majority opinion of the new decision declared that custom which limits the membership of *jongjung* to adult male descendents and excludes females is not valid anymore, because it discriminates women and does not conform to the entire legal order, at the top of which lies the Constitution. The majority opinion goes on to assert that the membership of the *jongjung* should be determined according to the sound reason (*jori*), which would lead to the conclusion that the descendants who have a common family name and origin should be members of *jongjung*.

In the course of the reasoning, the majority opinion stressed the principle of gender equality, quoting the articles of CEDAW, that the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field (article 1) and that state parties should undertake to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise and to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women (article 2 paragraph (e), (f)).

8. The Reform of the Family Law in 2007

On December 21 2007, the family law was again amended. In this amendment, there were some important changes. One of them was the introduction of a waiting period for consensual divorce, and the visitation right of the child. From the perspective of CEDAW, the change of minimum marriageable age is important. According to the former article 807 of the Civil Code, the minimum marriageable age for man was 18, and that for woman was 16.

This different treatment for man and woman was contrary to the article 16 paragraph 1 subparagraph (a), according to which States Parties shall ensure the same right for men and women to enter into marriage. Also the UN Committee on the Elimination of Discrimination Against Women has expressed concern about this.¹⁵

The new article 807 of the Civil Code has resolved this problem by stipulating the minimum marriageable age as 18, for men and women alike.

IV. CRC and the Korean Family Law

Korea has made reservations to some articles of the CRC.¹⁶ Apart from this, the relation

15 Concluding observations of the Committee on the Elimination of Discrimination Against Women : Republic of Korea. A/53/38/Rev.1, para. 382.

16 Korea made reservations to paragraph 3 of article 9, paragraph (a) of article 21 and sub-paragraph (b) (v) of paragraph 2 of article 40. The sub-paragraph (b) (v) of paragraph 2 of article 40 is about the right of the child to appeal in a criminal trial. This paper does not deal with this provision.

between CRC and the Korean family law reveals many problems.

1. The Reservation to Paragraph 3 of Article 9

Paragraph 3 of article 9 is as the following: States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except when it is contrary to the child's best interests.

The reason of Korea's reservation to this provision was that at the time of ratification of CRC, the Korean Civil Code guaranteed the visitation right of the parent, not that of the child.¹⁷ This reservation was criticized by many, including the UN Committee on the Rights of the Child, who has advised Korea to withdraw the reservation.¹⁸

At last, in 2007, the law was changed to guarantee the visitation right of the child as well as the parent's. The new Civil Code article 837-2 prescribes that "a parent who does not take care of the children and his/her children shall have the right to visitation." This change was made mainly in consideration of CRC. It seems that Korea will withdraw the reservation to paragraph 3 of article 9 in the near future.

2. The Reservation to Paragraph (a) of Article 21

Article 21 paragraph (a) is as follows: States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians, and that, if required, the persons concerned have given their informed consent to the adoption on the basis of counselling as may be necessary.

Korea has made reservation to this provision because at that time no mechanism for the review of the competent authorities for the adoption was available. In 2008, a full adoption (*chinyangja*) system was adopted, and for the procedure of a full adoption, a review by the court is required. But the procedures of the traditional simple adoption still do not require a review of the competent authorities. Only the consent of the parties and a report to the competent public official are enough.¹⁹

17 The former article 837-2, paragraph 1 of the Civil Code prescribed that "A parent not rearing the child shall have the visitation right."

18 Concluding Observations of the Committee on the Rights of the Child : Republic of Korea. 13/02/96. CRC/C/15/Add.51. para. 8; Concluding Observations : Republic of Korea. 18/03/2003. CRC/C/15/Add.197. para. 9.

19 Under the full adoption system, the legal filiation of the adopted child and the birth parents is dissolved. In contrast, under the simple adoption system, the legal bond between the adopted child and the birth parents remains regardless of the adoption.

This reservation was much criticized. The UN Committee on the Rights of the Child expressed concern that domestic adoptions may be arranged without authorization or involvement of the competent authorities and that such arrangements do not necessarily take into account the best interests of the child or, where appropriate, the views of the child.²⁰

Furthermore, the practice of adoption in Korea is problematic in many aspects. The Committee on the Rights of the Child also noted their concern on the high number of intercountry adoptions, and that Korea has not ratified the Hague Convention of 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption.²¹

The National Human Rights Commission of Korea has made a recommendation on April 11, 2005 to the Korean Prime Minister and the Minister of Foreign Affairs and Trade that adoption should be permitted only after the review of competent authorities, and the dissolution of adoption should be permitted only for the interest of the child. The Commission also recommended that Korea should ratify the Hague Convention.²²

3. Other Problems

There are many other problems concerning Korean family law in light of CRC. The following is only a few.

(a) The Right to Life

Article 6 of CRC stipulates that every child has the inherent right to life and that States Parties shall ensure the survival and development of the child to the maximum extent possible.

In this context, the statutory ground for intervention by the State in case of the parents' refusal to medical treatment for the children is incomplete. In many countries, when the parents refuse treatment of their ill child for religious or other reasons, the courts may order the parents to allow necessary treatment for the child. In contrast, there is no corresponding statute in Korea. In such cases, a resort to the termination of parental rights or the imposition of criminal sanction is theoretically possible. But these remedies are not so effective. Thus, an amendment of law is urgent.

(b) The Right to Know One's Parents

Article 7 paragraph 1 prescribes that the child shall have the right to know his or her parents. In Korea, protection of this right is not so strong. In particular, the right to rebut paternity is not conferred to the child, but only to the mother and her husband. This denial of right is also problematic in the constitutional context, as the dignity of the individual or the right to pursue happiness guaranteed in article 10 of the Constitution may include this right to know one's parents.

20 Concluding Observations : Republic of Korea. 18/03/2003. CRC/C/15/Add.197. para. 42 f.

21 Ibid.

22 This recommendation (in Korean) can be found at http://humanrights.go.kr/policy/policy/poli03_02.jsp (last visit: September 4, 2008).

(c) The Right to Express One's View

Article 12 paragraph 1 of CRC prescribes that the child has the right to express his or her own view in all matters affecting the child, and that the views of the child should be given due weight. Additionally paragraph 2 prescribes that the child shall be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child. Yet, this right is not so well guaranteed in Korean law and practice.

In particular, according to article 100 of the Family Procedure Rule, the family court should hear the child's view in cases of rearing, custody and visitation rights when the child is 15 years old or over. This would also mean that there is no need for the family court to hear the child's view when the child is under 15 years of age.

V. Conclusion

CEDAW and CRC have exerted great influence upon the Korean family law. Many recent changes of the Korean family law can be traced back to these 2 Conventions. However, certain disparities exist between CEDAW and CRC. From the perspective of CEDAW, the Korean family law has achieved almost all of the requirements mentioned in the CEDAW. In contrast, Korean family law has a long way to go before meeting the requirements of CRC. What are the reasons for such differences? For one part, strong interest groups for women have been active for a long time, while the voices advocating the interest of the children were weak. As a result, the Parliament or the Government had reacted more sensitively to the requests protecting women than those protecting children. Another reason was that the request for change towards the direction of gender equality was supported by the Constitution, while many thought that respect for the interest of children was not a constitutional issue. However, the interest of the child caught the eyes of the Constitutional Court Justices recently in the case of the paternal family name rule.²³

In the future, Korean lawyers should endeavor to make these two Conventions become part of our family law not only in written codes but also in reality.

23 See III. 6.

Session 2 Autonomy of Family and the Role of State–Protection of women and children (Domestic Violence, Alimony, and Maintenance for Children)

Status of women in the family: the balance between autonomy and protection

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Introduction

For analyzing Japanese law on the status of women in the family, we should focus attention on two distinctive periods: one is the postwar period of law reform, when most family law was radically revised, and the other is the last 15~20 years. In the latter period, the outline of revisions (the list of recommendations) in the Civil Code, Family and Succession Part, was adopted by the Legislative Council of the Ministry of Justice, although the revision itself has not yet been realized, and several important acts were promulgated.

The reform in the postwar period has already become history. To grasp the meaning of the change in the past 15-20 years and the current situation of family law in Japan, however, we should know the historical situation of the postwar period.

In the following, the situation and problems of these two periods will be outlined, and then we will discuss the future direction of Japanese law on the status of women in the family.

I The declaration of equality and keeping the balance

The Civil Code reform in 1947 was a drastic change of the Family and Succession Part. We can find its essential features in “The Law concerning Provisional Measures for the Civil Code attendant on the Enforcement of the Constitution of Japan” (*hereinafter* Provisional Measures Law). “The purpose of this Law is to take provisional measures which are based on individual dignity and the essential equality of the sexes for the Civil Code attendant on the enforcement of the Constitution of Japan,” says art.1 of the Provisional Measures Law, and the status of women in the family has been substantially improved. It can be divided in two aspects: personality and property.

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1 The aspect of personality: The abolishment of the concept of *Ie* (legitimate family) and the acquisition of parental authority by mother

(1) The abolishment of the concept of *Ie* and the head of *Ie*

The most important point of the reform of 1947 was the abolishment of the concept of *Ie*. Art.3 of the Provisional Measures Law clearly provided, "The provisions relating to *Ie* including the head of *Ie* and the *Ie* members are not applied from this time forward." Under the former law, the head of *Ie* owed a duty to support his *Ie* members on the one hand (art.747), and on the other hand, he had the right to determine the residence and to consent to marriage and adoption of his *Ie* members (former art.749 and 750) and other related rights. At the same time, primogeniture (the right of the firstborn son to inherit the status of the head of *Ie* and the entire estate. Former art.970) was abolished (Provisional Measures Law, art.7(1)). Through this reform, the concept of *Ie*, which consisted of the head and his family members (former art.732), has been expunged from our law.

This does not mean, however, the disappearance of "family.". After the reform of 1947, "married couple," instead of *Ie*, has been considered as a basic unit of "family."

Despite this change, the Civil Code revised in 1947 does not have any rules about how the intention of a married couple, i.e. family, should be determined, although art.752 provides the duty to provide mutual cooperation and assistance between husband and wife. Husband and wife have completely equal status and rights, and neither of them has preferential right of determination. However, this equality is the story in law. In fact, there are not a few married couples in which the husband has superiority.

(2) Joint parental authority

The equality of the sexes has been achieved not only between husband and wife but father and mother. The principle of joint parental authority was clearly stated by art.6(1) of the Provisional Measures Law: "Parental authority shall be exercised jointly by father and mother." The superiority of the father's authority, which was provided by former art.877(1), was abolished.

In this context, the Civil Code is also silent on discordance between father and mother, and in reality, although not in law, the true equality of father and mother has not been yet established.

2 The administration and allotment of property

(1) Approval of the right of wife to administer property

Another important point of the reform of 1947 was the approval of wives' right to administer property. Art.2(1) of the Provisional Measures Law stated, "The provisions to restrict the legal capacity because of the fact that she is a wife and/or mother, are not applied from this time forward," and art.5(2) of the same law stipulated, "The provisions related to marital property, which contradict individual dignity and the essential equality of the sexes,

are not applied from this time forward.” As a result, each partner of a married couple acquires the right to administer his/her own property independently from the other (art.762(1)). The separate property system has been adopted, and marriage has, in principle, no effect on the situation of property.

(2) The adoption of the right of inheritance of a spouse

The situation that each partner of a married couple is independent from the other in relation to property continues as long as they are married. When their marriage is dissolved, the proprietary result cannot be qualified as from a separate property system. Two important systems have been introduced. One is the right of inheritance of a spouse. “The spouse of a decedent shall always be an heir” and his/her share in succession was determined as one-third at least (art.8(2) of Provisional Measures Law). In addition, the provision on the distribution of property, which has its origin in alimony in divorce before the reform of 1947, is established (art.768).

Through the introduction of these two systems, both in divorce and death of a spouse, the property of a spouse would be transferred to the other. This transfer had primarily the meaning of life security for a transferee. In these days, it has become gradually considered as a way of substantial liquidation of marital property, which is not an accurate liquidation or allotment but merely approximate proceedings.

II The devices of autonomy and reconsidering of protection:

The situation after the outline of revisions in the Civil Code, Family and Succession Part, in 1996

The reform of 1947 has been continuously supplying the family model of postwar Japan for over 30 years. Since the 1980s, however, there has been a proliferation of phenomena which cannot be classified and understood in the light of this family model. In the new situation, the reform of family law was attempted and the outline of revisions in the Civil Code was adopted by the Legislative Council of the Ministry of Justice, although the revision has not yet been realized. On the contrary, in the field outside the Civil Code, several important and noteworthy laws were promulgated.

We will discuss the current movement of legislations which would deal with the problems of diversification (personalization) and mobilization (destabilization) of family from two aspects: personality and property.

1 The independence from *Ie* and husband

(1) The setback of the selective dual-surname system

Under the *Ie* system, former art.746 provided, “Head of *Ie* and its members shall use the surname of their *Ie*.” In the reform of 1947, this provision was replaced by new art.750: “A husband and wife shall adopt the surname of the husband or wife in accordance with that which is decided at the time of marriage.”

With this provision, theoretically, the surname of wife shall be adopted at a 50 percent rate, but in reality, over 90 percent of married couples still choose the surname of husband. In light of this, plus other problems, the criticism has long been made that the concept or notion of *Ie* continues to exist in a different form: the adoption of the surname of husband. In addition to this, a new type of complaint has become considerably important in the 1980s, when the number of working women has increased, and by the change of surname women are forced to suffer great inconvenience, especially in their professional life.

The most important point of the outline of revisions in the Civil Code, adopted in 1996, is the introduction of the selective dual-surname system. Its proposal is that the current provision mentioned above will be replaced by a new provision: "In accordance with that which is decided at the time of marriage, a husband and wife shall adopt the surname of the husband or wife, or each of them shall adopt their own surname before marriage." Conservative politicians have severely criticized this proposal; they argued that this would impair family integrity. The result was an unusual situation: although the outline of revisions was approved in the Legislative Council of the Ministry of Justice, the government did not submit the bill based on this outline. This situation remains unchanged, showing no sign of progress.

From the developments so far, two conclusions can be drawn. First, the concept or notion of *Ie* has not been thoroughly eliminated, although over 60 years have already passed since the postwar reform. Secondly, in order for women to acquire independence from *Ie*, they need the symbolic power of the Civil Code and other laws.

(2) The appearance of marital violence on stage

There were marital violence cases, especially by husband to wife, before the postwar period. The reform of 1947, however, did not squarely address the problem. Of course, marital violence has been the reason of judicial divorce. The court has approved suits for divorce for the reason of marital violence on the understanding that "any other grave cause making it difficult to continue the marriage" (art.770(1)(v)) includes the existence of marital violence. However, it has not been thought necessary to take action directly against marital violence.

In the 1990s, this attitude has become considered improper. Violence in families, especially violence by husband to wife, has become an important legal problem. "Act on Prevention of Spousal Violence and Protection of Victims" legislated in 2001 posits this act as being "in line with the efforts taken by the international community to eradicate violence against women" (the preamble of this act) and has established a system to deal with spousal violence, providing for notification, counseling, protection and support for self-reliance, etc. This act has been revised and broadened in its scope of application.

This legislation has made the following points clear. First, even between married couples, the impairment to personal dignity cannot be allowed. Secondly, in order to protect the victims, the state must intervene in the field of private life with its police force.

(3) As mentioned above, the number of women who want to acquire liberty, escaping from

the traditional restraints of “*Ie*” and the physical and psychological dominance of “husband”, is not a few. The assistance of the law for such women has been attempted, but satisfactory results have not necessarily been achieved.

2 The protection of housewives

(1) The expanse of the distribution of property on divorce

Let’s turn our attention to the question of property. In the revision of the Civil Code in 1980, the share of a spouse in succession had been broadened. When a marriage is dissolved because of the death of the husband, the surviving wife enjoys a sufficient degree of protection. On the other hand, the system of distribution of property on divorce has been criticized as defective.

Another important point of the outline of revisions in the Civil Code, adopted in 1996, is to introduce the “one-half rule” in the distribution of property. The current art.768(3) states, “the family court shall determine whether to make a distribution, and the amount and method of that distribution, taking into account the amount of property obtained through the cooperation of both parties and all other circumstances.” The outline has proposed several minor amendments of the above sentence and an important addition in the following sentence: “In this consideration, when the levels of contribution of each spouse for accumulation and conservation of property are not clearly different, such levels are deemed to be equal.”

In this proposal, we can find the idea that through the distribution of property, the contribution of a spouse who is not a wage-earner (mainly a wife) should be measured in financial terms. It should be noted that according to the rule above, the right to claim the distribution of property might be admitted, even when the amount of the property of a partner is not increased after marriage. This idea is that the quantity of labor input should be compensated independently of the proprietary situation of a partner.

(2) The assurance of payment of child support

The right of a spouse (mainly a wife) against a partner (mainly a husband) is not more protected than other creditors in the civil procedure. The exception is for the payment of child support, which is paid from one parent to the other, after divorce or separation. In the reform relating to security rights and civil execution in 2003, some measures were introduced; with the special provisions related to execution of small monetary claims for periodic payments (Civil Execution Act art.151-2(1)), the future installments for child support can be enforceable when one of the installments is in default, and the prohibition against seizure is relaxed and amount equivalent to one half of the wage, salary and other wage claims of similar nature can be seized for child support claims (Civil Execution Act art.152(3)).

The assurance of payment of child support explained above has the effect of the stabilization for the mother (wife), because in almost all divorce cases the parental rights would be given to mother.

(3) The right of a spouse (mainly a wife) against a partner (mainly a husband) is becoming more protected than before. However, with the exception of child support, is there any reason why a divorced spouse should be provided with a sufficient degree of protection? In the days when the number of working women has increased and the life support of a spouse (mainly a wife) is not necessarily required, the system of distribution of property should be carefully and fundamentally reexamined. The same is true as for the right of inheritance of a spouse.

Conclusion

In regards to personality, women want to be free from “*ie*” and husband. Of course, family law does not order women to be subordinate to “*ie*” and husband. Even if there were no law reform, a woman can live freely in her family. However, the dual-surname system and the actions against marital violence are essential, since there are a number of women who cannot enjoy freedom without the assistance of laws.

In the proprietary aspect, women want to stabilize their life after the dissolution of a marriage with the property of their former partner (the right of inheritance of a spouse and the distribution of property on divorce). These protections have been considered inevitable, but beyond this, there is the economic dependence of wives upon husbands, which also has been thought to be a natural state of affairs. With this assistance, women who are divorced can rebuild their independence.

Autonomy and protection are neither too close to nor too remote from each other. It is easy to say that balance is important. However, it is important to note that there are several ways of balancing. In these days, it becomes difficult to say categorically “the status of women”, because the disparity among women is rapidly increasing. Women who have already acquired independence in personality and property do not need the help of the law. For women who can get independence in personality and property, the indirect help of the law is desirable. However, more direct help of the law is required for those who are dependent to a large degree in personality and property.

As might be expected, it is not natural that all women share mutual interests. Considering the variety of needs of different women, what actions we should take for the advancement of the status of women? This question becomes clear if we change the word “women” to “men”, which of course has dual meanings: male and human. In considering the problem of “the status of women”, we are probably also asking ourselves about “the status of men.”

Closing Speech

Masahito INOUE*

Dean Zhu, Dean Kim, distinguished colleagues from Beijing and Seoul, and ladies and gentlemen: On the occasion of closing the 2nd Annual BESETO Conference, it is my honor and privilege to say a few words to all of you who have kindly spared precious time to be here today.

The BESETO Conference is a rather new innovation, which started just a year ago as a forum for trilateral, triangular academic exchange of three leading law schools in East Asia, Peking University Law School, Seoul National University College of Law and University of Tokyo Graduate Schools for Law and Politics. Before that, we had accumulated piecemeal exchange activities in the forms of symposiums, seminars and mutual visits between each pair of the three institutions separately. On the basis of these past accomplishments, we reached last September to the agreement that, in order to step up our collaboration much further, we should continuously hold a periodical, unified opportunity for trilateral exchange among the faculty members of the three institutions.

While China, Korea and Japan are different among each other in various aspects, including their respective historical developments, and social, political and economical conditions, we still share, as Professor Matsuo stressed in his keynote speech this morning, a common cultural tradition as well as an East-Asian philosophy or basic sentiment. Furthermore, each of us commonly is facing at various challenges and problems of similar nature in rapidly and expansively changing environments of modern world.

There is an old saying in Japan that three heads could make a Buddha's wisdom. We also have a famous story about a warrior lord in the 16th century civil war period who gave an instruction to his three sons that three arrows firmly combined into one bunch could become strong enough to survive against any attacks to break them even if each single arrow separately was not so tough.

Certainly, in our case, each of the three institution in itself is wise and strong. Still, we could become equipped with much better wisdom to cope effectively with various difficult or cutting-edge problems if we work collaboratively, exchanging our own wisdoms and thinkings.

In addition to such collaboration, I think I should put stress upon the significance of respecting and learning from our mutual differences.

In this respect, in the luncheon speech at the last Conference in Seoul, I referred to the

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words of the Irish President who visited our university several years ago. After her lecture, some student in the audience raised a somewhat delicate question, which is, how the president could manage to maintain unity or conformity of her nation among the people with different ethnical and religious backgrounds. The president calmly responded that, although many people tended to look for some common factors or similarity among the diverse people, the true key for conformity is difference rather than similarity. We must acknowledge, respect, be curious about, and learn from the difference of the others. It is my view that her words apply to the international exchange as well.

And I believe mutually shared sincere interest into such similarities and differences among each other should be the very spirit of our BESETO Conference. The stimulating presentations and lively discussions in each session of the Today's conference, I appreciate, have demonstrated that spirit very well.

The Today's conference is also co-sponsored by a governmental grant project, the Global Center of Excellence project on Soft Law, at the University of Tokyo. In contrast to the "hard law", which is the law in our conventional usage of that term, the "soft law" covers a very wide range of written as well as unwritten, governmental as well as non-governmental, rules, regulations, guidelines, agreements and other norms to control, regulate or coordinate human activities and problems in various aspects of our society. While the terminology is novel, the concept, in substance, is rooted deeply in our East Asian tradition. It has long been a wisdom of our people to solve effectively and properly various subtle or difficult problems, by resorting to some kind of "soft laws" rather than the strict "hard laws".

The presentations and discussions in both sessions focused mainly on the role of the "hard laws" in two very important fields of modern changing society. However, when we were discussing about the proper limits of their intervention into the autonomous area of business activities and family matters, I assume that we implicitly were discussing about the wisdom of resorting to some kind of "soft laws" as the reverse side of the coin. In that sense as well, I am pleased that the Today's conference was very successful and fruitful.

I appreciate the great contribution of the distinguished colleagues who made such stimulating presentations at each session. I also would like to thank Professor Matsuo for his very insightful keynote speech, and Professors Kanda and Dogauchi for ably organizing each respective session as the moderator. Lastly, I would like all of you to join me in expressing sincere gratitude to the directing manager, Professor Matsushita, and all the staff who planned and managed the conference very successful by applauding.

Last month, the flag of the Olympic Games was handed over from Beijing to London. For our purpose, I am privileged to hand over our flag from Tokyo to Beijing, more specifically, into the hands of Dean Zhu of Peking University, our next year's host. I look forward to seeing many of you again next year in Beijing.

Thank you very much.

