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Report on Additional Information Requested by the Committee on  
the Elimination of Discrimination against Women to the Government  
of Japan on November 4, 2011

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Japan Federation of Bar Associations

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## Introduction

The Committee on the Elimination of Discrimination against Women (the “Committee”) reviewed the implementation in Japan of the Convention on the Elimination of All Forms of Discrimination Against Women (the “Convention”) and released its “Concluding observations of the Committee on the Elimination of Discrimination against Women” (the “Concluding Observations”) on August 7, 2009, in which the Committee requested the Government of Japan to provide, within two years, detailed written information on the implementation of the recommendations contained in paragraphs 18 and 28 thereof. On August 5, 2011, the Government submitted its response regarding these two recommendations. However, on November 4, 2011, the Committee, after reviewing the submitted response, reiterated its concerns identified in paragraph 18 of the Concluding Observations, recommending that Japan provide, within one year, additional information on: a) Actions taken with respect to the adoption of the draft law amending the Civil Code, which sets the minimum age for marriage at 18 for both women and men; allows for the choice of surnames for married couples; and equalizes shares in succession between a child born in wedlock and a child born out of wedlock; and b) Actions taken with respect to the preparation and adoption of legal provisions abolishing the six-month waiting period required for women but not men before remarriage. In response to this request from the Committee, the Government released its “Additional information regarding the response by the Government of Japan on the Concluding Observations of the Committee on the Elimination of Discrimination against Women (CEDAW/C/JPN/CO/6)” (the “Additional Information”) on November 5, 2012.

In this report, the Japan Federation of Bar Associations (JFBA) examines the actual situation regarding how the Government has complied (or failed to comply) with the recommendations made by the Committee.

It is truly regrettable that the Government has not submitted a bill to amend or abolish the discriminatory provisions contained in the Civil Code and another related law to the Diet, and thus has failed to fulfill its obligations under the Convention by still retaining the discriminatory legal system presently in place.

### 1. Japan’s failure to fulfill its obligations to improve domestic laws

The Government has been failing to fulfill its State party obligations under the Convention to improve its domestic laws since it has not even submitted a bill to set the minimum age for marriage at 18 for both women and men, introduce a system which allows a married couple to use separate surnames, equalize the shares in succession between children born in wedlock and those born out of wedlock, and abolish the six-month waiting

period required only for women but not for men before remarriage.

## 2. Announcement of the “Outline of a Bill to Revise the Civil Code” and background to the shelving of this bill

Regarding the family law sections of the Civil Code which, as mentioned by the Committee in the Concluding Observations, contains discriminatory provisions, an outline for amendment of the Civil Code (the “Outline of a Bill to Revise the Civil Code”) was made by the Legislative Council of the Minister of Justice and submitted to the Minister of Justice in February 1996, in which virtually all of the recommendations in the Concluding Observations were incorporated, except for the fact that the waiting period required for women but not men before remarriage was not abolished but only shortened from 300 days to 100 days.

However, there were strong objections against this bill within the Liberal Democratic Party of Japan (the “LDP”), the ruling party at that time, and the Government could not obtain the LDP’s approval and thus did not submit such bill to the Diet. The Democratic Party of Japan (the “DPJ”) independently submitted a bill to the Diet to revise the Civil Code in line with the Outline of a Bill to Revise the Civil Code in 1997 and again with other opposition parties in 1998 and afterward. The DPJ also included revision of the Civil Code as part of its manifesto during the 2009 House of Representatives election.

After the DPJ came to power, the Ministry of Justice planned to submit a bill in line with the Outline of a Bill to Revise the Civil Code to the Diet during the 174<sup>th</sup> ordinary session convened on January 18, 2010. The Minister of Justice repeatedly stated his intention to submit the bill in meetings of the Budget Committee and the Committee on Judicial Affairs. However, objections were raised by the DPJ’s coalition partners such as the Kokumin Shinto (People's New Party) and the plan to submit the bill was shelved after attempts to reach a compromise failed.

To date, no bill has been submitted to the Diet for the revision of the Civil Code, either by the Government or by any members of the Diet. The submission of the bill to the Diet during the 171<sup>st</sup> ordinary session in 2009, at which time the DPJ was still an opposition party, was the last submission, and no such bill has been brought to the Diet since the DPJ came to power, even though it had been actively promoting revision of the Civil Code when it was an opposition party. The Government has, in essence, been ignoring the Outline of a Bill to Revise the Civil Code submitted by the Legislative Council for more than 16 years.

In the Additional Information, the Government explains that the reason behind it not

having submitted a bill until now is “because there are various opinions concerning these issues in the Government and among the public,” and thus “the Government considers that it is still necessary to continue to deepen public discussion of these issues.” However, in the Concluding Observations, the Committee stated that it “notes with concern the use by the State party of public opinion surveys to explain the lack of progress in the repeal of discriminatory legislation,” and further mentioned that the Committee “points out that the obligations undertaken under the Convention by the State party upon ratification should not be solely dependent on the results of public opinion surveys, but on its obligations to align national laws in line with the provisions of the Convention as it is a part of its national legal system.” Despite these points, the Government is still using public opinion surveys to explain the delay in revising the laws and even mentioning the possibility of not revising the laws, depending on the opinions expressed by the public. Such attitude is equivalent to an explicit denial of the obligations undertaken under the Convention by the State party upon ratification and cannot be accepted.

In addition, the Prime Minister gave his reply to questions in the Diet in January 2012 that he would continue to discuss the issues surrounding the amendment of the Civil Code in the Government and among the ruling parties, although there were various opinions on the issues. His attitude has apparently taken a step backward. The Government should be aware that the discussion phase has already passed and what the Government should do now is to present how it plans to fulfill its obligations under the Convention.

Needless to say, the Government should exert its efforts to promote a better understanding on the issues among the Japanese people. However, the only example of public outreach mentioned by the Government was the information posted on the Website of the Ministry of Justice, for which no improvement has been made since 2009 when the Concluding Observations were released. We must state that we cannot see any sincere efforts having been made by the Government in this regard.

### 3. A step backward occurring in the Basic Plan for Gender Equality

The Third Basic Plan for Gender Equality (adopted by the Cabinet in December 2010, the “Third Basic Plan”) states that, “the Government continues to discuss the amendment of the Civil Code, including setting the minimum age for marriage at 18 for both men and women and the introduction of a system which allows a married couple to retain separate family names, based on the diversification of situations and structures of couples and families, as well as recommendations contained in the Committee's Concluding Observations,” as a measure to “reconsider social systems and practices and raise awareness from the perspective of gender equality.” This represents a major step backward compared to the report filed on July 23, 2010 by the Council for Gender Equality, entitled, the “Basic

Vision for Formulating the Third Basic Plan for Gender Equality,” which clearly stated that, “amendments to the Civil Code are necessary.”

Indeed, the above-mentioned ideas have basically remained unchanged since 10 years ago, as it can be found in the First Basic Plan for Gender Equality (adopted by the Cabinet in December 2000), that “from a gender equality perspective, and based on public awareness trends, we are continuing to consider reforming the marriage and divorce system, including the introduction of a system which allows a married couple to use separate surnames and the shortening of the waiting period for women before they can remarry.” The only change made in the Third Basic Plan was that the phrase “based on ..., as well as recommendations contained in the Committee's Concluding Observations” was added. The weak wording of this phrase makes it very difficult to say that it is strongly suggesting that making improvements (amendments) to the domestic laws is a legal obligation of the Government under the Convention. The Second Basic Plan for Gender Equality (adopted by the Cabinet in December 2005) stated that, "while keeping abreast of trends in public awareness by conducting opinion polls, from the perspective of eliminating career obstacles brought about by a change of surname after marriage due to the requirement that a married couple has to adopt one of their surnames at the time of marriage, the Government continues its efforts to deepen public discussion of the proposed system of allowing married couples to retain separate family names, together with the proposed revisions of the marriage and divorce system, including setting the minimum age for marriage at 18 for both men and women and reducing the waiting period required for women but not men before remarriage.” However, in the Third Basic Plan, the Government deleted the phrase “from the perspective of eliminating career obstacles brought about by a change of surname after marriage due to the requirement that a married couple has to adopt one of their family names at the time of marriage,” and only mentioned that, “the Government continues its efforts to deepen public discussion...,” which must be seen as a step backward.

Even though the expressions in the Third Basic Plan are a step backward, the Government is still responsible for taking actions in accordance with the Third Basic Plan. However, no serious efforts can be observed in this regard. According to the White Paper on Gender Equality 2012, the only action taken by the Government with regard to amendment of the Civil Code is that, “the Government made a follow-up report regarding amendments of the Civil Code including the introduction of a system to allow a married couple to retain separate family names and submitted it to the Committee in August, 2011.” This essentially means that the Government has taken no action except for the submission of a follow-up report to the Committee.

Therefore, the Government has not complied with the request raised by the Committee in paragraph 18 of the Concluding Observations.

In the Additional Information, the Government mentioned that the Minister of Justice and the Chair of the Specialist Committee on Monitoring the Council for Gender Equality had made positive statements in meetings of the Council for Gender Equality, but no concrete details of the “consideration” and “efforts” were described.

#### 4. Arguments by the Government in lawsuits concerning the system allowing for the choice of surnames for married couples and the remarriage waiting period

In February 2011, a lawsuit was filed in the Tokyo District Court (Case No.6049 (wa) of 2011), seeking compensation from the Government, claiming that Article 750 of the Civil Code, which forces a married couple to have the same surname, infringes on the right to retain one’s original name under Article 13 of the Constitution of Japan, the right to freedom of marriage under Article 24 of the Constitution of Japan and the Convention on the Elimination of All Forms of Discrimination against Women. In this lawsuit, the defendant (the Government) repeated its arguments such as, “the Convention is non-self-executing,” and “the Convention only obliges the State Parties to establish or maintain domestic systems with a certain level or contents concerning designated matters but does not confer any rights on individuals.” Furthermore, the Government came up with an argument in its third brief dated the 10th of October 2012 that, “Article 750 of the Civil Code can not be interpreted as violating the Convention.” These arguments are entirely against the Concluding Observations of the Committee and are equivalent to a denial of the obligations of the Government to improve domestic laws, including Article 750 of the Civil Code.

In addition, in another lawsuit brought before the Okayama District Court in 2011(Case No.1222 (wa) of 2011), seeking compensation from the Government for its omission to legislate against discrimination in the waiting period required for women but not men before remarriage, regarding Item 1, Article 733 of the Civil Code, the defendant (the Government) repeated its arguments its first brief dated the 18th of November 2011 that, “the provision does not violate Item 1, Article 14 and Item 2, Article 24 of the Constitution of Japan,” and that “no illegality existed in the omission of legislation.” Furthermore, regarding the Convention, the Government only argued that opinions expressed by the Committee were not legally binding in Japan, expressing its negative attitude toward correcting the current nonconformity of domestic laws to the Convention. The Okayama District Court dismissed the lawsuit in October 18, 2012, but the plaintiff lodged an appeal in October 29, 2012 and now the case is pending in the branch court of Hiroshima High Court (Case No.336 (ne) of 2012, not mentioned in any law reports).

## 5. Developments in precedents on Discrimination against children born out of wedlock

The proviso to item 4 of Article 900 of the Civil Code that the share in inheritance of a child born out of wedlock shall be one half of the share in inheritance of a child born in wedlock has not yet been abolished. The Supreme Court Grand Bench decision in 1995 upholding the constitutionality of this provision (Grand Bench, July 5, 1995, Minshu Vol. 49, No. 7, Page 1789) remains good law to this day.

However, all subsequent rulings on the constitutionality of this provision by the Supreme Court Petty Bench have held it to be constitutional by only a narrow margin. Further, a 2009 ruling by the Second Petty Bench (Second Petty Bench, September 20, 2009, Kagetsu Vol. 61, No. 12, Page 55) concluded that the provision was constitutional, but in a supplementary opinion Justice Yukio Takeuchi stated that “at the present moment (2009) at least, it must be noted that there are extremely strong doubts regarding the constitutionality of this provision.” In addition, in March 2010, in an inheritance dispute between an adopted child and a biological child born out of wedlock in which the constitutionality of this provision was contested, the Tokyo High Court ruled that applying this provision to the case was unconstitutional (Tokyo High Court, March 10, 2010, Hanta No. 1324, Page 210). Furthermore, in August 2011, the Osaka High Court ruled that this provision was unconstitutional (Osaka High Court, August 24, 2011, to be listed in its reports, bound and finalized), followed by a ruling by the Nagoya High Court in December 21, 2011 that it was unconstitutional to apply Article 1044, to which this provision applies *mutatis mutandis*, to the case (Nagoya High Court, December 21, 2011, Judgments of Lower Courts on the Supreme Court Website).

Under these developments, it is strongly expected that the Supreme Court Grand Bench will overturn its judgment on this issue. In July 2010, the Supreme Court Third Petty Bench decided to transfer to the Supreme Court Grand Bench an inheritance dispute between a child born in wedlock and a child born out of wedlock, in which the constitutionality of this provision was contested. For this reason, there were expectations that the previous decisions on this issue would be overturned. However, an out-of-court settlement was subsequently reached between the parties and the case ended without a decision being rendered regarding the constitutionality of this provision (Third Petty Bench ruling, March 9, 2011, Supreme Court Website). In the meantime, there is another pending dispute in which the constitutionality of this provision is being contested in the Supreme Court, increasing expectations that the previous decisions on this issue will be overturned. However, the JFBA is of the opinion that the Government should, as a State Party to the Convention, the Convention on the Rights of the Child, and other international treaties, amend domestic laws so as to eliminate discrimination against children born out of wedlock without waiting for a specific ruling thereon by the Supreme Court.

## 6. Other issues on eliminating discrimination against children born out of wedlock

In March 2010, after the Concluding Observations were released, a notice was issued by the Civil Affairs Bureau of the Ministry of Justice stating that a birth notification would be accepted without any mention of whether the child was born inside or outside of wedlock, as long as it stated that the child would be entered in the mother's family register. However, Article 49 of the Family Registration Act, which requires such mention of whether the child was born inside or outside of wedlock to appear in the birth notification, has not been revised and is still existing regardless of its discriminatory nature.

In the Third Basic Plan for Gender Equality, revision of the Civil Code was mentioned, although the expression thereof was admittedly inadequate as it merely stated that "the Government intends to continue considering amendments to the Civil Code", while amendment to the Family Registration Act was not expressly included. Moreover, the Third Basic Plan fails to list discrimination against children born out of wedlock in matters of inheritance as one of the possible areas for amendment of the Civil Code, indicating that the Government has no political intention of bringing about the elimination of such discrimination.

## 7. Calls for amendments to the law by civil society

After the change of government in 2009, hopes increased among the public that the Civil Code would be amended, given that the DPJ that had been proactively working for amendment up until that point had taken power. The JFBA released its "Statement Calling for Early Amendment of Discriminatory Provisions in the Family Law" on February 26, 2010 and proactively lobbied the Government, the Diet, political parties and the public by holding symposiums and taking other actions. Since the change of government alone, a total of 30 local bar associations have also issued statements calling for amendments to the law. Furthermore, in response to the above mentioned ruling of the Osaka High Court, which judged the provision in question to be unconstitutional, the JFBA again released its "Statement Calling for Early Amendment of Discriminatory Provisions in the Family Law" on October 6, 2011.

NGOs and other civil bodies are continuously working towards achieving amendment of the law. The JFBA co-hosted a meeting with Diet members hosted by the mNet-Information Network for Amending the Civil Code (mNet) on March 8, 2012, and supported another meeting with Diet members also hosted by the mNet on September 5, 2012. Both meetings attracted large numbers of participants who were eager to achieve revision of the Civil Code, representing a growing desire among the people for amendment of the Civil Code.

On the other hand, there were some political movements against the requests made by the Committee, including the “Resolution Opposing a System for the Choice of Surnames for Married Couples” adopted by some local governments, but it is dangerous to consider such a backlash as constituting the “public opinion” without regard to basic principles. As noted by the Committee, it should be remembered that public opinion surveys should not be used to explain the lack of progress in the amendment or abolition of discriminatory provisions.

#### 8. Statements made by other countries to Japan at the 14<sup>th</sup> Session of the UPR Working Group of the UN Human Rights Council

On October 31, 2012, during the 14<sup>th</sup> session of the Universal Periodic Review (UPR) Working Group of the United Nations (UN) Human Rights Council, Japan was reviewed for the second cycle and the report of the Working Group on Japan was endorsed by the Working Group as a whole on November 3, 2012 (A/HRC/wg.6/14/1.12 November 2, 2012 Draft report of Working Group on the Universal Periodic review Japan).

In addition, the Government accepted to take follow-up actions concerning three recommendations made in the first UPR cycle on Japan in 2008, which were: to adapt national legislation to bring it into line with the principles of equality and non-discrimination; to repeal all legal provisions that discriminate against women; and to encourage the continued taking of measures relating to discrimination against women, in particular to raise the age of marriage to 18 for women as for men (A/HRC/8/44/Add.1 August 13, 2008 UNIVERSAL PERIODIC REVIEW Report of the Working Group on the Universal Periodic Review Japan Addendum Conclusions and/or recommendations).

In this session of the Working Group, 78 States made statements regarding the Japanese human rights situation after the first UPR cycle, and many States expressed their concerns about discrimination against women including recommendations to amend marriage legislation in the Civil Code and requested Japan to exert more efforts to eliminate such discrimination. They also recommended that Japan ensure equality between children born in wedlock and those born out of wedlock and eliminate any discrimination against children born outside of wedlock.

The Government will present its future actions to be taken in response to these recommendations during a session of the Human Rights Council to be convened in March 2013.

The JFBA urges the Government to positively accept the concerns and recommendations raised again by other countries during the second UPR cycle and to

immediately amend the Civil Code and the Family Registration Act in order to eliminate discriminatory marriage legislation against women and discrimination against children born out of wedlock.

## Conclusions

As stated above, the Government has clearly failed to sincerely fulfill its obligations to amend the Civil Code, regarding which follow-up was requested by the Committee. The JFBA has compiled this report in the hope that it will be of assistance to the Committee and that it will encourage the Government to immediately eliminate discrimination against women in accordance with the Convention.

End

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