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—Human Rights—

contents

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Human rights of foreigners

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Does the guarantee of the Constitution of Japan on the human rights extend to foreign nationals staying in Japan? Today, it is generally acknowledged, thanks to the Japanese governmental principle of universal cooperation and global understanding of human rights, that foreigners also have basic human rights in Japan. The rights, however, are not equal as ones for Japanese. So what rights do foreign residents have under the Constitution? There are two useful judicial precedents to clarify it. The first is the MacLean Case. In this case, the right to reside, enter, carry out political activities became main issues. The second is the case over the right to vote in local election. It provoked the dispute that whether we should give local voting right for permanent residents or not.

MacLean Case

"The fact"

In 1969, McLean, with American nationality, got the permission to stay in Japan for one year and came to Japan. He got the residential permission for working as English teacher, and, at first, he did. But, without notification to Japanese government, he

changed his job and took part in the demonstrations and rallies against Vietnam War and the Japan-U.S. Security Treaty. Next year, he applied to extend his stay, but the Ministry of Justice refused and ordered to deport in 120 days. After that, McLean applied the extension again, but the Ministry of Justice refused again because of his political activities during the stay. McLean was dissatisfied with the Ministry's decision and brought an action in the court.

The right to enter Japan and the right to reside were provided by item1 article 22 of the Constitution of Japan. However, this doesn't mean that the right to entry is secured for foreigners. The Supreme Court judged that nations didn't have any obligations to accept foreigners. So the right to enter isn't guaranteed unless nations conclude special treaties. This idea bases on International common law. The right to reside isn't guaranteed based on the same reason.

The right to carry out political activities for foreigners is guaranteed in narrower range than Japanese. The Supreme Court judged that basic human rights is extended for foreigners equally unless they naturally intended for only Japanese and the right of speech and assembly is guaranteed equally without things should not be accepted for foreigners.

The case over the right to vote in local election

"The fact"

In 1990, Koreans having the right of permanent residence were objected to the Election Administration Committee because they weren't registered in the list of the electorate though they were permanent residents. At first, their statement was rejected by Election Administration Committee, after that, they filed a suit for cancellation with Osaka District Court.

The right to vote written in Article 15 of Constitution of Japan is intended for only the Japanese people. Under the principle of the sovereignty of the people, "the Japanese people" in here should be interpreted the people having Japanese nationality. Article 93 of Constitution which provides the top and members in the local public organization are elected by "inhabitants" in the local directly. Do "inhabitants" in here contain foreigners living in Japan? Osaka District Court judged that "inhabitants" in here meant "the Japanese people" living in the local area. The court, on the other hand, judged that it was not banned to give foreigners—particularly having close relationship with the local public organization like permanent residence—the right to vote from the viewpoint of the purpose and importance of local autonomy in the Constitution Chapter8.

The guarantee of human rights for foreigners is restricted to some extent by policymaking. However, to try to give the guarantee equally as Japanese isn't against the aim of the Constitution of Japan. Social rights and the right to vote in local area are exactly the rights having such natures. To consider Japanese way in the future, the human rights for foreigners are the field needs to discuss more.

Human rights of women in Japan

Misaki Tanaka

1. The history of human rights of women in Japan

The “Ie” is a Japanese term, which translates directly to household. It can mean family’s lineage. It is popularly used as the traditional family structure, and the regulation of Japanese family system in old civil law of Japan. The old civil law was established in 1898. The symbolic “Ie” refers to not only bloodlines but also economic and socio religious functions that take place within the family. Until recently, wives had taken on the duties of housekeeping work like cooking, cleaning, and raising the children. In this system, the eldest son inherits the household property the responsibility of taking care of his parents. The eldest son is also expected to live with his parents when they grow older. So women who are married with eldest son have to live with husband’s parents. In addition, arranged marriage was very common before World War Ⅱ, so marriage for love was very few. Before World War Ⅱ, Japanese Women didn’t have a choice to decide how to live a life after marriage.

2. The equal situation in Family Law in Japan

2-1. Non-remarriage term for women

Under the present law and regulation in Japan, there are a lot of problems against the principle of equal rights for men and women. The principle is written clearly in Article 14 and 24 of the Constitution of Japan and in Article 733 of family law that prescribes about marriage and divorce, provides follows.

1. Women can't have a second marriage until 6 months after finish the cancellation or revocation of pre-marriage.
2. If women became pregnant before the cancellation or revocation of pre-marriage, the previous clause isn't applied.

It means that the law forbid women remarrying for 6 month after they divorced whether the women is old age or non-pregnant. The purpose of this article is to avoid duplication of an estimate of father.

The "estimate of father" means that in relationship of legal father and children in Japan. If wife is pregnant in the term of legal relationship of marriage, to estimate legal father immediately, the father is estimated as a legal father. Moreover, if wife become pregnant in between the term of divorce and remarriage, law have to estimate legal father definitely. The purpose of the article is just to avoid the duplication of legal

father.

The Supreme Court judged the article 733 was not unconstitutional. It said that the article didn't go against the aim of constitution of 14 and 24. Nowadays the science technique has made remarkable progress. The fact of pregnancy, medical analysis shows more immediately and from DNA analysis proves precisely. Though the judiciary in Japan still forbids women to remarriage in 6months after one's divorce, the article can conflict with article 14 and 24 of the constitution. In France and Korea, the not-remarriage term was deleted recently.

In addition, the article was regarded as questionable by United Nation Human Rights Committee in 2008, and the overall view of Committee on the Elimination of Discrimination against Women advice Japan to reconsider the article 733.

2-2. Name rights of women

In the article 750 of family law provides that "Marriage couple have to call one family name husband's one or wife's one to follow the regulation of marriage." This regulation, at first sight, seems like equality for both men and women. But in the actual conditions in Japanese society, 97% of the marriage couple choose husband's family

name. This is greatly influenced by common practice in Japanese history.

Through the ages, it has been common practice to choose husband's family name in Japan.

But recently, a lot of women go out from home and work as hard as men. To continue to work in the society, it is hard to change own name for women by marriage. It restricts women's freedom to have rights of name and rights of marriage. And there is such a growing tendency toward women.

3. Recent law of protection for women's rights

3-1. A prohibition law for Domestic Violence

Recently, domestic violence for women becomes problem and A prohibition law of Domestic Violence is started in 2001. Domestic violence invades the rights to live freely. In Japan, the problem tends to be invisible and the relief for the domestic violence was not enough to save victims in spite of the fact that the domestic violence include a criminal act connected with invasion of human rights. As a fact, most victims are women, for it is difficult for women to become independent economically.

It violates a women's majesty and disturbs materialization of equality of man and

women in Japanese society. To abolish the situation, Japanese government launched to start to make the system that prevents domestic violence. And the purpose of a prohibition law of Domestic Violence in Japan is to make the system of reports, consultations, protection, and support for women's independence. This is also in accordance with international agreement which international society has to try to exterminate violence for women.

As previously explained, if there is the regulation of equality of men and women, in the reality, there is the fact that the rights of choice for women are restricted. For example, in the situation of political attendance of women, it is only 13% in Japan. This is lower than the average of world women's political attendance, 18.9%. To break down the situation in Japan, It is not enough to maintain the new law for women to have a freedom to choice own name. To abolish the common practice is the key to solve the problem. Japanese society has to reconsider about importance of women's society attendance.

The New Human Rights

Shiori Saito

The new human rights are actually the rights that are not included in the Constitution of Japan, but with the change of the society, the people came to claim that the rights should be admitted as constitutional rights. For example, the right of privacy, the right to protect one's environment, the right of self-determination and the intellectual property right have been mainly discussed for several decades. Here I will explain two examples which are more famous among them.

First, the right of privacy has been improved as the one to right to be let alone in American precedents. It had been viewed as the personal rights of private law for a long time. However, with a rapid development of the information oriented society, it came to be understood as the right to control one's personal information. The novel, "After the Banquet" written by Yukio Mishima, caused the argument about this right for the first place. In this case, whether this work violates the right of privacy or not was disputed in the Tokyo district court. According to its decision, the right of privacy was admitted based on Article 13, and the plaintiff could claim a compensation for damages by the

article 709 in the civil law. Article 13 is the most essential article in the Constitution of Japan in discussing the new human rights, which prescribed that “All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs”. After that, in the case that the police took pictures of participants of a demonstration, the right of privacy was admitted as a right of the Constitution based on the Article 13. In addition, now that we face with the information oriented society where the Internet plays an important role, our personal information is exposed to a danger of being exposed to the public. Thus the right of privacy can be regarded as one of the most famous new human rights which are getting more and more recognized.

Moreover, one of the other new human rights is the right to protect one’s environment. This right supports the basis of daily lives of all people. It has been claimed by the necessity of prevention of environmental pollution caused by a high growth in 1990s. In Japan, the Environmental Pollution Prevention Act was established in 1967, but in America the term of “the right to protect one’s environment” came to appear in some thesis from 1969. In general, it is defined as “the right to require a

restoration and a maintenance of a healthful and comfortable environment", but in concrete it indicates such as the right to sunlight, the right of calmness and the right to a view. Of course, these rights are not described in the Constitution. Nevertheless, both Article 13, the right to pursue one's well-being, and Article 25, the right to live can be grounds to secure them. For example, in the case that citizens suffered from noises of taking off and landing at the Osaka Airport required a prohibition of flights during night and a compensation for damage. The Supreme Court admitted the compensation but did not admit the right to protect one's environment itself. They have never admitted this right as the constitutional right.

In this way, I explained two examples of the new human rights. They have been already taken granted in the society, but some of them are not recognized as a formal right in the Constitution by the Supreme Court. The substantial problem is that how these rights should be treated in the future.

≪Reference≫

Cited in Section 1

Nobuyoshi Ashibe, “Kenpo(憲法). 5th edition” Iwanami-shoten: Tokyo, 2011, 91-98

Nobuyoshi Ashibe,”Kenpo-gaku. Ⅱ .Genaral remarks”yu-hikaku,1996, 121-159

Yosha Reseach, “McLean v Minister of Justice, 1978”

(http://members.jcom.home.ne.jp/yosha/yr/citizenship/McLean_v_MOJ_1978.html)

The Japan Times Community, “Schizophrenic Constitution leaves foreigners’ rights mired in confusion”

(http://www.japantimes.co.jp/community/2011/11/01/general/schizophrenic-constitution-leaves-foreigners-rights-mired-in-confusion/#.UgHLtxZ3W-Q)

Cited in Section 2

Ryoko Akamatsu "human rights of women" 2006

Mutsuko Asakura "Lax of Labour and Gender" 2000

Miyoko Tuzimura "Gender and Law" 2005

Mutsuko Asakura,Noriko Iwao"Law of feminism" 2004

Mari Osawa"to make gender equarity society" 2002

Cited in Section 3

Nobuyoshi Ashibe. Kenpo(憲法). 5th edition. Iwanami-shoten: Tokyo. 2011. 118-125

Commission on the Constitution, House of Councillors official website.

Accessed on August 18 2013.

http://www.kenpoushinsa.sangiin.go.jp/kenpou/houkokusyo/houkoku/03_26_01.html