



How CEDAW Is Implemented in East Asia:
Case Studies from Japan, Hong Kong & South Korea

《消歧公约》在东亚如何实施
——基于日本、中国香港和韩国三个法域的案例研究

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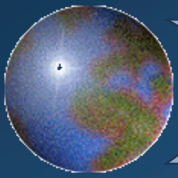
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Comparing the impact of CEDAW in Japan, HK, and South Korea

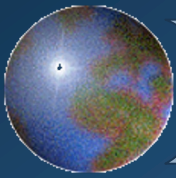
比较《消歧公约》在日本、中国香港和韩国的影响

Useful case study because all 3 have constitutions that protect the right to equality.
考虑到三个法域都在宪法中保障了平等权，这是一种有意义的案例比较研究

All 3 also have developed economies; high levels of education; and secular legal systems that permit judicial review (so discriminatory laws can be challenged).
三个法域都拥有发达的经济、很高的教育水平，以及允许司法审查的、非宗教性的法律体系（从而能够对歧视性的法律发起挑战）

Yet women are still underrepresented in the upper levels of business, government, the judiciary, and the legal profession.
然而，女性在企业、政府、司法机构和法律专业高层职务的代表人数仍然不足

Clearly, a constitutional equality clause is not adequate to promote gender equality.
显然，宪法上的平等保障条款不足以真正促进性别平等



Comparing the impact of CEDAW in Japan, HK, and South Korea

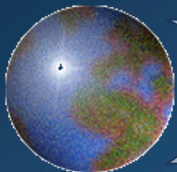
比较《消歧公约》在日本、中国香港和韩国的影响

Can CEDAW help? What factors influence the relative significance of CEDAW?

《消歧公约》能帮助解决这些问题吗？哪些因素影响了《公约》的相对重要性？

Factors to consider: NGO participation; government's desire to obtain "positive" comments from the CEDAW Committee; judicial attitudes (e.g. whether judges are willing to refer to CEDAW as guidance when interpreting domestic legislation).

可以考虑的因素包括：非政府组织的参与、政府接受消除对妇女歧视委员会（CEDAW委员会）“积极”评价的意愿、司法的态度（例如，法官们是否愿意将《公约》作为解释国内法的指引）



What Does CEDAW add to the legal framework?

《消歧公约》能给当地的法律体系带来哪些增益？

“States parties” to the CEDAW treaty are reviewed periodically by the UN Committee on the Elimination of Discrimination Against Women.

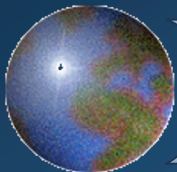
《消歧公约》的“成员国”会定期接受联合国消除对妇女歧视委员会的审议

CEDAW Committee welcomes NGO participation. It does not just rely on governments. The CEDAW Committee has persuaded many governments to amend discriminatory laws (e.g. in the area of nationality, governed by Art. 9 of CEDAW).

CEDAW委员会欢迎非政府组织的参与。委员会并不只依赖政府的报告。委员会已经说服很多国家政府修改了歧视性的国内法（如《公约》第9条规定有关国籍问题的歧视性法律）

States are also obligated to prohibit discrimination outside the public sphere (e.g. in the private employment market, which is governed by Art. 11 of CEDAW).

成员国也有义务禁止在政府就业领域之外的歧视（如《公约》第11条规定的发生在私人就业市场的歧视）



What Does CEDAW add to the legal framework?

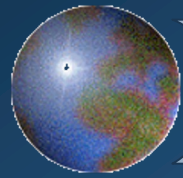
《消歧公约》能给当地的法律体系带来哪些增益？

States parties are also obligated to take “all appropriate measures” to modify customs and practices which constitute discrimination against women and to eliminate discrimination in matters relating to marriage and family relations. (See, e.g. Arts. 2(f), 5, and 16 of CEDAW.)

成员国同样必须采取“一切适当措施”修改构成对妇女歧视的习俗和惯例，并在有关婚姻和家庭关系的问题上消除歧视（参见《公约》第2条第(f)款，第5条，第16条）

These are just a few examples – in brief, CEDAW requires governments to act proactively. It also expressly allows for temporary special measures (“affirmative action”) to address systemic discrimination. (See Art. 4 of CEDAW.)

以上仅列举一些例子。简而言之，《公约》要求政府积极主动采取行动，并明确允许采用暂行特别措施（“扶持行动”）解决系统性的歧视（参见《公约》第4条）



JAPAN's 1947 Constitution

日本1947年《宪法》



Art. 14 of Constitution prohibits discrimination on the basis of sex.

Art. 24: provides for “equal rights of husband and wife” within marriage.

(This was rather progressive for 1947.)

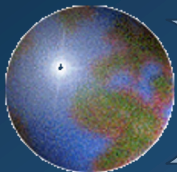
《宪法》第14条禁止基于生理性别的歧视；

《宪法》第24条规定，婚姻关系中的“丈夫和妻子享有平等权利”

（对于一部1947年的宪法来说，已经相当进步了）

1981: Japan's Supreme Court held that a lower mandatory retirement age for women was irrational discrimination (used Art. 90 of Civil Code to import equality clause from Constitution).

1981年：日本最高法院认定，适用于妇女的更低的法定退休年龄构成不合理的歧视（通过援引《民法典》第90条引入宪法的平等权条款）



JAPAN's 1947 Constitution

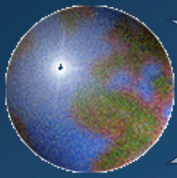
日本1947年《宪法》

But generally Japan's judiciary has shown great deference to the Diet (legislature); it applies a test similar to “rational basis” to determine constitutionality (low level of scrutiny). And judges in Japan have been very reluctant to use CEDAW as a guide to interpret constitutional clauses.

但总体上，日本的司法系统对国会（立法机关）表现出了极大的尊重；法院采用类似于“合理依据”的标准（一种比较低的审查标准）来判定系争法律的合宪性。日本的法官非常不愿意采用《消歧公约》作为解释宪法条款的指引。

Example: in 2015 it upheld a Civil Code provision requiring married couples to use the same surname. Accepted, as justification, assumption that couples with different surnames are more likely to experience marital conflict. 5 judges (including all 3 women) dissented.

例如，2015年，最高法院认定，《民法典》要求已婚夫妻使用同样的姓的规定合宪，接受了“使用不同姓的夫妻更容易产生婚姻冲突”的假定作为判决理由。五名大法官，包括所有女性大法官（共三名）都对判决保留了反对意见



JAPAN's 1947 Constitution

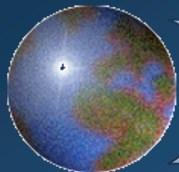
日本1947年《宪法》

2021: upheld the law again; this time the judges acknowledged that compelling a person to change surname could cause harm but held that only the legislature could address that harm. The court was not persuaded by litigants' arguments based upon CEDAW.

2021年：最高法院又一次维持了该条款的合宪性。这一次，法官承认，强迫一个人改变姓氏可能会对其造成损害，但认为只有国会有权解决这种损害，没有采纳当事人基于《公约》提出的论点。

See: *Same Surname Case: Japanese Supreme Court Holds that Forcing Couples to Share a Surname is Constitutional* (2022) 135 Harvard Law Review 1504-1511.

参见讲座资料第49页的夫妻同姓案



CEDAW's Impact in Japan 《消歧公约》在日本的影响力

Japan signed CEDAW in 1981 & ratified in 1985

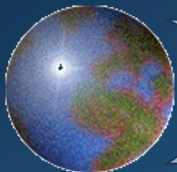
It then enacted a fairly weak law on employment discrimination (hesitant to provide a strong enforcement model).

日本在1981年签署、1985年批准了《公约》。随后，日本制定了一部相当薄弱的就业歧视法（不愿在法律中提供强有力的执行模式）

But Japan's government did agree to amend some discriminatory laws to comply with CEDAW. For example, it reformed the rule of patrilineal descent (originally a Japanese woman could not pass on citizenship to her children if the father was foreign).

不过日本政府确实同意修改一些歧视性的法律，使其符合《公约》的要求。例如，政府改革了父系血统制的规则（在此之前，如果丈夫是外国人，则日本妇女不能将公民身份传给自己的子女）





CEDAW's Impact in Japan

《消歧公约》在日本的影响力

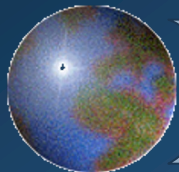


2018: finally equalized age of consent to marriage (previously 16 for women & 18 for men).

2018年：日本最终统一了法定婚龄（在此之前，女性16岁、男性18岁可以结婚）

The mandatory waiting period to remarry after divorce (which only applied to women) was shortened from 6 months to 100 days and the government is moving to abolish it.

只约束女性的离婚后、再婚前的强制等待期由六个月缩短到100天，政府目前正在着手废除这一规定



CEDAW's Impact in Japan 《消歧公约》在日本的影响力



Japan NGO Network for CEDAW submits shadow reports & monitors government actions. Government makes a modest effort to address the Concluding Observations of CEDAW Committee but is very opposed to any special measures (e.g. quotas to promote political participation).

日本的CEDAW非政府组织联盟会向CEDAW委员会提交影子报告、并监督政府的履约行为。日本政府对解决委员会在结论性意见中提出的问题只做出了微薄的努力，而且强烈反对制定任何暂行特别措施（如确立能够促进妇女参与政治的配额）

Petrice Flowers has characterized Japan as case of “medium degree” of compliance with CEDAW. (See *International Human Rights Norms in Japan*, 2016 Human Rights Quarterly 85.)

Petrice Flowers将日本对《消歧公约》的遵守程度评为“中等”（参见 *International Human Rights Norms in Japan*, 2016 Human Rights Quarterly 85）



South Korea's Constitutional Framework

韩国的宪政框架

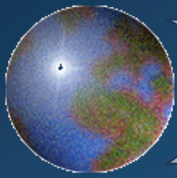
Art. 11 prohibits discrimination on numerous grounds, including sex
韩国《宪法》第11条禁止基于多种理由的歧视，包括基于生理性别的歧视

Art. 32 protects working women from discrimination in employment
《宪法》第32条保护劳动妇女不受就业歧视的权利

Art. 36 provides that marriage shall be entered into and sustained on the basis of individual dignity and equality of the sexes
《宪法》第36条规定，婚姻的缔结和维系必须建立在个人尊严和两性平等的基础之上

Since 1999, Korean Constitutional Court has applied a standard of judicial review that is similar to the proportionality test (and it has frequently cited CEDAW).

从1999年开始，韩国宪法法院在司法审查时采用了类似于比例原则的标准（并经常引用《消歧公约》）



South Korea's Constitutional Framework

韩国的宪政框架



Examples 示例

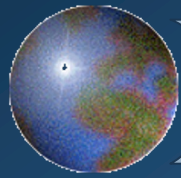
1999: invalidated practice of awarding veterans extra points on civil service exams.
1999年：宣告在公务员考试中给退役军人加分的做法无效

2005: invalidated the "house head system"
2005年：宣告“户主制度”无效

2005: invalidated Civil Code provision requiring children to use father's surname
2005年：宣告《民法典》要求孩子使用父亲的姓的条款无效

2015: criminal law prohibiting adultery was held unconstitutional (violated right to privacy & sexual self-determination)
2015年：禁止通奸的刑法条款被宣告违宪（因其侵犯了隐私权和性自主权）

2013: Korea's Supreme Court ruled that a man may be prosecuted for marital rape
2013年：韩国最高法院裁定，男性可以因为婚内强奸被起诉



South Korea & CEDAW

韩国与《消歧公约》

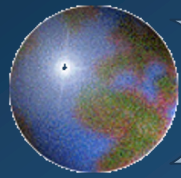
Ratified CEDAW in 1994. Originally filed a reservation to Article 9 of CEDAW for *jus sanguinis a patre* (citizenship passing down paternal line).
韩国于1994年批准了《消歧公约》，韩国最开始基于父系血统制（公民身份只在父系中传承）对《公约》第9条提出了保留

1997: Amended Nationality Act to comply with CEDAW & CRC.

1997年：韩国修订了《国籍法》，使其符合《消歧公约》和《儿童权利公约》的规定

2006: Acceded to the CEDAW Optional Protocol in 2006 (enabling individuals to file complaints with the CEDAW Committee after exhausting their “domestic remedies”).

2006年：加入了《消歧公约》的任择议定书（从而允许个体公民在穷尽“国内救济”的情况下向CEDAW委员会提出申诉）



South Korea & CEDAW

韩国与《消歧公约》

Also adopted a quota system to increase women's political participation.

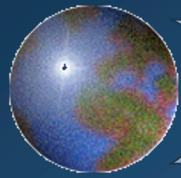
韩国还通过了旨在促进妇女参与政治的配额制度

Government also agreed to create a Human Rights Commission (although it has had difficulty maintaining independence over the years).

韩国政府还同意建立一个人权委员会（尽管多年以来它很难保持独立性）

South Korea's reports to CEDAW Committee show an assertive approach to implementing CEDAW. This may reflect a desire by the government to show the international community that it has fully transitioned from an authoritarian system to a liberal democracy.

韩国政府向CEDAW委员会提交的报告显示，它在履行《公约》方面采取了坚定的态度。这或许反映出政府希望向国际社会表明，韩国已经从专制制度完全过渡到了民主制度

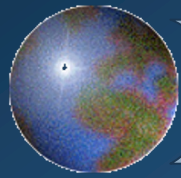


South Korea & CEDAW

韩国与《消歧公约》

BUT many problems remain in South Korea (e.g. very high rate of domestic violence) and the recently elected government is overtly hostile to the concept of gender equality. The next review by the CEDAW Committee will be very interesting. Human Rights Commission and NGO reports have alerted Committee to the backlash against gender equality in the current government.

然而，韩国仍然存在很多问题（如家庭暴力的发生率非常高），最近当选的政府则对性别平等的概念公开表达了敌意。因此CEDAW委员会对韩国的下一次审议将令人拭目以待。人权委员会和非政府组织的报告已经向CEDAW委员会指出，应注意现任政府在性别平等方面的反弹



South Korea (continued)

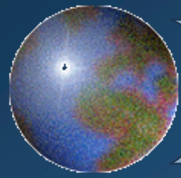
韩国与《消歧公约》

April 2019: the Korea's Constitutional Court (KCC) held (7 to 2) that a law that banned abortion (with very limited exceptions) was “non-conforming” with the Constitution.

2019年4月：韩国宪法法院以7:2的表决做出裁决，一部禁止堕胎的法律（仅在非常有限的情况下可以例外）“不符合”宪法

The KCC essentially applied the proportionality test: determined that the law restricted a woman's right to self-determination beyond the minimum necessary to achieve the legislative purpose (protecting fetal life).

宪法法院实质上适用了比例原则的标准：系争法律对妇女自决权的限制超出了实现立法目的（保护胎儿生命）所需的最低限度



South Korea (continued)

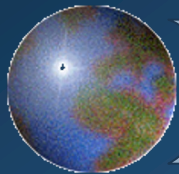
韩国与《消歧公约》

KCC also held that the legislative purpose of the law was not being achieved in any event because the law prohibiting abortion was so rarely enforced.

法院还裁定，由于禁止堕胎的法律很少被执行，因此该法律的立法目的无论如何都不可能实现

The KCC gave the legislature until the end of 2020 to amend the law but it did not do so. So the law ceased to have effect on 1 January 2021.

法院允许立法者在2020年底之前修改该法，但立法者并没有这么做。于是，该法自2021年1月1日停止生效



Hong Kong: Transnational Constitutionalism?

香港：跨国宪政？

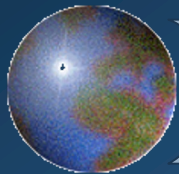


Until the final years of the “colonial period” there was no constitutional guarantee of equality & CEDAW did not apply. (UK ratified but HK government asked to be left out.)

直到“殖民地时期”的最后几年，宪法并不保障平等权，而《消歧公约》在香港也不适用（英国批准了《公约》，但香港政府要求将香港排除在外）

ICCPR did apply to HK but had little impact because no local legislation implementing it.

《公民权利和政治权利国际公约（ICCPR）》适用于香港，但其影响微乎其微，原因是缺乏实施《公约》的本地立法



Hong Kong: Transnational Constitutionalism?

香港：跨国宪政？



1985: Sino-British Joint Declaration: ICCPR & ICESCR would continue to apply to HK after 1997

1985年《中英联合声明》：ICCPR和《经济社会和文化权利国际公约（ICESCR）》在97年之后继续在香港适用

1989: HK government proposed local Bill of Rights Ordinance (to be based on ICCPR)

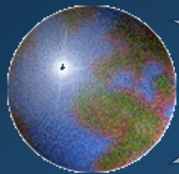
1989年：香港政府基于ICCPR建议制定本地的《人权法案》

1990: HK Basic Law (regional constitution for SAR) was adopted

1990年：制定《香港基本法》（香港特别行政区宪法）

Art. 39 of the HK Basic Law incorporates both the ICCPR & ICESCR

《基本法》第39条将ICCPR和ICESCR纳入了香港的法律体系



Hong Kong: Transnational Constitutionalism?

香港：跨国宪政？

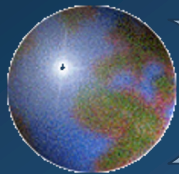


Lots of discriminatory laws and government policies in place at that time
当时有很多歧视性的法律和政府政策

- Ban on female inheritance of land in “New Territories” part of Hong Kong
禁止女性继承香港“新界”地区的土地
- “Protective legislation” (labor laws restricting women’s ability to work)
“保护性立法”（限制妇女工作的劳动法）
- Even the government posted discriminatory job advertisements
甚至政府也会发布歧视性的招聘广告

Women’s movement used debate on Bill of Rights to raise awareness
妇女运动利用了关于《人权法案》的论点来提高认识

Filed a “shadow report” with UN Human Rights Committee (ICCPR)
向联合国人权理事会(ICCPR)提交“影子报告”



Hong Kong: Transnational Constitutionalism?

香港：跨国宪政？

Three women legislators made a huge difference in Hong Kong . . .

三名女性立法者在香港产生了巨大的影响



Christine Loh drafted a bill to end the ban on female inheritance of land in NTs

陆恭蕙起草了一项法案，废除了禁止女性继承新界土地的规定

Emily Lau introduced a Legislative Council motion in support of CEDAW which passed. Made it difficult for government to continue to reject CEDAW.

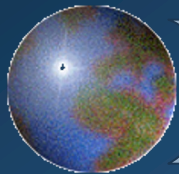
劉慧卿向立法会提出了支持《消歧公约》的动议，并获得通过。
使政府难以拒绝

CEDAW was extended to HK in 1996 (with agreement of UK and China).

《消歧公约》于1996年（基于中英双方约定）扩张适用于香港

Anna Wu drafted the Equal Opportunities Bill (government responded with two compromise bills on sex and disability discrimination)

胡紅玉起草了《平等机会法案》（但政府回以妥协的性别和残疾歧视的法案）



Hong Kong: Transnational Constitutionalism?

香港：跨国宪政？



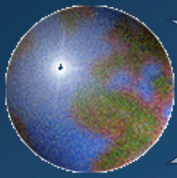
Sex Discrimination Ordinance enacted in 1995 and went into force in 1996.

《性别歧视条例》于1995年制定，1996年生效

An Equal Opportunities Commission was established: it investigates complaints, conciliates, and sometimes litigates on behalf of complainants.
平等机会委员会成立：委员会调查投诉、主持调解、有时也代表投诉人提起诉讼

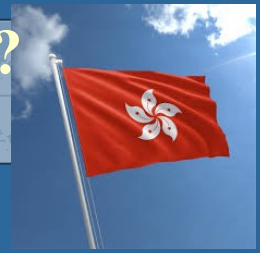
EOC v. Director of Education (2001): Court referred to CEDAW when interpreting the SDO and therefore rejected the government's defense of a policy that made it easier for boys to be admitted to elite secondary schools.

平等机会委员会诉教育总监案（2001）：法院参照《消歧公约》解释《性别歧视条例》，驳回了一项（受到政府支持的）使男孩更容易被精英中学录取的政策



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HK NGOs have traditionally been very active in drafting shadow reports.
传统上，非政府组织在起草影子报告方面一直非常积极

However, HK government is now less responsive to public views as the legislature is less representative of the general public.

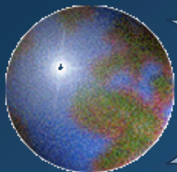
然而，由于立法机构的代表性大大降低，香港政府现在对公众意见的反应也大不如前

There is also a new concern: will members of NGOs be prosecuted (e.g. for sedition) if they send critical NGO reports to UN treaty bodies?

还有一个新的问题：如果非政府组织成员向联合国公约机构提交了批评性的NGO报告，他们会不会被追诉（如被控煽动罪）？

For discussion in context of the 2022 review of HK's compliance with the ICCPR, see Carole J. Petersen, *Window Dressing or Meaningful Constraint? The Role of the International Covenant on Civil and Political Rights and the United Nations Human Rights Committee in Hong Kong's Legal System*, 52(3) HONG KONG LAW JOURNAL 1031- 1056 (2022).

结合2022年香港ICCPR履约审议了解相关讨论，参见白嘉露教授上述文章



In all three jurisdictions, NGO shadow reports are very important
非政府组织的影子报告在三个法域都非常重要

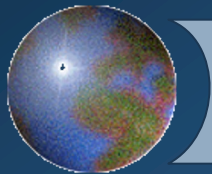
International Women's Rights Action Watch-Asia Pacific assists NGOs
国际妇女权利行动观察（亚太地区）在以下方面协助非政府组织：
<https://cedaw.iwraw-ap.org/>

Examples: it organizes trainings for women on CEDAW so that they can fully understand the scope of their governments' obligations under the treaty.

例如：它们为妇女组织《消歧公约》的培训，使她们充分了解其政府在《公约》下的义务范围

It assists with drafting of “shadow reports” for CEDAW reviews in Geneva.

它们协助非政府组织起草“影子报告”，这些提交给CEDAW委员会的“影子报告”有助于委员会审查成员国履约情况



Some preliminary conclusions from case study

案例研究得出的一些初步结论

Equality clauses in constitutions can be very helpful but only if judicial review is meaningful and judges are willing to adopt a purposeful approach to interpretation.

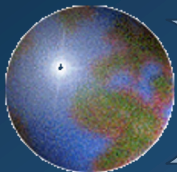
宪法中的平等权条款可能非常有用，但前提是存在有意义的司法审查，且法官愿意采取目的解释方法（在解释条文时考虑法律的目的）

CEDAW is more comprehensive and it gives governments additional incentives to adopt progressive reforms.

《消歧公约》非常全面，能够为政府提供更大的动力采取积极改革

This is especially true if NGOs are active in submitting “shadow reports” and if the government is eager to improve its international reputation (as the government of South Korea was when it ratified CEDAW and also the CEDAW Optional Protocol).

如果非政府组织积极提交“影子报告”，且政府渴望提高其国际声誉，这种效应就尤其明显（如韩国政府在批准《消歧公约》及其任择议定书时的情形）



Some preliminary conclusions from case study

案例研究得出的一些初步结论

CEDAW can also inform judicial interpretation of domestic law if judges are open to arguments based upon international law.

如果法官对基于国际法的论点持开放态度，《公约》也可以为他们解释国内法提供参考

The distinction between monist and dualist systems is less important than judicial attitudes.

一元制和二元制的区别不如司法机构对国际规范的态度重要

Example: the courts in Hong Kong (which has a dualist system) have been willing to use Hong Kong's international treaty obligations as guidance when interpreting Hong Kong's domestic law.

例如，实行二元制的香港的法院一向愿意参考国际条约义务来解释本土立法

Yet in Japan (which has a monist system) the judiciary seems reluctant to cite CEDAW as guidance when interpreting domestic law.

而实行一元制的日本的司法机关在解释国内法时似乎并不愿意引用《公约》作为指导