



GENDERING STRATEGY FOR “PEACE AS HUMAN RIGHTS”: Toward the Construction of an Anti-Military Theory

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I. Introduction: A comprehensive view on peace, human rights and gender

<War, in itself, is a violation of human rights. >

Based on this principle, and based on a comparative study of pacifism in constitutional law, we examine a gendering strategy for “peace as human rights”. This presupposes the establishment of a comprehensive view on Peace (P), Human Rights (HR) and Gender (G).

1) The interdependent relation between Peace and Human Rights (P & HR) is already clear. Especially in Japanese constitution law, due to the specific guarantee of <the right to live in peace> in the Preamble to the Constitution of Japan, a great importance has been attached to the need to review the problem of peace from the point of view of human rights, which lead to a discussion on “peace as human rights”. This view of peace is shared by the United Nations’ position on human security², and is based on the interdependence between peace and human rights.

2) Concerning the relation between Human rights and Gender (HR & G)³, since the 1990s, especially, the international women’s human

rights theory has seen new developments based on the conception that “women’s rights are human rights”. The debate of human rights has been focused on women as victims and casualties of war, domestic violence or sexual abuse.

On the flip side, with the increasing participation of women in the military, problems concerning the rights to profession or the rights to self-determination of female military personnel have emerged. The issue on the liberty or the rights to profession of the prostitute is also called a feminist dilemma. Thus the discussion on Gender and Human Rights has become more complicated.

3) Behind these developments lies the intensification of the debate on Peace (war, armed forces) and Gender (P & G), the issue of women and peace has also been considered in international documents such as the Convention on the Elimination of All Forms of Discrimination against Women(1979) and the Beijing Declaration and Platform for Action (1995). There are the issues on the oppression of women as mass rape (gang rape), or so-called comfort women

(sexual slavery) in wartime on one hand. And there are problems on increasing participation of women in military service on the other. This antagonism forms a thorny issue of feminism (a feminist dilemma) on “women soldiers”. The relation between peace and gender has been also discussed from the point of view of issues such as the impoverishment of women due to industrial development and the violation of women’s rights in developing countries.⁴

Thus, the relation between Peace, Human Rights and Gender has so far been examined from the point of view of the bilateral relations between Peace and Human Rights (P & HR), Human Rights and Gender (HR & G), Peace and Gender (P & G). However, the triangular structure formed by Peace, Human Rights and Gender (P & HR & G) remains open to further discussion and requires multiple perspectives, such as that of comparative constitutional law or that of gender-based human rights studies.

First, from the point of view of comparative constitutional law, we can see that there are many types of pacifist constitutional provisions (see section 4 below). From the perspective of the Japanese Constitution, which aspires to “peace as a human right” by guaranteeing both <the right to live in peace> and <the renunciation of war>, the relation between “Peace as a Human Right” and Gender (P as HR & G) is also a problem to be discussed.

Furthermore, it is necessary to examine the rationality of constitutional stipulations concerning the military, as there are some that incorporate gender-based differences.

To give an example, in the article 59 of the current constitution of Switzerland (enacted in January 2000), it is provided that “*Every Swiss man is required to do military service. Alternative*

civilian service shall be provided for by law.” (Paragraph 1) and “*Military service shall be voluntary for Swiss women*” (paragraph 2)⁵.

Admittedly, there is the differentiated treatment based on gender. This problem has to be examined in combination with the fact that Swiss women had been excluded for a long time from political life and treated as second-class citizens, because, unlike men, they had not rendered military service. Also the fact that they were granted the right to vote late (in 1971) should be noted.

The article 12a of the Basic Law of the Federal Republic of Germany stipulated in 1990, that:

(1) Men who have attained the age of eighteen may be required to serve in the Armed Forces, in the Federal Border Police, or in a civil defense organization.

(2) Where, during a state of defense, civilian service requirements in the civilian health system or in the stationary military hospital organization cannot be met on a voluntary basis, women between eighteen and fifty-five years of age may be assigned to such services by or pursuant to a statute. They may on no account render service involving the use of arms⁶.

Nevertheless, the revision on December 1, 2000 stipulates the last sentence of the article 12a(4), that “Under no circumstances may they be required to render service involving the use of arms.”⁷

It means that “women should not be required to bear weapons under any circumstances”, thus admitting the participation of women in combat on a voluntary basis. Behind this revision stood the decision of November 11, 2000, on Kreil v. Germany⁸ of the European Court of Justice, which established that national provisions in Germany which excluded women from any military posts involving the use of arms were in violation of the EU Equal Treatment Directive. On the basis for this decision, there was the principle of women’s

human right to freely choose their occupation.

As a matter of fact, in European countries and North America, the process of lifting the ban on women in combat positions has advanced, bringing with it a division inside the feminist movement on the problem of “women soldiers”.

It is in this context that below, I will examine, in turn, the feminist movement’s thorny issue of

II. A feminist dilemma: “women soldiers”

Here is one of the thorny issues of feminism, so-called a feminist dilemma, which has brought with it a division in the feminist ideology and movement. It is that of women soldiers.

The basic opposing positions are (A) which assumes that women soldiers have the right to choose their occupation and claim equal rights with men, and ask for the right to enlist and participate in combat, and (B) which opposes (A).

These opposing positions essentially correspond to (①) traditional liberal feminism, which pursues equal rights with men, and (②) the various streams of the second wave feminism, which generally oppose this. Nevertheless, as there are various small streams, it is not so easy to attempt a classification. Smaller factions within the latter trend of feminism, especially Marxist feminism and radical feminism, split regarding human rights (especially the right to self-determination), according to whether they deny or affirm them. Postmodernist feminism, which criticizes modernism and universalism, is apt to deny them. <Eco-feminism> strongly supports the view of women as the childbearing sex and thus opposes liberal feminism, but is in turn criticized for its <essentialist> view of women as inherent pacifists.

Although many of the trends belonging to ② agree in their opposition to the “same as men” ori-

“women soldiers”, citizenship and gender, peace and gender from the perspective of human rights, a comparative analysis of pacifist constitutions, and women’s responsibility towards peace.

entation of the equality policy adopted by liberal feminism as an “emancipation of women project”, they cannot be against women choosing their occupations of their own free will. This is where the thorn in this issue is.⁹

As a matter of fact, in America, mainstream feminist organizations such as NOW (National Organization for Women), embracing the position in (A= ①) above, requested, after the Vietnam war, that women be allowed to serve in the military, and, by crying for “the freedom of women to participate in combat” during the Gulf War, extended the posts available to women soldiers (the number of women soldier participants in that war stands at 40,000 or 12% in 1991).

At the opposite pole, the position in (B) was embraced (apart from conservative women and anti-feminists) by <Eco-feminists>, which embrace motherhood feminist, and radical feminists who connect the emancipation of women to anti-war/peace. However, in the aftermath of all this, with the switch from draft-based military service to voluntary service and the introduction of high technology weapons, those who opposed NOW became hard pressed to develop “an anti-war ideology which was not based on the <essentialist> assumption that women are inherent pacifists”.¹⁰

This issue becomes even more complicated if we consider the oppositions between *feminism and*

liberalism, and feminism and nationalism.

To give an example, if we consider the issue of women soldiers to be one of individual liberty (the rights to choose one's occupation) and self-determination, as in the case of prostitution/compensated dating and sex workers, there is

III. Citizenship and Gender

Concerning *nationalism and feminism*, Professor Chizuko Ueno has raised poignant questions. Regarding questions such as “Can Feminism Transcend Nationalism?” and “Is feminism able to coexist with nationalism?”, she has shown that the two are incompatible, stating that “the emancipation of women is not possible within the frame of the modern nation-state”. Furthermore, she argues that we should aim for “the <de-naturalization> and <de-essentialization> of the nation-state and woman”, “the <de-construction> of the nation-state by gendering it”. She also insists that “obtaining women's rights through gender-equal nationalism is a ‘trap’ for feminism”.¹¹

Nevertheless, “it is a fact that, throughout history, feminism has been a companion, even an accomplice to nationalism” and that “there is even such a concept as *feminist nationalism*”. She qualifies this, however, by stating that “there are many conceptions of feminism and the meaning of nationalism depends on context and definition”.¹²

Therefore, Ueno argues that “if we reject feminism as a package of ideas that are automatically pacifist, anti-military, democratic, and anti-discriminatory, then we also have to reject the ‘prediction’ that feminism is incompatible with totalitarianism, militarism, and racism”¹³. Through these arguments, they aim to “*de-package*” of feminism.

In practice, “as a result of the tug-of-war between the dynamics of nationalism and that

bound to be an inevitable clash between *liberalism and feminism*. On the other hand, nationalism, which assumes that all citizens (men and women) should unite to fight the enemy of the state, conflicts with the brand of feminism that is sensitive to gender differences.

of gender”, countries have their own ways of creating women soldiers¹⁴. Through the equal participation of men and women in the military, the <essentialist> view of gender would be destroyed.

Today, it can be said that the <essentialist> or stereotyped conception of women as inherent pacifists and the consideration of women as only victims and casualties has been clearly negated.¹⁵ This point should prove a wealthy source of historical and demonstrative studies regarding a multitude of issues; such as (a) the mobilization of women (into the Women's Volunteer (Labor) Corps and the Volunteer Fighting Corps) during the second world war¹⁶, (b) the home front gender roles of the Women's National Defense Association and the “pressing into service” of motherhood under the slogan “Give birth and multiply” under the emperor system of Japan, and, (c) the issue of “comfort women” for the military (sexual slaves for the military¹⁷) and the violation of women's human rights and “human dignity” during the war, etc.

The relation between *feminism and nationalism* outlined above can also be analyzed, with a change of perspective, from the point of view of *citizenship and gender structure*.

Needless to say, the concept of citizenship has been the subject of much discussion concerning its ambiguity and universality since the 1950 definition of Marshall, which states

that “citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to rights and duties”.¹⁸ Today, in addition to problems focusing on (i) residents’ rights/ status (and the legal status of immigrants), and (ii) civil rights or political rights (especially the right of women to participate in politics), the concept of citizenship has been broadened and is now also discussed from the point of view (iii) social rights, the right to participate in society, and the public good.¹⁹

It is discussed not only from the perspective of gender and the exclusion of women from leadership and government, but also, with increasing importance, from the perspective of the coexistence of cultures and pluralism, and the exclusion from society of immigrants and others like them. Of course, here there is also the problem of the compound discrimination with respect to citizenship, rights, freedom, and representation faced by immigrant women.

Furthermore, starting in the 1970s, (a) the theory of citizenship based on liberalism (the theory of gender-neutral citizenship, uninfluenced by considerations of gender) has been challenged by feminism, especially by the proposed theory of (b) gender-differentiated, “treat-women-as-women” citizenship, which emphasizes gender-based differences. After that, in order to sublimate these theories, they have proposed an eclectic theory of (c) gender neutrality by gendering citizenship.²⁰

Against the background of these developments, the relation between *feminism and militarism* appears to be complicated. Historically, military service has been an important element, ever since the Greek and Roman civilizations, with the draft and military service being the basis on which serving free men have been treated as first-class citizens, and (non-serving) women and other men as second-class citizens.

On the other hand, the universal gender-neutral view has tied up with *liberalism and feminism* to demand the equal participation of women to the military industry and military service. This is the stream which affirms that there should be women soldiers. The opposing stream appeared later, as we have seen above, but was then hard pressed to provide an argument against the existence of women soldiers that did not rely on <essentialism>. Moreover, since nowadays “war has become a matter of financial funds, technological power and intelligence in this age of high technology weapons”, the trend is to abolish the military service.²¹ In addition, with the privatization of war, the introduction of what is essentially a mercenary system spells the end of an era in which military service is grounds for first-class citizenship.

In this way, along with changes in the history of war, the concept of citizenship is being modified. Furthermore, as a result of 30 years of gender studies, the essentialist, character-based view of women that has placed special emphasis on the aspect of women as victims and casualties of war and as inherent pacifists is now being challenged. Things have come to a point where the criminal, human rights-violating nature of war itself is being reconfirmed as a problem. In this situation, we should face up to the side of women as participants in war and perpetrators, and not focus only on the simplistic view of “women as victims” in war.

In this way, we can now envisage a way to develop the argument on “peace from the perspective of women’s rights”, into the argument on “peace and human rights in general”. That is to say, the issues of women soldiers and “comfort women” are an opportunity to develop gender human rights studies into post-gender human rights studies.²²

Chizuko Ueno describes this as follows:

“ *If the ‘comfort women’ issue can be*

constructed discursively as a human rights violation, then it is also possible to argue that being made to become a murderer for state as a soldier is a human rights violation for men. Is this within the scope of human rights theory? The question that the comfort women issue has thrust upon us is not simply that of crimes. War itself is the crimes.[....]

The position of women, in indication the logical paradox of a female citizen, exposes the cracks in the nation-state. Yet, does that mean we need to accept the essentialist premise that woman equals pacifist. The arrival point for a gender history that has deconstructed an engendering of the nation-state is this de-naturalization and de-essentialization of the category nation-state as well as that of women”²³.

I do not object to this last point and her view of war as a crime (violation of human rights) in itself, but, from the point of view of constitutional law and human rights studies, I have to answer “YES” to her question regarding the domain of human rights. (“*Is this within the scope of human rights theory ?*”)

In point of fact, in today’s constitutional law and human rights studies, based on the assumption that war in itself is a violation of men and women’s human rights, and recognizing rights such as soldiers’ right not to be forced to kill people or to refuse to perform military service on grounds of conscience, and the right to live in peace, we are building a theory of “peace as human rights” and “human security”. The validity of the law and human rights approach should be recognized here too.

IV. The validity of the human rights approach

1. Unifying human rights and gender: from victim to “agent”

Behind the fact that, in the latter part of the 20th century, the interdependence between human rights and peace was made clear in the ring of the debate on international human rights, was the contribution of the International Covenant on Civil and Political Rights concerning the rights of women. The Convention on the Elimination of All Forms of Discrimination against Women, the Nairobi Forward-Looking Strategies for the Advancement for Women, and the Beijing Declaration and Platform for Action expressed clearly that establishing the human rights of men and women is an indispensable condition to achieving peace and disarmament (“no human rights without peace”). At the same time, they emphasized, based on women’s human rights violations during armed

conflicts and “women’s viewpoint”, the equal participation of men and women to conflict resolution and the promotion of disarmament, and made clear the relationship between “no peace without human rights” and “no peace without women’s participation”.²⁴

This is how the direction we should take was defined, in order to aim for and achieve equal participation of men and women to disarmament and the peace process, by transcending the character-based, essentialist argument for “women’s rights” and the elimination of discrimination against women based on the character-based, essentialist, and simplistic view of “women=victims” and the conventional view of “women= peace-oriented”. This is where the theoretical development lies: in the change from women as victims of war to women as “agents” in the anti-war/ peace process, from character theory to “agent”, from the elimination

of discrimination to equal participation.²⁵

Regarding the shift from the elimination of discrimination to equal participation, it can be argued, quite reasonably, that the United Nations' approach itself tacitly approves of the existence of women soldiers, and that "promoting the equal participation of men and women in military organizations is an international trend".

However, on the other hand, it is also possible to place greater importance on the view that women should participate in anti-war, disarmament and peace organizations not as combatants and soldiers, but as non-combatants.

For example, the interpretation is also possible that the Outcome Document of the "Women 2000" United Nations Special Session that was held in New York conceives of the equal participation of women in a form other than as soldiers when it talks about "the contribution of women in the areas of peace-building, peacemaking and conflict resolution".

2. New Developments on "Violence against Women": Towards a Denial of War Itself

On the other hand, it is true that, so far, in international documents after the Convention on the Elimination of All Forms of Discrimination against Women, the approach from the viewpoint "women=victims of armed conflicts" has played an important role. The importance of the condemnation of gender-based violations of women's human rights, expressed in the 1993 Vienna Declaration and UN Declaration on the Elimination of Violence against Women, cannot be overestimated. Moreover, in 1998, in a landmark provision, the International Criminal Court listed "rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, and all other forms of sexual violence" both as crimes against

humanity (chapter 7, article 1g) and war crimes (chapter 8, article 2 b22).²⁶

In all probability, from now on, apart from condemning "violence against women", what is needed is a theory of peace-orientation that breaks away from <essentialism>, that is, a way for women to participate equally without participating in combat. For this, the point should be made clear that war itself is a violation of human rights and that the problem of equality between men and women is one with the problem of equal participation to decisions on anti-war, disarmament, and peace, to guarantee human rights.

I think that the task of ensuring such a development offers the world's peace movements and women's organizations an important guiding principle. Japanese peace movements especially are in a position to lead in this respect, since Japan has a pacifist constitution and they understand the importance of the right to live in peace. In fact, the Okinawa Women Act against Military Violence (OWAAMV²⁷) organization is now drawing attention for raising local feminist problems that are at the same time global, from a position that opposes military violence, sexual violence, destruction of the environment, and imperialism.²⁸ The activity of the Women Peacemakers Program of the International Fellowship of Reconciliation is also well-known.²⁹

These women's peace organizations are in a difficult position, because they are considered to be based on the victim view or an unyielding <character-based> ideology, and they are on the periphery.³⁰ Their task is to not lose themselves in their <essentialist> views and start in a new direction in order to establish human rights and criminalize war. In this respect, while acknowledging the effectiveness of the gender-based approach, it is necessary to broaden our perspective and enlarge the organizations' constituency in order to bring back the issue

from the periphery to the center, and to transcend the subjective, militant approach and ascend to an objective one. It is especially necessary that, through interdisciplinary cooperation between constitutional law, peace theory, international politics, gender law and such others, to raise this issue to the international level.

Especially for Japan, who has a peace

constitution, it would be effective to reconfirm the significance of the constitutional right to live in peace and the renunciation of war from a broad, comparative constitutional law perspective, and aim to globalize and raise this standard to the world level. For this reason, in what follows, I include some notes on peace constitutions from the perspective of comparative constitutional law.

V. “Peace as Human Rights” and Gender

1. A typology of Peace Constitutions from the perspective of comparative constitutional law

Various modern Constitutions, such as France’s 1791 and 1946 constitutions, Spain’s 1931 constitution, Italy’s 1947 constitution, the 1948 Basic Law of the Federal Republic of Germany, established constitutional pacifism by explicitly guaranteeing pacifism in the constitution. However, their pacifism is limited to the renunciation of wars of aggression. Only the Japanese constitution, due to the self-reflection which followed the war that brought about the first use of an atomic weapon in the history of humanity, anticipated the modern form of pacifist constitutions when it explicitly guaranteed the renunciation of war, non-maintenance of armed forces with war potential, and the right to live in peace. Subsequently, there was an increase in the number of constitutions of newly independent countries in Asia, Africa and Central and South America, with pacifist provisions.

A bird’s eye view of the constitutions of the world at the beginning of the 21st century enables us to make the following distinctions.

(1) Constitutions with general peace provisions (Finland, India, Pakistan, China, Russia, etc.)

In Finland’s constitution which came into effect in March 2003³¹, it is established that “Finland participates in international co-operation for the protection of peace and human rights and for the development of society”(Sec.1-3). Finland maintains its own armed forces and has a Partnership for Peace agreement with NATO. Men aged 18 and older are drafted into the army, while women may perform service on a voluntary basis.

Nuclear powers such as India and Pakistan also uphold peace in principle, in abstract terms, and so do China and Russia.

(2) Constitutions which renounce wars of aggression or conquest (France, Germany, South Korea, etc.)

Since the French constitution of 1791, many other constitutions stipulate the renunciation of wars of aggression or conquest. The preamble to the 1958 French constitution now in force, states that it respects the preamble to the constitution of 1946, which stipulates the renunciation of wars of conquest; furthermore, the Constitutional Council (*Conseil Constitutionnel*) of France recognized the latter as norm, and so it is preserved as norm in the current constitution.

The constitution of South Korea, too, in effect from 1987, states in article 5 that “The Republic of Korea endeavors to maintain international peace and renounces all aggressive wars. The Armed Forces shall be charged with the sacred mission of national security and the defense of the land and their political neutrality must be maintained³²”. The right of the president to be supreme commander of the armed forces and the obligatory military service are also stipulated.

(3) Constitutions which renounce wars as a means to settle international conflicts and specifically guarantee international cooperation (Italy, Hungary, etc.)

Article 11 of the Italian constitution (1947) states that “Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes”, and “Italy agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations, provided the principle of reciprocity is guaranteed. Italy promotes and encourages international organizations furthering such ends”. Thus Italy agrees to transfer sovereign power to international organizations, but (in article 78) there is also a provision regarding the declaration of war³³.

The constitution of the Republic of Hungary, too, in article 6 paragraph 1 states that “the Republic of Hungary renounces war as a means of solving disputes between nations and shall refrain from the use of force and the threat thereof against the independence or territorial integrity of other states”, and in paragraph 2 states that “the republic of Hungary shall endeavor to cooperate with all peoples and countries of the world”, but on the other hand, recognizes the president’s right to command the armed forces and in chapter VIII rules on “The Armed Forces and the Police”

(articles 40 A-C) and in article 70H, on defense and military service³⁴.

(4) Constitutions which maintain a policy of neutrality (Switzerland, Austria, Malta, Moldova, etc.)

In Austria in 1975, provisions regarding the purpose of universal national defense were added to article 9a, in which it is specified that the task of national defense is to “maintain and defend permanent neutrality”. In Switzerland too, the current constitution enacted in 1999, maintains Switzerland’s traditional neutrality through provisions such as “The Federal Parliament takes measures to safeguard the external security, the independence and the neutrality of Switzerland” (article 173 paragraph 1a) or “The Federal government takes measures to safeguard the external security, the independence and the neutrality of Switzerland” (article 185 paragraph 1), but, on the other hand, article 59 states that “Every Swiss man has to render military service. The law provides for an alternative service” and that “For Swiss women, military service is voluntary”, thus allowing differentiated treatment based on gender (as mentioned previously)³⁵.

Other countries who have adopted the policy of neutrality and guarantee it in their constitutions are Cambodia, Malta, Moldova.

(5) Constitutions which explicitly prohibit nuclear and other weapons (Palau, Philippines, Colombia, etc.)

Based on the potential horror of nuclear weapons, some constitutions of the countries along the Pacific Ocean and Central and South America, enacted in the 1980s, when the chance for nuclear disarmament came, specifically ban nuclear, biological and chemical weapons. Article 113 of the 1981 constitution of Palau, in the South Pacific, article 8 paragraph 2 of the 1992

constitution of Paraguay in South America, article 81 of the 1991 constitution of Colombia specify that “The manufacture, importation, possession, and use of chemical, biological, or nuclear weapons are prohibited as is the introduction into the national territory of nuclear and toxic wastes”. These provisions have drawn attention because they are connected to the environmental right to enjoy a healthy environment. We can say that such provisions point to what the task of 21st century constitutions should be.

(6) Constitutions which explicitly guarantee not to maintain armed forces (Costa Rica, Republic of Palau etc.)

One country that has been drawing attention for the fact that it does not have armed forces is the small Central American country of Costa Rica. Located in an area rife with conflicts and coup d'états, article 12 paragraph 1 of its constitution, enacted on November 7, 1949, stipulates:

ARTICLE 12.

- 1) The Army as a permanent institution is abolished. There shall be the necessary police forces for surveillance and the preservation of the public order.
- 2) Military forces may only be organized under a continental agreement or for the national defense; in either case, they shall always be subordinate to the civil power: they may not deliberate or make statements or representations individually or collectively³⁶.

“The Army as a permanent institution is abolished”. Nevertheless, paragraph 2 prescribes that it may maintain military forces under a continental agreement (that is, with the Organization of American States, under the Inter-American Treaty of Reciprocal Assistance, etc.), or when necessary for national defense. However, Costa Rica has not

had an army for more than 50 years; public order and border defense are performed by the Civil Guard, or Police Force by another name. Costa Rica, whose constitution allows it to maintain an army for national defense but has not made use of this, has thus been able to raise the budget percentage for education and welfare and has maintained the highest level for literacy, life expectancy, etc., among developing countries.

Neighboring Panama's constitution too stipulates that “the Republic of Panama does not have an army”, but it also rules that “Every Panama citizen is required to bear weapons to defend the independence and territorial integrity of the country”. In addition, 27 other countries specify that they do not maintain armed forces: the Federated States of Micronesia, the Republic of Palau (in the Pacific), the Independent State of Samoa (in Polynesia), the Republic of Vanuatu (in Melanesia), the Republic of Maldives and the Republic of Mauritius (in the Indian Ocean), Panama and the Dominican Republic in the Caribbean, and smaller European countries such as the Principality of Monaco and the Principality of Andorra.³⁷

(7) Constitution which renounces war, abolishes armed forces and also explicitly guarantee the right to live in peace (Japan)

The Japanese constitution³⁸ stipulates that:

Article 9 paragraph 1

“Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes”.

Paragraph 2

“In order to accomplish the aim of the preceding paragraph, land, sea, and air forces,

as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized”.

Thus, the Japanese constitution explicitly guarantees that Japan renounces war and does not maintain armed forces. Furthermore, the preamble to the constitution states that “We recognize that all peoples of the world have the right to live in peace, free from fear and want”, thus establishing the right to live in peace.

From a comparative constitutional law perspective, it can be seen that, on these points, the constitution of Japan is unique.

However, needless to say, the real situation is very different from the stipulations in the constitution. The reality is that Japan has begun the re-armament in 1952 under the suggestion of the GHQ influenced by the Korea War (1950-1953) and established the Self-Defense Forces in 1954. The Japanese government has expanded the defense spending till the sixth position in the world in 2008 in terms of defense expenses³⁹. Also Japan began the dispatch of Self-Defense Forces overseas during the Gulf War in 1990, as PKO/PKF activities, and deployed abroad under the Treaty of Mutual Cooperation and Security between the United States and Japan.

Moreover, the Defense Agency was promoted to the Ministry of Defense in 2007, and the number of women soldiers has exceeded 10000, under the policy for Gender equality.

The comparative analysis above is based on the text of the constitutions. Otherwise, if we take into account reality and the interpretations assumed by governments, it would not be possible to sketch a single classification of world constitutions.

In Japan, due to the gap between constitutional norm and reality, the debate has intensified on whether the constitution should be modified to match the reality. However, given that many

countries explicitly guarantee peace in their constitutions and are clearly moving towards denuclearization and disarmament, we should value the significance of the Japanese constitution as the perfect embodiment of such ideals.

2. Tasks regarding Peace, Human Rights and Gender

Next, let us return to the first constitutions mentioned, the constitution of Switzerland and the Basic Law of the Federal Republic of Germany.

The first problem is why these constitutions sought to prohibit women’s participation in combat. Regarding this, the reason given has to do with (i) the characteristics and nature of women and the difference between men’s and women’s abilities; sometimes the decline in army effectiveness and morale are pointed out. But it is already confirmed that one cannot make such generalizations. That high technology weapons have rendered this argument moot was shown by the fact that the plaintiff in the lawsuit that led to the modification of the German Basic Law was a woman electrical engineer wishing to be employed by the Electrical Repairs Unit of the army.

Another reason given, which looks somewhat more convincing, has to do with (ii) the fact that from the perspective of the protection of maternity, women’s health should be protected since their bodies have the gender role of perpetuating life. This argument is connected to the “protection or equality “one concerning working conditions, and it can be said that it involves elements that cannot be countered easily.

However, it becomes clear that there is no reason for which only women should be protected from war, when one remembers that the depleted uranium ammunition used by the U.S. Army in the attack on Iraq during the Gulf War has been linked to birth defects. We would have to counter

that, today, the right not to be killed or harmed by acts of war and the right to refuse to cooperate in carrying out acts of war belong not only to women, but also to men.

If this argument is on the right track, it follows that the right to (ask the state for) protection from injuries incurred during war, and even protection from war as a violation of human rights, can be claimed equally by both men and women. There still remains the problem, though, of whether the right to refuse military service and forced participation in combat should be recognized equally for men and women. Since only women's right to do so is affirmed in the previously mentioned Swiss and German constitutions, it follows that men's right is not recognized, a problem that should be investigated theoretically from the perspective of human rights.

The second problem is why only men's obligation to serve in the military and forced participation in combat should be legalized. The view here is that military service is a duty for all healthy men (and "true citizens") and it cannot be

denied that part of the reason lies in the relatively higher combat capability of men. Needless to say, this duty is legalized based on the logic of the nation-state. By making military service one of the requirements for the attainment of citizen status (citizenship), the logic of men's integration into the nation-state, and women's exclusion from it (second-class citizenship) was made legal.⁴⁰

In spite of this, since it could not interpret the effect on integration into the nation-state and citizenship from a gender point of view, the U.S. Supreme Court ruled in the 1981 Rostker decision that the federal law obliging only men to register for the draft is constitutional.⁴¹

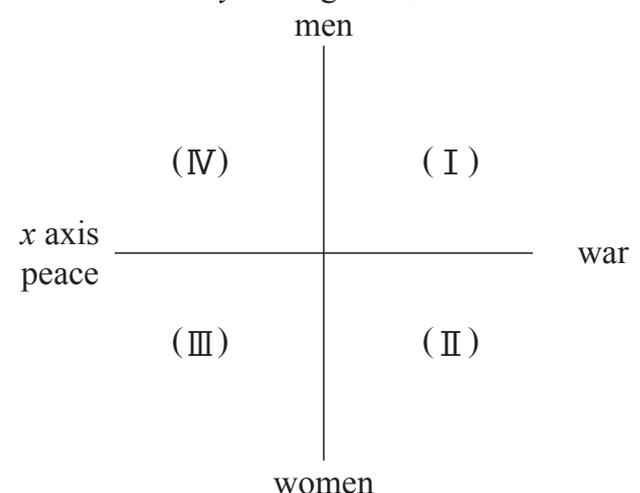
On the other hand, the theorization of the logic behind refusal of military service for reasons of conscience (centered on convictions, conscience or religious beliefs) has progressed. In point of fact, article 59 of the Swiss constitution provides for alternatives such as public service or a special fee (tax) to be paid, and the Basic Law of the Federal Republic of Germany provides alternatives too.

VI. Further research tasks: the "Peace, Human Rights, Gender" research matrix

From the analysis above, we can confirm that the three factors of peace, gender, and human rights are condensed into the issue of military service. So at this point, let us review our research tasks based on the three-dimensional structure formed by peace (war), gender (men and women) and human rights (affirmation or denial).

On the prerequisite axes *x* and *y*, let us place *peace (war)* and *gender*, respectively, and then let us further divide the *x* axis into *war* and *peace*, and the *y* axis into *men* and *women*. We obtain four sections (see figure 1) as follows: (I) war × men, (II) war × women, (III) peace × women, (IV)

Figure 1 : War (peace) and gender
y axis (gender)

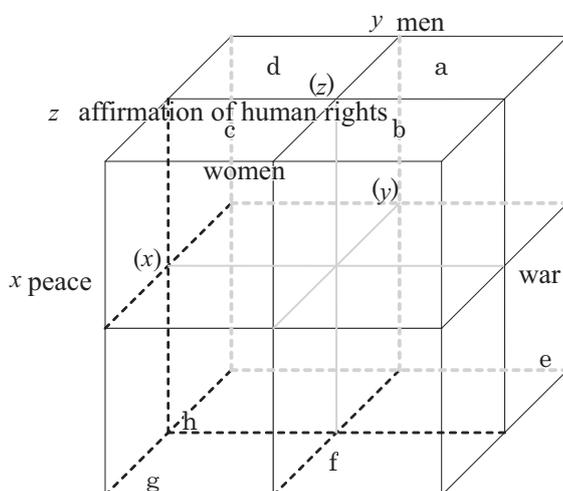


peace × men.

Here, we mentioned military service by men (I), women’s participation in combat (II), and women as contributors to peace (III); the perspective in (I), war and men (men as perpetrators or victims and casualties of war) has not been sufficiently examined before. We can also see that (IV) too, covering the issue of peace and men (other than refusal of military service for reasons of conscience), and men as contributors to peace, has not been sufficiently discussed. In Japan, who has a peace constitution, only the relationship between women and peace has been discussed concerning peace and gender; further research will have to build a theory of the relationship between peace and men.

In addition, let us add the third dimension *z* of human rights to our structure, and perform a third-dimensional cross-section analysis to sort out the research tasks. Let us divide axis *z* into the possibility/ impossibility of treating women soldiers and military service as a human rights problem, and combine it with the previous axes *x* and *y* to obtain 8 third-dimensional sections (see figure 2).

Figure 2 : The peace, human rights and gender matrix



The sections obtained are:

- a) war × men × human rights <positive> (such as men’s right to participate in war);
- b) war × women × human rights <positive> (women’s right to participate in war, women soldiers’ freedom to choose their occupation, equal treatment of men and women within the army, etc.);
- c) peace × women × human rights <positive> (women’s right to refuse to participate in war, women’s right to live in peace, etc.);
- d) peace × men × human rights <positive> (men’s right to refuse to perform military service or participate in war, etc.);
- e) war × men × human rights <negative> (men soldiers’ violation of human rights on the battlefield, etc.);
- f) war × women × human rights <negative> (women soldiers’ violation of human rights on the battlefield, etc.);
- g) peace × women × human rights <negative> (feminist pacifism based on criticism of human rights, essentialist view of women as inherent pacifists);
- h) peace × men × human rights <negative>.

In this report, we touched on (b), (c), (d), and (g), but from now on we will have to build a theory of the still unexamined areas of (a), (e), (f), and (h). For example, (a) involves issues such as the significance of war for men’s human rights, and (e), issues such as the violations of human rights by men soldiers (rapes on the war front)⁴².

Furthermore, while continuing to build a theory of “the right to peace” within a theory of human rights, such as the right to live in peace, or the right to refuse to participate in war, we will be able to see progress in the further structural and multidimensional analysis of peace, human rights, and gender.

VI. Conclusion

There may be no need for a long conclusion. We have already confirmed the importance of the Human Rights approach and “Peace as Human Rights”.

Taking Human Rights seriously toward the construction of an anti-military theory, and establishing a “Gender strategy for Peace as Human Rights” through a multidimensional analysis of peace, human rights, and gender; these are our conclusion and our tasks.

For these aims, it is important to have cooperative efforts between academia and citizens’ movements, the public and private sectors with an eye to action by connecting the theories to policymaking efforts. For these objectives, it is important to establish a “Gendering Asia network” with an extensive eye to action by connecting Asia and Europe, national and transnational approaches.

Notes:

1 Professor of constitutional law at the School of Law of Tohoku University, Sendai, Japan, and director of the Gender Equality and Multicultural Conviviality Center (<http://www.law/tohoku/ac/jp/gcoe>). This center functions within the Global COE (Center of Excellence) Program initiated by the Japanese Ministry of Education, and succeeds the former Gender Law and Policy Center established at Tohoku University in 2003 under the 21st Century COE Program (<http://www.law.tohoku.ac.jp/coe>). The center aims to promote research and training in academic fields relating to gender equality and multicultural conviviality.

On these issues see M. Tsujimura (ed.), *International Perspectives on Gender Equality and Social Diversity*, Tohoku University Press, 2008; M. Tsujimura and E. Yano, *Gender and Law in Japan*, Tohoku University Press, 2007; M. Tsujimura and D. Lochak (dir.), *Egalité des sexes: La Discrimination Positive en Question*, La Société de la Législation Comparée, 2006; M. Tsujimura, “Les Transformations du rôle des femmes au Japon: La signification de trois données statistique dans les domaines de la politique, de la famille et du travail”, in *Gender Law and Policy Annual Review 4*, Tohoku University 21st Century COE Program, 2007; “Egalité du Genre et la constitutionnalité de ‘Discrimination Positive’”(ibid.); M. Tsujimura “Women’s Rights in Law and Praxis” in

Y. Higuchi (ed.), *Five Decades of Constitutionalism in Japanese Society*, University of Tokyo Press, 2001, pp.155-70; M. Tsujimura, *Gender to Jinken* [Gender and Human Rights], Nihon Hyoronsha, 2008; M. Tsujimura, *Gender to Hou* [Gender and Law], Fuma-Shobo, 2005; M. Tsujimura, *Hikaku kempo* [Comparative Constitutional Law], Iwanami Shoten, 2003.

- 2 On the evolution of views on human security, see, among others, *From Territorial Sovereignty to Human Security* (The 28th Annual Conference 1999), Canadian Council on International Law, 2000; Bertrand D. Ramcharan, *Human Rights and Human Security*, 2000.
- 3 On gender and human rights, see Karen Knop (ed.), *Gender and Human Rights*, 2004; Deborah L. Rhode and Carol Sanger, *Gender and Rights*, 2005, among many others.
- 4 See V. Spike Peterson, *Gendered State: Feminist (Re) Vision of International Relation Theory*, 1992.
- 5 Federal Constitution of the Swiss Confederation of 18 April 1999, <http://www.admin.ch/ch/e/rs/101/a59.html>, (Art. 59 Military service and alternative service)
- 6 Basic Law for the Federal Republic of Germany (Promulgated by the Parliamentary Council on 23 May 1949) Art.12a added in 24 June 1968, <http://www.fordham.edu/halsall/mod/CONST-DE.html>
- 7 Basic Law of the Federal Republic of Germany, Art.12a [Compulsory military and alternative civilian service], 2008, [http://www.bundestag.de/interakt/informat/fremdsprachiges-material/downloads/ggE12a-\(4\)If](http://www.bundestag.de/interakt/informat/fremdsprachiges-material/downloads/ggE12a-(4)If), during a state of defense, the need for civilian services in the civilian health system or in stationary military hospitals cannot be met on a voluntary basis, women between the ages of eighteen and fifty-five may be called upon to render such services by or pursuant to a law. Under no circumstances may they render service involving the use of arms.
- 8 Kreil v. Germany, Case C-285/98, European Court of Justice, Judgment of January 11, 2000 [2000]ECRI-69.
- 9 Jean Bethke Elshtain, “Thinking about Women and International Violence”, in Peter R. Beckman and Francene D’Amico, *Women, Gender and World Politics*, 1994, pp.109-118; Toshiko Kanai, *Feminizumu mondai no tenkan* (The turning point of the feminist problem), from p.149.
- 10 See Chizuko Ueno, *Josei Heishi no Kouchiku* [The making of a woman soldier].
- 11 See Chizuko Ueno (translated by B. Yamamoto), *Nationalism and Gender*, Trans Pacific Press, 2004, pp.143-146; Chizuko Ueno, “Citizenship and Gender: Is Feminism Compatible with Nationalism?”, in Miyoko Tsujimura (ed.), *International Perspectives on Gender Equality and Social Diversity*, Tohoku University Press, 2008, (supra.note1) pp.25-42.
- 12 Chizuko Ueno, “Citizenship and Gender: Is Feminism Compatible with Nationalism?”, *op.cit.*, p.58.
- 13 Ibid., p.64.
- 14 See Yoko Sasaki, *Souryokusen to Josei Heishi* [Total war

- and women soldiers], from p.148.
- 15 Tine Davids and Francine Van Driel (eds.), *The Gender Question in Globalization*, 2005, pp.3-22.
 - 16 See, among others, Yoko Sasaki above; Mikiyo Kano, "Tennousei to genda"[The emperor system and gender] in *Women, War and Human Rights 4* edited by the Association for Research of the Impact of War and Military Bases on Women's Human Rights; Aiko Okoshi, *Kindai Nippon no Genda* [The Gender of Modern Japan]; Yuko Nishikawa, *Kindai Kokka to Kazoku Moderu* [The modern state and the family model].
 - 17 See Margaret D. Stetz, "Representing <Comfort Women>: Activism Through Law and Art", in Torry D.Dickinson and Robert K.Schaeffer, *Transformations: Feminist Pathways to Global Change: An Analytical Anthology*, 2008. op.cit., pp.244-249; Aiko Okoshi, "Kokka to Seibouryoku" [The state and sexual violence]; Etsuro Totsuka, *Kokusaihou kara Mita Nihongun Seidorei Mondai* [The issue of the Japanese army's sexual slaves from the perspective of international law], Iwanami Kouza *Gendai no Hou 11-Genda to Hou* [Law today: gender and law] from p.313; Yuko Suzuki, *Senso Sekinin to Genda* [Responsibility for war and gender] among others.
 - 18 T.H.Marshall, *Citizenship and Social Class*, 1950, pp.28-29. On the development of the concept of citizenship see G. Shafir (ed.), *The Citizenship Debates*, 1998; B. Siim, *Gender and Citizenship*, 2000; B.Hobson (ed.), *Gender and Citizenship in Transition*, 2000; S.K. Hellsten et als. (eds.) *Women's Citizenship and Political Rights*, 2006.
 - 19 R. Voet, *Feminism and Citizenship*, 1998, pp.12-16.
 - 20 Ibid., pp.14-16, 28-30. For details, M.Tsujimura, *Shimin Shuken no Kanousei- 21Seiki no Kempou, Demokurashii, Genda* [The potential of people's sovereignty- constitution, democracy and gender in the 21st century), Yushindo, 2002, from p.188.
 - 21 See Chizuko Ueno, *Nationalism and Gender*, supra. note11; Ueno, "Citizenship and Gender: Is Feminism Compatible with Nationalism?", in Miyoko Tsujimura (ed.), *International Perspectives on Gender Equality and Social Diversity*, supra.note 11, p.66-67.
 - 22 See M.Tsujimura, *Genda ga Hiraku 'Jinken no Seiki'- Posuto-genda no Jinkenron ni Mukete* [How gender is making way for 'the century of human rights'- towards a post-gender theory of human rights), *Soubun* 428, from p.15.
 - 23 See Chizuko Ueno, *Nationalism and Gender*, pp.145-146.
 - 24 See M. Tsujimura, *Genda to Jinken* [Gender and Human Rights), 2008, from p.292.
 - 25 See M.Tsujimura, "Danjo Kyoudou Sanka Shakai to 'Josei no Jinken'", in *Jurist* no.1192, from p.69.
 - 26 An outline of these developments can be found in Kyoko Yamashita, *Josei Sabetsu Teppai Jouyaku no Tenkai* [(New developments in the Convention for the Elimination of All Forms of Discrimination Against Women), from p.26.
 - 27 Yuko Fukumura and Martha Matsuoka, "Redefining Security: Okinawa Women's Resistance to U.S.Militarism", in Nancy Naples and Manisha Desai (eds.) *Women's Activism and Globalization*, 2002, pp.239-263, 259-261.
 - 28 Torry D.Dickinson and Robert K.Schaeffer, op.cit.(supra. note17) pp.238-240.
 - 29 Shelly Anderson, "Crossing the Lines: Women's Organizations in Conflict Resolutions", *ibid.*, p.260.
 - 30 Ibid., pp.263-264.
 - 31 The Constitution of Finland, June 11, 1999 (731/1999) http://www.om.fi/uploads/54begu60narbnv_1.pfd.
 - 32 The Constitution of the Republic of Korea, <http://english.ccourt.go.kr/home/english/welcom/republic.jsp>
 - 33 The Constitution of Italy, [http://en.wikisource.org/wiki/Constituion-of-Italy\(official_translation\)](http://en.wikisource.org/wiki/Constituion-of-Italy(official_translation))
 - 34 The Constitution of the Republic of Hungary, [http://en.wikisource.org/wiki/Constituion-of_-Hungary\(official_translation\)](http://en.wikisource.org/wiki/Constituion-of_-Hungary(official_translation))
 - 35 Supra.note 8.
 - 36 The Constitution of Costa Rica, <http://www.costaricalaw.com/legalnet/constitutional-law>.
 - 37 See Akira Maeda, *Guntai no Nai Kokka-27 no Kuniguni to Hitobito* [Nations without armies: 27 countries and peoples], Nihon Hyouronsha, 2008.
 - 38 The Constitution of Japan, Promulgated on November 3, 1946,Came into effect on May 3, 1947,see,<http://www.kantei.go.jp/foreign/constitution-and-government-of-jp>, The Preamble, Paragraph 3 declares: *We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.*
 - 39 According to The Military Balance 2008, top six countries are USA, China, Russia, United Kingdom, France and Japan. <http://www.iiss.org/publications/the-military-balance>
The numbers of soldiers of Japanese Self-Defense Forces is nearly 240,000,including 10,000 women's soldier. Defense expense of 2005 was 4,856,400,000,000yen (\$42,835,000,000).
 - 40 See M.Tsujimura, *Shimin Shuken no Kanousei- 21Seiki no Kempou, Demokurashii, Genda* [The potential of people's sovereignty- constitution, democracy and gender in the 21st century), Yushindo, 2002, from p.188; Ruth Lister, *Citizenship: Feminist Perspectives*, 1997; Ueno, *Shiminken to Genda* (Citizenship and gender), in *Shakai Seigi*, vol.21, Jouchi University Press, from p.17; Ueno, *Shiminken to Genda* (Citizenship and gender), in *Shisou* vol.955; Ueno, "Ikinobiru tame no Shisou" [The philosophy of survival] (essay).
 - 41 *Rostkar v. Goldberg* 453 U.S.57 (1981).
 - 42 On rapes committed by soldiers, see Cynthia Enloe, *Maneuvers: The International Politics of Militarizing Women's Rights*, from p.61.