CURRENT LEGAL PROBLEMS CONCERNING WOMEN WORKERS IN JAPAN

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1. Introduction — Characteristics of Japanese Women Workers

The number of women engaged in labor other than domestic household work is increasing every year in Japan. In 1992, 40.7%

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(1) This ratio had declined until 1975 because it was reflected by a decline in the number of female workers engaged in agriculture. The ratio however picked up its growth momentum again in 1988. SŌMUCHŌ TŌKEIKYOKU (Management and Coordination Agency, Statistics Bureau), RŌDŌRYOKU CHŌSA (Labor Force Survey) 1992.

of the total labor force consisted of women. The woman labor force participation ratio has grown too. It was 50.7% in 1992.(1) The percentage in the number of women workers as employees is also increasing. Women accounted for 31.1% of all employees in 1960. From 1960 to 1988 male employment increased by a factor of 1.75 whereas the figure for women was 2.26. As a result women accounted for 36.8% of all Japanese employees in 1988. This ratio was 38.6% in 1992.(2) The average age of women workers was 26.3 years in 1960 but it reached 36.0 in 1992. Married women (including widows and divorcees) represented 44.7% of all women workers in 1960. By 1992 this had grown to 66.8%

In spite of the changes in the situation of women workers in the labor force, I would like to emphasize some characteristics which distinguish the peculiar status of Japanese women workers from those in other industrialized countries.

First, the famous 'M shaped curve' of female employment according to age group remains in Japan.(3) The United Kingdom was the only other industrialized country characterized by this at least until 1991(4) but now it has changed. This clearly shows that a majority of women discontinues working during child care and starts to work again after the youngest child goes to school. Each year, the lower limit of the center of the M shaped curve is rising. However, I cannot but admit that working conditions in Japan have not yet sufficiently been developed for women to continue to remain working during child care.

(2) We can point out various causes of increase in female workers in Japan. They are the change of life-cycle of women (woman is marrying later than before, more women never have been married), the rising cost of living including the costs of education and housing loans, the improvement in the facilities for reducing domestic house hold chores and nurseries, revolutionary developments in technology increasing the proportion of lighter labor duties and the simplification of labor tasks in the services sector.

(3) A comparison of women labor force participation ratios by age group in 1992 showed a low figure for the 15–19 age group, a reflection of the high percentage of girls entering upper secondary schools. After climbing to a peak of 75.6% for the 20–24 age group, the ratio goes on to form a M-shaped curve, dropping to 64.0% for the 25–29 age group and 52.7% for the 30–34 age group, then gradually increasing after the age of 35. *supra note* 2.

(4) ILO, YEAR OF LABOUR STATISTICS 1991. But the bottom of the center of the M-shaped curve in England was 66.8% for the 25–34 age group in 1991. This ratio is rather high compared that in Japan.

Second, there is a large wage gap between men and women. This gap has been reducing slightly since the mid-seventies, but the reduction is rather small compared with that in other industrialized countries. If we apply an index of 100 to the average monthly wage of male employees, the average for female employees was 50.7 in 1988.[5]

The principal reason for this wage gap is the division of labor between men and women or gender segregation.[6] This is the third characteristic of Japanese women workers which I would like to emphasize. There are differences in the sizes of enterprises employing men and women. Besides, gender differences in job or grade within the same company and sex-specific differences in employment categories are quite common in Japan.[7]

In this article I shall briefly outline the Japanese legal system and employment management concerning women workers. I then hope to analyze the current legal problems of women workers in Japan and to suggest some alternative legal strategies with which the problems might be overcome.

2. The Legal System and Employment Management before 1985

(1) The Constitution and the Labor Standards Law

After World War II, the Japanese Constitution[8] established the basic legal values including respect for the individual and the right to the pursuit of happiness (article 13), equal opportunity under the law (article 14 para. 1), equal rights for husband and wife (article 24 para. 1), individual dignity with regard to family life

[5] This gap showed 82.1% in Denmark, 81.8 in France, 73.6 in West Germany (1989), 76.6 in United Kingdom, 87.9 in Australia and 65 in the United States. ILO, WORLD LABOR REPORT 1992, at 24 (1992).

[6] ILO finds that there are two factors of the earning's gap between men and women in Japan. They are the seniority wage system under which an employee's pay rises with the length of service in the same enterprise and the fact that women are concentrated in lower-paid jobs and not given equal employment opportunities. ILO, *Women Fail to Make Gains in Work Place,* in ILO PRESS RELEASE dated Sept. 6, 1992.

[7] Ohsawa Mari, *Policital Measures with respect to Marginal Labour Force* (Discussion Paper for the third Comparison Symposium between Japan and West Germany) 4–10 (1991).

[8] NIHONKOKU KENPŌ (The Japanese Constitution of 1946) enforced as from May 3, 1947.

(article 24 para. 2), the right to life (article 25) and the right to work (article 27). The Labor Standards Law[9] which provides the minimum standards for labor conditions was established in 1947. It is based on these legal values in the Constitution and is now in force. Article 3 provides that 'an employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker'. Article 4 provides that 'an employer shall not engage in discriminatory treatment of a woman as compared with a man with respect to wages by reason of the worker being a woman'. There are penalties for violations of these articles (article 119 no. 1).[10]

However, the prohibition of sex-based discrimination is not expressly stated in article 3 and article 4 provides for equal treatment of the sexes with respect to wages only. Sex discrimination in working conditions other than wages, such as hiring, job assignment, promotion and training, is not directly prohibited by the Labor Standards Law. Why does article 3 contain such an omission? It is commonly acknowledged that this was due to concern that the special protective provisions for women workers provided in the Labor Standards Law would conflict substantially with the prohibitory clauses relating to sex-based discrimination.[11] Formerly, the administrative interpretation considered that sex discrimination in employment, other than in relation to wages, did not violate the Labor Standards Law.[12] However, since the mid-sixties, most judicial decisions have supported and developed the legal principles governing equal treatment of the sexes. It has been held that

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[9] RŌDŌ KIJUN HŌ (The Labor Standards Law) Law No. 49 of April 7, 1947.

[10] It provides that 'a person who comes under any of the following items shall be sentenced to penal servitude of not more than 6 months or to a fine of not more than 100,000 yen.'

[11] ARIIZUMI TŌRU, RŌDŌ KIJUN HŌ (The Labor Standards Law) 78 (Yūhikaku, 1963).

[12] an interpretative regulation (Nov. 30, 1965, Kisyū No. 6767) was issued in 1965. It mentioned that the requirement that women resign upon marriage should be guided to be revised while it does not directly violate the Labor Standards Law. The administrative agency cannot enforce them to be abolished. Later, this regulation was replaced by the other interpretative regulation (May 20, 1975, Kihatsu No. 556) saying that the agency shall guide and encourage them to be abolished.

unreasonable sex discrimination in employment was void as a violation of 'public policy and good morals' (Civil Code[13] article 90). The established legal rule was that private autonomy (freedom of contract) was placed within the framework of 'public policy and good morals' and the male-female equality principle became a component of 'public policy'.[14] It shall refer to some representative judicial decisions concerning women workers in part 4 of this article.

(2) Traditional Employment Management

'Lifetime employment' and 'Pay based on seniority' are two characteristics of traditional employment management in Japanese companies.[15] These systems have been beneficial for the management of companies. Despite the fact that employees are paid a low starting wage, companies are able to instil a feeling of loyalty because the employees have their incentive in the possibility of staying with the company for life. For the employees as well, these systems have been beneficial in giving a certain stability in employment.

The male worker as 'the head of the family' has normally been placed at the center of such employment stability. On the contrary, females have merely been part of the 'marginal labor force' and have thus not benefited from such traditional employment management. Under the lifetime employment system, it is quite difficult for a company to adjust the workforce to accomodate fluctuations in economic prosperity, so that labor costs tend to increase at such times. In order therefore to adjust the size of the labor force, a majority of companies have always resorted to employing some part-time empoloyees or temporary workers who can be discharged more easily than regular employees. A large percentage of this marginal labor force usually consists of women workers who therefore work

[13] MINPŌ (The Civil Code) Law No. 89 of 1896 and Law No. 9 of 1898.

[14] SUGENO KAZUO, JAPANESE LABOR LAW 128 (University of Washington Press, 1992)

[15] NIHONTEKI KOYŌ KANKŌ NO HENKA TO TENBŌ—KENKYŪ HŌKOKU HEN (Change and Future of Japanese Employment Practices) 3 (1987), Joju Akita, *Employment Practice versus Contract in Japanese Firms,* 39 SHAKAI RŌDŌ KENKYŪ 322 (1992).

without the benefit of employment stability. In the 1960s the 'merit system' of labor management was introduced. As a result traditional employment management in Japan was changed slightly. However, most comapnies still retain the basic stance in their empolyment policy that women are marginal workers and men are regular workers as heads of their families.

3. The Equal Employment Opportunities Law (hereinafter EEOL) and Current Employment Management

(1) The Content of EEOL

The legal status of Japanese women advanced in the mid-eighties. The United Nation's Convention on the Elimination of All Forms of Discrimination against Women of 1979 was ratified by Japan in 1985. Japan became the 72nd party to the Convention.

In order to adjust Japanese internal laws to the Convention, three legislative reforms were required. The first was the amendment of the Nationality Law.[16] The second was the reform of the curriculum for Home-Economics in schools.[17] The third legislative reform, EEOL, appeared as a revision of the Working Women's Welfare Law of 1972. Before this revision was passed, sex-based discrimination in employment was not expressly prohibited by the statutes except in relation to wages, as I pointed out above. EEOL expressly provides equal employment opportunity for men and women with regard to every aspect of employment including recruitment, hiring, job assignment, promotion, vocational training, fringe benefits, retirement and dismissal.

The full title of EEOL is 'the Law Respecting the Improvement

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[16] The Nationality Law was amended by Law No. 45 of 1984 on May 25, 1984. According to the system established under the Nationality Law before amendment, in principle, a child acquired Japanese nationality only when the father not the mother was a Japanese national at the birth. It was inconsistent with the Convention. Now it provides that a child may acquire Japanese nationality if either the father or the mother is a Japanese national at the time of the birth.

[17] The curriculum in school education was necessary to be reformed. Before, the curriculum for Home-Economics in high schools was compulsory only for girls. It apparently violates the U.N. Convention. Therefore, it was reformed to 'selected compulsory system' which means that boys and girls are required to choose one of three subjects of Home-Economics.

of the Welfare of Women Workers, including the Guarantee of Equal Opportunity and Treatment between Men and Women in Employment'.[18] Women's groups and trade unions were demanding more effective legislation modelled on the equal employment opportunities laws in the industrialized countries of Europe and North America. On the other hand management organizations were strongly against this. Following endeavors to find a compromise,[19] the Minister of Labor drafted EEOL, not as new legislation, but as a law completely revising the Working Women's Welfare Law. This amended law was enacted in 1985 and it became effective as of April 1, 1986. In this revision, the basic objective of the law is found in a combination of two ideas. One is the guarantee of equal opportunity and treatment between men and women and the other is the improvement of the welfare of women workers.

According to EEOL, employers *shall endeavor to give women equal opportunity with men*, with regard to recruitment and hiring (article 7). With regard to job assignment and promotion of workers, the law provides also that employers *shall endeavor to treat women equally with men* (article 8). On the other hand, it provides that with regard to vocational training, fringe benefits, compulsory retirement age, resignation and dismissal, employers *shall not discriminate against a woman worker as compared with a man* by reason of she being a woman (articles 9, 10 and 11). These provisions represent two different kinds of stipulation. The former is termed the endeavor provision and the latter is termed the prohibitory provision.

What is the legal difference between these two types of provision? According to the interpretation of the Minister of Labor,[20] violation of the endeavor provision has no effects in private law.

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[18] KOYŌ NO BUNYA NI OKERU DANJONO KINTŌ NA KIKAI OYOBI TAIGŪNO KAKUHO TO JOSHI RŌDŌSYA NO FUKUSHI NO ZŌSHIN NI KANSURU HŌRITSU. Law No. 113 of July 1, 1972 and Law No. 45 of June 1, 1985.

[19] For the compromise between women's groups, trade unions and management organizations, see, ASAKURA MUTSUKO, DANJO KOYŌ BYŌDŌ HŌ RON (Equal Employment Laws between Men and Women in Japan and Britain) 241 et seq. (Domesu Syuppan, 1991).

[20] AKAMATSU RYŌKO, SHŌSETSU DANJO KOYŌ KIKAI KINTŌ HŌ OYOBI KAISEI RŌDŌ KIJUNHŌ (Equal Employment Opportunity Law and Amended Labor Standards Law) 243 et seq. (Nihon Rōdō Kyōkai, 1985).

This means that a woman discriminated against by contravention of these provisions has no recourse to the courts on the ground that the action was in contravention of EEOL. However, these provisions do not affect public policy which embodies the principle of male-female equality under the Constitution and the Civil Code. Therefore an aggrieved woman can ask the courts to declare the action to be void as a violation of the Civil Code and to require the employers to pay damages in tort under the said Code. On the other hand, violation of the prohibitory provisions has effects in private law. Employment contracts, work rules and collective agreements which contravene the provisions are void and also constitute torts. Employees do not necessarily have to rely on the Civil Code. I shall comment about this interpretation later.

EEOL has three dispute resolution procedures. Firstly, it provides that when a complaint is submitted by a woman worker, the employer shall endeavour to find an amicable settlement by means such as referring the complaint to grievance machinery (article 13). Secondly, the Director of the prefectural Women's and Young Worker's Office is empowered to give any necessary advice or guidance and to make any neccessary recommendation to the parties concerned (article 14). Thirdly, the Director in question shall refer the dispute to the Equal Opportunity Mediation Commission for mediation (article 15). The Commission may make a proposal for mediation and recommend its acceptance to the parties concerned (article 19).

(2) The Defects of EEOL

Since EEOL was a 'result of compromises' between labor organizations and management, it is full of contradictions. I shall point out some serious defects which should be amended.

The Minister of Labor is empowered to issue guide-lines on measures which employers shall endeavor to take under the endeavor provision. According to the guide-lines,[21] two typical employers' practices are incompatible with the law. One is the practice which

[21] 1986, Rōdōshyō Kokuji No. 4.

excludes women from recruitment, hiring, job assignment and promotion. The other is the practice which establishes adverse requirements for women concerning recruitment, hiring, job assignment and promotion. However, the Minister of Labor considers that employers' practices which exclude men and establish adverse requirements for them are not incompatible with the law. According to the interpretation of the Ministry in question, that is because the main objective of the law is the improvement of the welfare of women workers.[22] Exclusion of male workers is not related to this main objective. Neither do the guide-lines on the endeavor provisions cover the recruitment of women for part-time jobs only, because EEOL is not concerned with practices such as the exclusion of men from part-time recruitment.

I do not support this interpretation because it will ensure that the law is not effective in eliminating job segregation which continues to exist between men and women. Most women will continue to work part-time and most men will work full-time. Job segregation between the sexes will not diminish and will not be eliminated as long as part-time workers are predominantly women and full-time workers are predominantly men. The clause containing the objective of the law should be amended to ensure that the main objective of the law is the guarantee of equal opportunity and treatment between the sexes rather than the improvement of the welfare of women workers.

The confusion arising from differentiation between the endeavor provisions and the prohibitory provisions cannot be ignored as I pointed out above. Most scholars consider that the endeavor provisions do not affect public policy which, under the Constitution and the Civil Code, embody the principle of male-female equality.[23] This is also confirmed by the relevant legislative history.[24]

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[22] AKAMATSU, *supra note* 21, at 242 et seq.

[23] NAKAJIMA MICHIKO et al., JOSHI RŌDŌ HŌ NO JITSUMU (Practical Business of Labor Law for Women) 8 et seq. (Chuo Keizai Sha, 1990), ISHIBASHI CHIKARA ed., DANJO KOYŌ BYŌDŌ NO SHINJIDAI (A New Time for Equal Employment between Men and Women) 242 et seq. (Horitsu Bunka Sya, 1989), MIYAMOTO YASUMI et al., DANJO KOYŌ BYŌDŌ NO TENKAI (The Development of Equal Employment between Men and Women) 31 (Gyōsei, 1988), SUGENO, *supra note* 13, at 120 et seq.

However, employers tend to believe that sex discrimination in contravention of the endeavor provisions is a more permissible practice than practices in contravention of the prohibitory provisions. That is not of course a correct interpretation of EEOL. But it cannot be denied that the two different provisions give rise to confusion. The endeavor provisions should therefore be revised and should become prohibitory.[25]

Mediation by the Equal Opportunity Mediation Commission (article 15) was expected to be the most effective of the three dispute resolution procedures. However, in the 7 years since the Law came into force no mediation has yet been conducted. In some disputes mediation was sought but they were not referred to the Commission. One of the reasons is that the Director of the prefectural Women's and Young Worker's Office considered that the subject matter of the disputes was not covered by the Law and thus not within the jurisdiction of the Commission.[26] The other reason is that employers did not agree to mediation. The law provides that where only one of the parties concerned applies for mediation, the Director may refer it to the Commission only if the other party concerned agrees to the mediation. Where employers do not agree to mediation, the Commission will hardly deal with any disputes.[27] This is

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[24] 32, 101 The Minutes of the House of Representatives 8 (June 26, 1992).

[25] I don't agree with the legal interpretation that violation of the endeavor provision has no effects in private law although violation of the prohibitory provisions have them. I interpret that both provisions do not any legal effects in private law. They are providing with guidance for administrative authorities for equal employment opportunities. Only this interpretation will bring the result to avoid the differentiation between two provisions. See ASAKURA, *supra note* 20, at 264.

[26] On March 1992, 22 married women working for the Sumitomo Life Insurance Company claimed to have been refused to promote because of their marital status and asked a Director of Osaka prefectural Women's and Young Worker's Office to refer the dispute to the Equal Opportunity Mediation Commission. But the director decided not to refer the case to the Commission on Nov. 1992 because the subject matter of the dispute (in this case, it was the discrimination because of the marital status) was not covered by the Law. MAINICHI SHINBUN (Mainichi News Paper) Nov. 14, 1992.

[27] In 1991, women workers to Tōkai Radio Company proposed the Director to make a referral for mediation but it was decided not to refer it to the Commission for the company refused a consent. ŌWAKI MASAKO, BYŌDŌ ENO SEKANDO SUTĒJI E (To the Second Stage of Equality) 50 et seq. (Gakuyō Syobō, 1992).

the most serious defect of EEOL and it weakens implementation.

(3) New Tendencies in Employment Management

After EEOL was enacted in 1985, a certain degree of change became apparent in the employment management of women workers in large companies. In them it was not simply assumed that women were a marginal labor force. Some companies gradually realized that they would utilize women as a basic labor force. As a result, many large companies began to adopt new employment management policies. This is called the separate-track system. Under it, on the basis of their agreement and abilities, employees are channelled into two tracks, each of which entails different types of jobs and treatment. One track, typically called the 'career track' (sōgō-shoku), mainly involves duties related to planning and development, requires willingness to accept company-wide transfers and holds out the possibility of promotion to the highest executive levels. The other is typically called the 'general track' (ippan-shoku), which mainly involves the performance of non-discretionary tasks, does not require changing one's residence in connection with a job transfer and limits the level to which one may be promoted. Under the survey, almost 31% of companies were found to have put the separate-track system from 1986 to 1987.[28]

Most women tend to choose the general track because transfer is difficult. As a result, the system is producing new gender differences in employment.[29] The number of women who choose the career tracks has recently been increasing slightly. This endorses the fact that some large companies are taking positive steps to provide a welcome for women with superior qualifications. Unfortunately however, I cannot unconditionally approve the personnel management and employment management policies of large companies which intend to utilize women as career track workers. Companies

[28] J. Gelb, *Tradition and Change in Japan: The Case of Equal Employment Opportunity Law,* 10 US-JAPAN WOMEN'S JOURNAL 109 (1991), ZEN NIHON MINKAN RŌDŌ KUMIAI RENGŌ KAI (All Japan Private Labour Union Association), SAN NEN ME WO MUKAETA KINTŌ HŌ (Equal Opportunity Law in its Third Year) (1989).

[29] See, KŌSUBETSU KOYŌ KANRI NI KANSURU KENKYŪ KAI HŌKOKU (Research Paper of Employment Management of Separate-track System) (Josei Shokugyo Zaidan, 1990).

are trying to apply to women the male model of employment management practices which previously applied only to men. It requires an employee to work like a 'combatant of the corporation (Kigyō Senshi)'.

Male employees have coped with such employment management heretofore, since they were enjoying indirect support from their wives who were providing the necessary background comforts. By way of contrast, women who meet the challenges of competition in the work place are also shouldering domestic responsibilities. It is thus quite obvious for women that they are competing under adverse and nearly impossible conditions. The results of such female competition are gradually becoming apparent. Amongst women workers, there is a definite increase in ailments attributed to overwork, stress and strain. These are known as 'the complete exhaustion syndrome' or 'super-woman syndrome'.[30] In the light of such developments the question must be posed whether the current situation of women workers in Japan is improving or not. It is probably now time to change the male work model with which women have been trying to fall into line. Not only women workers but also male workers themselves should be aware of the importance of an employment system which guarantees the fulfilment of workers at the place of work and in their home life.

4. Judicial Decisions concerning Discrimination in Employment on the Basis of Sex.

Even though the legal system concerning the equality of the sexes in employment has some serious defects, as I pointed out above, there are over 70 judicial decisions which support and develop the relevant legal principles. After outlining the more important these decisions, I shall indicate some problems inherent in them.

(1) Discrimination in Mandatory Retirement, Resignation and Dismissal

The first judicial decision on sex discrimination in employ-

[30] NIHON KEIZAI SHINBUN (Japan Economic News Paper) Sept. 26, 1989.

ment related to a requirement that women resign upon marriage (Sumitomo Cemento Case,[31] Tokyo Dist. Ct. Dec. 20, 1966). The Court supported the plaintiff's contention that the requirement was void as a violation of public policy. The latter, as we have seen, incorporates a prohibition of discriminatory treatment on the basis of sex and a guarantee of freedom in marriage.

The next development sees the courts holding that mandatory retirement of women at an early age is also void as a violation of public policy (Tōkyū Kikan Kōgyō Case[32], Tokyo Dist. Ct. July 1, 1969). Subsequent to this decision, the above principle concerning early mandatory retirement systems for women was soon applied to all mandatory retirement systems that discriminated against women. In 1981, the Supreme Court held that there was no rational basis for different mandatory retirement age systems on the basis of sex even if the age difference was only 5 years (Nissan Jidōsya Case,[33] the S. Ct. March 24, 1981).

(2) Discrimination in Wages

Typical forms of discriminatory treatment with respect to wages in Japanese companies are the establishment of separate male and female wage scales, the placing of a ceiling on the level of remuneration to which a woman may aspire on the basis of seniority, payment of housing, household and family allowances to men only, payment of men's wages on a monthly basis and women's wages on a daily basis.

In 1975, the first judicial decision on wage discrimination was handed down. It was held that the establishment of separate male and female wage scales was a clear case of sex-based discrimination which contravened article 4 of the Labor Standards Law. The

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[31] 17 RŌDŌ KANKEI MINJI SAIBANREISHŪ (Labor Civil Cases Reporter—Lab. Civ. Cases in following) 1407 (1966).

[32] 20 Lab. Civ. Cases 715 (1969). In this case, women's retirement age was 30 while men's was 55.

[33] 35 SAIKŌ SAIBANSHO MINJI HANREISYŪ (Supreme Court Reporter, Civil Cases) 300 (1981). In this case, women's retirement age was 50 while men's was 55. See, Asakura, *Danjo Betsu Teinen Sei* (Mandatory Retirement System Discriminating Against Woman) 101 BESSATSU JURIST 33 (1989).

company was ordered to compensate women for the difference in pay compared to that of men (Akita Sougo Ginkō Case,[34] Akita Dist. Ct. April 10, 1975). As a part of their wages most Japanese companies pay 'household allowances' or 'family allowances' to employees as 'heads of household' supporting families. In the Iwate Ginkō Case, a bank was paying family allowance to heads of household. According to the employment rules of the bank however only the male employee in the case of a working couple could be a head of household. *In casu* the bank did not pay the allowance to the female employee in a working couple, despite the fact that she was registered with the local authorities as head of household. The Morioka District Court ruled that this was clearly a case of sex-based discrimination and a violation of article 4 of the Labor Standards Law (Iwate Ginkō Case,[35] Morioka Dist. Ct. March 28, 1985). The Sendai High Court,[36] on appeal, held that the bank rule constituted unlawful discrimination (January 10, 1992). The bank did not appeal to the Supreme Court and the decision of the court *a quo* was therefore confirmed and upheld.

On the other hand, in the Nissan Jidōsya Case, the court ruled that a system which pays household allowance to whichever one of a working couple is earning more is not sex-based discrimination and is quite rational (Nissan Jidōsya Case,[37] Tokyo Dist. Ct. January 26, 1989). The previously mentioned Iwate Ginkō Case in which only females were excluded as recipients of household allowance was characterized as an obvious case of sex-based discrimination. According to the Nissan Jidōsya Case however if the wife was remunerated at a higher level than her husband she could be the recipient of the allowance. Hence the court concluded that the system of payment did not in itself involve sex-based discrimination under the Japanese legal system.

Although it is difficult to critisize this decision from a legal point

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[34] 26 Lab. Civ. Cases 388 (1975).

[35] 450 RŌDŌ HANREI (Labor Case Judgments) 62 (1985).

[36] 605 RŌDŌ HANREI 98 (1992).

[37] 533 RŌDŌ HANREI 45 (1989). See Asakura, *Kazoku Teate Shikyū Yōken to shiteno 'Setainushi' no Igi* (The Meaning of Head of Household as the Requirement of Ricipient of Household Allowance) 957 JURIST 200 (1990).

of view in Japan,[38] *de facto* problems nevertheless persist. Men constitute the majority of heads of household in Japan. Payment of household allowance to the party with the higher remuneration results in allowances being paid mainly to male empolyees. The system impacts on women adversely and produces a disparate effect by widening differences in pay between male and female. Furthermore household allowances affect the amount of pensions to be received by workers after their retirement. It is submitted that if household allowance is to be paid to either one of a working couple, the recipient in each case should be determined by a decision of the family in question. In the Nissan Jidōsya Case, a settlement was achieved before the Tokyo High Court. The company paid a group of workers a sum of ¥1.3 million in settlement. Thereafter household allowance was to be paid to either one of a working couple in accordance with their applications. Recently however objections against such allowances themselves have been voiced by women workers.

(3) Discrimination in Promotion

In 1980, the Tsu District Court decided the first case relating to sex-based discrimination in promotion (Suzuka Shiyakusho Case,[39] Tsu Dist. Ct. Feb. 21, 1980). The plaintiff, a local civil servant, was not promoted to the appropriate rank although most of the male workers who were employed at the same time with her had been promoted. Of 37 males in the same employment period, 28 had been promoted. The remaining 9 were mostly workers for whom clear objective reasons existed as to why they had been refused promotion. By way of contrast, only 9 women out of 60 had been promoted. The court ruled that refusal to promote the plaintiff was sex-based discrimination and was illegal as contraven-

[38] This is a typical disparate impact discriminatory case in the U.S. Some Commentators suggest the possibilities of an interpretation of disparate impact theory in this case though any courts in Japan have not ever ruled cases under the disparate impact theory. For example, Honda Junryo, *Kazoku Teate wo Setainushi ni shika Sikyū shinai koto ha Gōhō ka?* (Is Family Allowance Legally Paid Only to Head of Household?) 1211 RŌDŌ HŌRITSU JUNPŌ 4 (1989).

[39] 336 RŌDŌ HANREI 20 (1980)

ing the general prohibitory provisions of the Local Civil Service Law.[40] The City of Tsu, the defendant, was ordered to pay ¥1.02 Million which the plaintiff would have been paid if she had been promoted.

On appeal, the Nagoya High Court reversed the District Court decision (Nagoya High Ct.[41] April 28, 1983). The appellant tried to establish that the respondent was not qualified for promotion to the advanced status to which she aspired because of lack of enthusiasm for work, insensitivity and intolerance. The court held that the employer normally has a discretion to decide who should be promoted and unless it grossly exceeds the limits of its discretion, it is not liable. After the lodgment of an appeal to the Supreme Court, a settlement was achieved. The plaintiff was promoted to a higher rank. In the case of sex-based discimination in promotion, there tends to be difficulty in proving that the discrimination stems from the victim's sex. As happened in the Suzuka Shiyakusho Case on appeal, companies very often try to justify the discriminatory refusal to promote on the grounds of lack of specific qualifications or inferiority to men in ability to work.

On the other hand, in 1990, the Tokyo District Court held that refusal to promote women to higher rank was illegal (Syakaihoken Shinryō Housyū Shiharai Kikin Case,[42] Tokyo Dist. Ct. July 4, 1990). In the corporation (the defendant *in casu*) two parallel trade unions were represented. As a result of substantial discrimination by the company between the unions, members of Union A were ranked lower than members of Union B. In 1976, on a recommendation of the Central Labor Commission, members of Union A were promoted to the same level as those of Union B. However, women employees were unconditionally excluded from such promotion and were the only category to be so excluded. Eighteen women filed suit. The court held that the defendant's conduct was illegal and it had to pay the group of women plaintiffs a sum of ¥96

[40] CHIHŌ KŌMUIN HŌ (The Local Civil Service Law) Law No.261 of Dec. 13 of 1950.
[41] 408 RŌDŌ HANREI 27 (1983). See Asakura, *Shokaku Sabetsu* (Discrimination in Promotion) 88 BESSATSU JURIST 40 (1986).
[42] 565 RŌDŌ HANREI 7 (1990)

million damages under the Civil Code. Although the corporation appealed to the High Court, a settlement was achieved in December 1991 before the hearing. The women workers received over ¥152 millions.

(4) Sexual Harassment

In 1989, the first law suit on sexual harassment in Japan was brought in the Fukuoka Discrict Court. This case was reported generally in the press. In the past, most victims of sexual harassment had, at least ostensibly, left theri jobs of their own accord. No suits at all had been brought. In this case, the plaintiff left a publishing company because she had been sexually harassed for two years by her superior. He spread rumors relating to her private life and accused her of having secret love affairs which was not true. She submitted a complaint against the superior to her employer (through the managing director) who urged her to quit her job. The Fukuoka Dictrict Court held that both the superior and the employer were liable to the plaintiff in an amount of ¥1.65 million for damages under articles 709 and 715 of the Civil Code[43] (Fukuoka Sexual Harassment Case,[44] Fukuoka Dist. Ct. April 16, 1992). The decision did not use the word 'sexual harassment' but it held that the conduct of the superior and the employer had had a negative affect on the woman's working environment.[45]

In Japan, according to a recent poll, 70% of women workers feel

[43] Article 709 of the Civil Code provides that a person who intentionally or negligently violates the rights of another is obligated to compensate for the damages arising therefrom. Article 715 para. 1 of the Code provides that one who employs another person for a certain undertaking is liable for such damages caused by employee to third persons in the execution of such undertaking unless the employer has exercised due care in the selection of the employee and in the supervision of the undertaking, or unless the damages would have arisen even if due care had been exercised.

[44] 607 RŌDŌ HANREI 6 (1992)

[45] In 1991 before the Fukuoka Case, the first judicial decision on sexual harassment in Japan held that a supervisior was liable under article 709 of the Civil Code for sexually harassing an employee and was liable to pay her an amount of ¥1.1 million for damages. New Fujiya Hotel Case, Numazu Branch of Shizuoka Dist. Ct. Dec. 20, 1990, 580 RŌDŌ HANREI 17 (1991). But this case did not mention the liability of the employer therefore Fukuoka Case was the first case which ordered the company to be liable for the torts.

that they are victims of some kind of sexual harassment.[46] In March of 1991, the Second Tokyo Bar Association drafted and released its sexual harassment legislation proposal. It proposed to build committees to hear greivances.[47]

(5) Outstanding Problems in Legal Theory

I would like to point out two important problems which ramain outstanding in the wake of judicial decisions concerning sex-based discrimination in employment.

Firstly there are difficulties of proof for plaintiffs in establishing discrimination on the basis of sex. As pointed out above, Suzuka Shiyakusho is a typical case in point. The plaintiff had to prove that she was refused promotion because of her sex, not because of any lack of qualifications required for the enhanced status and not because of inferiority in ability to perform the required duties. This kind of problem does not of course exist in cases relating to sex-based mandatory retirement systems, sex-based separate wage scales and payment of allowances on the basis of sex. It is evident that in such cases women as such are excluded from the systems in question or are disadvantaged by falling under different systems from those applicable to men. The discriminatory treatment is so clear that there are no probative difficulties for plaintiffs. Even in promotion cases the problem is not always present. In the Syakaihoken Shinryō Houshyū Shiharai Kikin Case, the reason for refusal of promotion was clearly sex-based discrimination because only women refused promotion! In the Suzuka Shiyakusho Case however some women had been promoted but the number was much smaller than that for men. Women were not completely excluded from promotion in this case. Hence the plaintiff had to prove that the reason for refusal of promotion was not based on her ability but on her sex. Providing the reason for refusal of promotion is however much more difficult for a plaintiff than for a defendant. As the Nagoya High Court

(46) ONNA 6500 NIN NO SHŌGEN (Sixty five hundreds Women's Testimony) (Gakuyō Shobō, 1990).

(47) 1264 RŌDŌ HŌRITSU JUNPŌ 71 (1991). NAKASHITA YŪKO et al., SEXUAL HARASSEMENT 201 et seq. (Yūhikaku, 1991)

in the Suzuka Shiyakusho Case said, an employer has a discretion in relation to promotion.

Secondly, there is a situation which impacts adversely on the overwhelming majority of women even though women are not always completely excluded. A good example can be found in the Nissan Jidōsya Case concerning family allowances. The payment system which pays household allowances to whichever one of a working couple is earning more does not exclude only women, but it impacts adversely on them. There are mechanisms for solving such problems in other industrialized countries. The Sex Discrimination Act in the United Kingdom provides that indirect discrimination is prohibited.[48] In the United States, there is a legal theory relating to situations which have a disparate impact on persons on the basis of their sex. According to the theory, when a rule which is *ex facie* gender neutral or a practice of an employer has a disproportionate effect on one sex, it is sex-based discrimination if the practices cannot be justified by business necessity.[49] On the contrary, in Japan, up to now, no court has yet articulated such a legal theory concerning sex-based discrimination. Neither are there statutes prohibiting indirect discrimination in Japan. Of course,

[48] Article 1 of Sex Discrimination Act 1975 (1975, c. 65) provides that (1) a person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if (b) he applies to her a requirement or condition which he applies or would apply equally to a man but (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applies, and (iii) which is to her detriment because she cannot comply with it. Inspirational source for British legislation on indirect discrimination was American Law. ROY LEWIS ed., LABOUR LAW IN BRITAIN 476 (Basil Blackwell Ltd, 1986), ASAKURA, *supra note* 20, at 446 et seq.

[49] See B.L. SCHREI & P. CROSSMAN, EMPLOYMENT DISCRIMINATION LAW 80–205 (2nd Ed., ABA, 1983). Judicial recognition of adverse impact discriminaton is generally traced to the Supreme Court Case of Griggs v. Duke Power Co. (401 U.S. 424, 1971). Griggs case decision held that once the complaining party proved the challenged employment practices excluded a significant number of qualified women or minorities, the burden shifted to the employer to prove that the employment practice was required by business necessity. But the Court's opinion in Wards Cove Packing Co. v. Atonio (109 S. Ct. 2115, 1989) overturned the legal principle governing disparate impact case established under Griggs. One purpose of the 1991 Civil Rights Act was to codify the concepts of business necessity. See Civil Rights Act of 1991, Pub. L. No. 102–166.

if the court finds that the employer's apparent intention was to discriminate against women by a practice which *ex facie* is sex-neutral, it is possible to hold that the employer has discriminated agaist women on the basis of sex. The burden of proof is however on the plaintiff.

5. Conclusions

Thus far I have described the characteristics of Japanese working women, the legal system, employment management policies and judicial decisions concerning women workers. I have also indicated and analyzed outstanding problems which are inherent in these systems, policies and decisions. In conclusion I would like to suggest some important reforms which would bring about an improvement in the situation of working women. They include the improvement of working conditions and the reform of family responsibility which would change the Japanese male working model.

(1) The Improvement of Working Conditions and the Environment in the Workplace.

The Labor Standards Law prescribes basic working conditions such as wages, working hours, holidays, vacations, safety and health in the workplace, etc. Particularly important is the appropriate regulation of working hours. A reduction in working hours would not merely be relevant in improving working conditions but would also be a strategic step towards social and economic transformation in Japan. The Japanese government established the drastic goal of reducing overall annual working hours to 1800 by 1992. In order to achieve this goal, the Labor Standards Law was amended in 1987[50] and now in 1993 a bill to reduce working hours is

[50] A bill revising the Labor Standards Law was enacted on September 1987 and it is effective as of April 1, 1988. Important aspects of the revision were (1) to declare the reduction of working hours from 48 hours to 40 per week though actual maximum working hours were 46 hours per week as a first step and (2) to make maximum working hours less ligid by increasing the working hours averaging schemes to three and establishing flex-time systems. SUGENO, *supra note* 15, at 207 et seq.

introduced in the Diet.[51] Overall annual working hours in 1992 were 1972. But they were 2080 in manufacturing industries which are fairly long when compared with working hours in the advanced industiral nations of Europe and America.[52]

One reason for the long working hours in Japan is the amount of overtime. By law,[53] the principal basis for overtime is a labor-management agreement on overtime for the workplace (also known as an article 36 agreement). The law does not however provide an upper limit for overtime. In 1991 the Supreme Court held that the dismissal of an employee who refused to work overtime was valid, because an employee has a duty to work overtime under certain conditions (Hitachi Seisakujo Musashi Kōjō Case,[54] the S. Ct. Dec. 28, 1991). This decision goes in the opposite direction to the movement towards reducing working hours. In addition to normal overtime, work taken home or work done voluntarily, the so-called 'blanket overtime' and 'overtime at a service' is often not calculated as overtime in Japan. Advocates for employees are very anxious about the realization of a reduction in working hours. On occasion long working hours cause deaths among employees from overwork 'Karōshi'. 'Karōshi' is not a particular disease. It refers to death from brain hemorrhage, acute heart attack, cardiac failure etc. These are ailments of the brain or heart but are characterized as being brought about by mental stress originating in overwork.

In June 1988, 7 lawyers' associations opened up a telephone consulting service for the 'Karōshi problem' and surprisingly received over 1000 enquiries in a year.[55] A majority of the enquries was

(51) The primary aims of the bill of 1993 revising the Labor Standards Law are (1) to carry into effect the 40-hour-per week system as from April, 1994 and (2) to introduce the working hours averaging schemes over one Year period. ASAHI SHINBUN, Jan. 30, 1993

(52) The working hours in year were 1943 hours in the U.S., 1902 in the U.K., 1982 in France and 1582 in Germany in 1991. ASAHI SHINBUN Jan. 30, 1992.

(53) Article 36 of RŌDŌ KIJUN HŌ, *supra note* 10.

(54) 594 RŌDŌ HANREI 7 (1992). In this case, 'under certain condition' means if work rules clearly provide that overtime work can be ordered when needed by the company, the employee has a duty to work overtime.

(55) NATIONAL DEFENSE COUNSEL FOR VICTIMS OF KARŌSHI, KARŌSHI—WHEN THE 'CORPORATE WARRIOR' DIES 6 et seq. (Mado Sha, 1990).

from the families of Karōshi victims about the possibility of qualifying for compensation under the Worker's Accident Compensation Insurance Law.[56] It is not however an easy matter to have 'Karōshi' recognized as 'illness resulting from employment' for which insurance benefits are payable. The main point is whether one can say that the worker's death, injury or illness has a causal relationship with engaging in his or her duties. Administrative interpretations[57] hold that, to be deemed 'Karōshi', workers must have engaged in particularly arduous duties compared with their ordinary ones within one week of falling ill. In accordance with this interpretation most deaths are difficult to categorize as being caused by such duties. In 1990, only 33 out of 600 applicants were paid insurance benefits.[58]

Trade unions tend to accuse employment management. They have not however involved themselves effectively in improving working conditions. I would like to emphasize that in order to reduce working time and to prevent 'Karōshi', it is not only necessary to reform the legal system regulating working hours but it is also necessary that an employee be able to arrange his or her life independently.

(2) Responsibility for the Family

In Japan, responsibility for the family is a burden which is considered as resting solely on the female. Even in the Spring labor offensive of 1981, the slogan was 'the wage which doesn't force Mom into a side job.' The EEOL of 1985 instituted various measures of employment assistance for women to harmonize working life and family life. Child care leave[59] was one of these measures.

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[56] RŌSAI HOKEN HŌ (The Worker's Accident Compensation Insurance Law) Law No. 50 of April 7, 1947.

[57] Oct. 26, 1987, Kihatsu No. 620

[58] Okamura Chikanobu, *Karōshi no Rousai Nintei* (The Recognition of Karōshi *as Caused by Duties) 1278* RŌDŌ HŌRITSU JUNPŌ 10 (1991).

[59] Article 28 of EEOL provided that employers shall endeavour, as necessary, to take measures to accomodate child-care for the women workers they employ, including the institution of child-care leave (whereby women workers with children are allowed, on request, to absent themselves for a fixed period to look after their children).

It was however only available for female workers. In 1988, the United Nation's Committee on the Elimination of Discrimination against Women (CEDAW) pointed out that the Japanese law which granted child care leave to females only seemed to be a problem because it would have the effect of entrenching traditional stereotyped sex roles in society.[60]

In 1990 the fertility rate in Japan declined to the very low level of 1.57. This generated great concern in government and in the ruling party. As a result, the law which gives employees a legal right to leave for child care was enacted in 1991.[61] An important aspect of this new law is that it guarantees the right to child care leave to working parents of both sexes. Under the new Child Care Leave Law, a worker can ask his or her employer for child care leave in respect of a child aged less than one year. Leave however is without pay. Wages and other economic conditions are to be governed by arrangements between employer and employee. Payment is of course an indispensable requirement when male and female workers are equally encouraged to take such leaves. As mentioned above the Japanese legal system and legal theory have many outstanding defects which should be reformed in future mainly in relation to reduction of working hours and responsibility for the family. I am convinced that realization of these goals depends in the last analysis upon giving independent workers the possibility to make decisions concerning how they are to work, how they are to arrange their own lives and reform their working conditions. These efforts will finally introduce the necessary reforms into the Japanese legal system.

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[60] U.N. Doc. CEDAW/C/SR.108, para. 90. See ASAKURA, *supra note* 20, at 120.

[61] IKUJI KYŪGYŌ HŌ (The Child Care Leave Law) Law No.76 of May 15, 1991. RŌDŌSYO FUJIN FUKUSIKA, WAKARIYASUI IKUJI KYŪGYŌ HŌ (Compact Guidance of the Child Care Leave Law) (Yūhikaku, 1991), OKUYAMA AKIRA, IKUJI KYŪGYŌ HŌ Q & A (The Child Care Leave Law Q & A) (Keiei Syoin, 1992), YAMAMOTO YOSHITO, IKUJI KYŪGYŌ HŌ (The Child Care Leave Law) (Rōdō Junpō Sha, 1992), HAYASHI HIROKO, IKUJI KYŪGYŌ HŌ NO SUBETE (Exposition of the Child Care Leave Law) (Yūhikaku, 1992).