

Employment Discrimination Law in Japan : Human Rights or Employment Policy?

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I. Introduction

Every advanced country has some form of regulation to promote the employment of racial minorities, women, older people, disabled persons and the like, who find it difficult to find employment and suffer low wages. Their approaches, however, are not uniform. There are two types of regulations: a “human rights approach” and an “employment policy approach.”¹

The “human rights” approach treats differences of treatment based on the prohibited grounds (ex. sex, race) as a violation of the human rights of the individual to equal treatment. Any exception to this principle is strictly construed so as to interfere as little with the rights of individuals as possible. Preferential treatment for female workers and the like, so-called “reverse discrimination,” is also considered to be against the principle of equality. In contrast, the “employment policy approach” uses a variety of policy instruments to support individual workers, paying attention to their different attributes, such as their age or disability². The general principle of equality provides only protection against arbitrary discrimination; strict judicial scrutiny is not applied. When certain treatments based on certain grounds are regulated to attain employment policy objectives, those regulations take on a patchwork aspect, and are realized through gradual legislative processes.

Japan takes both approaches, the former for women and the latter for the elderly, disabled persons and part-time workers. It has paid subsidies to employers who hire and maintain the employment of the elderly but enacts no comprehensive age discrimination laws. It sets employment quotas for disabled persons but has no disability discrimination law. Paying lower wages for part-time workers has not been illegal per se. Moreover, it can be analyzed that Japan has treated discrimination on the grounds of belief or social status as an object of the employment policy approach, since regulations against such discrimination have been subordinated to the principle of “freedom of contract.”

However, in Japan, even sex discrimination laws have evolved from the employment policy approach into the human rights approach step by step over a long period. Putting this into consideration, there is a good chance that legal protection for the elderly, disabled

¹ See Kazuo Sugeno, “Discrimination In Employment: Dynamism And The Limits of Harmonization In Law” in Roger Blanpain (ed.), *I Discrimination In Employment XV World Congress of Labour Law And Social Security 5* (1998); Takashi Araki, “The Impact Of Fundamental Social Rights On Japanese Law” in Bob Hepple (ed.), *Social And Labour Rights In A Global Context: International And Comparative Perspectives 215* (2002).

² See Bob Hepple, “Legislation Against Age Discrimination In Employment: Some Comparative Perspectives” JILL Forum Special Series No.19 (2004).

persons and part-time workers to be strengthened progressively through legislative and judicial efforts on the basis of formation of social consensus and changes in employment practices in the future.

II. Constitutional Basis

In the development of Japanese employment discrimination law after World War II, constitutional provisions on fundamental human rights and social rights provided its basis³. The Japanese constitution promulgated in 1946 had a list of fundamental human rights, including the guarantee of equality under the law and prohibition of discrimination on the grounds of race, creed, sex, social status or family origin (Art.14 Para.1).

Besides human rights, the Constitution prescribes fundamental social rights. Article 27 Paragraph 1 proclaims that all people shall have the right to work and thus obliged the state to give workers suitable employment opportunities. This objective is established in the “Law of Labor Market” including the Employment Measure Act (hereinafter the “Measure Act”) of 1966 which proclaims the general principle of labor market policies, the Older Persons’ Employment Stabilization Law of 1971 (hereinafter the “Older Persons Act”) and the Disabled Persons’ Employment Promotion Act of 1960 (hereinafter the “Disabled Persons Act”).

Article 27 Paragraph 2 requires the state to enact laws regulating terms and conditions of employment. Accordingly, the Labor Standards Act (hereinafter the “LSA”) was introduced in 1947. Other labor-protective legislation followed, including the Equal Employment Opportunity Act of 1985 (hereinafter the “Equality Act”) which regulated discrimination against women, the Child Care Leave Act of 1991 (amended as the Child Care and Family Care Leave Act later, hereinafter the “Child Care Act”), the Act Concerning the Improvement of Employment Management, Etc. of Part-Time Workers of 1993 (hereinafter the “Part-Time Act”) and so forth. Apart from these acts, general clauses of the Civil Code including abuse of rights (Art.1), public order (Art.90), tort (Art.709), have played an important role in the development of Japanese employment discrimination law.

Here it is worth noting that “Japanese employment discrimination law” (defined as containing the LSA, the Older Persons Act, the Disabled Persons Act, the Equality Act and the Part-Time Act in this article) has its source not only in the equality clause (Art.14) but also the right to work and the obligation of states regulating terms and conditions (Art.27 Para.1 and 2). This is illustrated by the fact that the principle of equal treatment was incorporated in the LSA whose basis was mainly Article 27 Paragraph 2 of the Constitution.

III. Employment Discrimination Law during the Postwar Period

A. The Principle of Equal Treatment in the LSA

Articles 3 and 4 of the LSA of 1947 declared the principle of equal treatment applied to labor contracts as follows:

(Equal Treatment)

Article 3. 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.

³ Regarding the Constitutional basis of Japanese employment and labour law, see Araki, *supra* note 1.

(Principle of Equal Wages for Men and Women)

Article 4. 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.

These articles were inserted to match international standards⁴. They also aimed to combat major types of discrimination which attracted social concern at that time, covering discrimination against persons from other Asian countries, that is to say, discrimination by reason of “nationality.” That is why Article 3 of the LSA listed “nationality” instead of “race,” although nationality has been construed as including race by major labor scholars after that.⁵ The word “social status” was added because there had been discrimination against persons originated from the lowest class under the feudal system. Discrimination by reason of “creed” was interpreted as covering discrimination based on workers’ political opinions and thus unfavorable treatment against leftists, which prevailed with the influence of the red purge right after the War, became illegal.

Japanese employment equality law during the post-war era, however, had limitations with regard to its concept of discrimination, scope of application and breadth of forbidden grounds. It can be analyzed to have started taking the employment policy approach rather than the human rights approach.

B. Concept of Discrimination: Cases of Wage Discrimination

Discriminatory treatment (dismissal, demotion and the like) in violation of the foregoing articles is nullified (LSA Art.13). When there is differentiation in wages by reason of prohibited grounds and preferred groups’ wages are determined by a clearly articulated rule, discriminated workers can demand equal treatment with preferred workers. Discriminatory treatment can also give rise to responsibility in damages as a tort (Civil Code Art.709).

What is difficult for discriminated workers is that they bear the burden of proof for unfavorable treatment “by reason of” prohibited grounds, that is to say, discriminatory intent. Japanese courts have devised the imposition of this burden on employers de facto under certain circumstances. Yet this attempt was not always successful. This point will be illustrated with reference to wage discrimination cases.

1. General Wage Systems

A brief overview of Japanese wage systems⁶ will help us to understand how this limit has been revealed in cases of wage discrimination. In Japan, normally, basic wages for regular workers are divided into basic wages and various allowances regularly paid. Basic wages have been decided not only by contents of jobs performed by workers; they consist of two types of wages; age/seniority-based wages that increase automatically in accordance with workers’ age or length of service; and skill-based wages determined under the “skill-based grade system.” Besides those wages, various allowances are paid according to workers’ personal circumstances, such as family allowances and housing allowances. In short, Japanese wage systems have had their basic idea in providing workers with the security of their life; as

⁴ For example, the principle of equal remuneration for men and women for equal work or equal value had been already confirmed in the 1919 Treaty of Versailles. The Declaration of Philadelphia (1944) had provided that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”.

⁵ Kazuo Sugeno (translated by Leo Kanowitz), *Japanese Employment And Labor Law* 148 (2002).

⁶ See Takashi Araki, *Labor And Employment Law in Japan* 70-73 (2002).

a (male) worker gets older, more dependent relatives are added to his family, and their increasing living expenses can be covered by age/seniority-based wages and family/housing allowances⁷.

In order to provide incentives for improved performance, basic wages systems were gradually modified to reflect an individual's skill and performance: the "skill-based grade system." This system has a certain number of grades (e.g. A-G), which are further divided into subgrades (A1-A5, B1-B5, etc.), both of which reflect workers' level of skill. In order to move to a higher grade, workers must fulfill certain requirements and undergo evaluation. A certain amount of wages has been, however, dependent on worker's seniority, because it had the merit of being impartial; promotions to higher grades are decided considering the worker's length of service, and workers can automatically be raised to a higher subgrade after spending the maximum period in a particular subgrade. Meanwhile, employers enjoy discretion in deciding who deserves pay raises in a shorter period.

2. Typical Forms of Discrimination

The typical forms of wage discrimination involved the topping off for women in an age/seniority-based wage system and the payment of housing and family allowances to men only⁸. In one district court case, the amount of age-based wage was previously topped off when the employee reached the age of 26 only for employees who were not "heads of households" and then, only for employees whose work areas were limited⁹. It was presumed that the employer, in adopting both policies, "recognized" that they adversely affected women, and thus deliberately discriminated against women in violation of Article 4 of the LSA. In another case, with regard to the payment of a family allowance to an employee who was a head of household, the employer treated only male employees as heads of households if the income of the employee's spouse exceeded the non taxable level¹⁰. This practice was also presumed to be intentional discrimination.

Furthermore, because employers have margin of discretion under the "skill-based grade system," establishing discriminatory intent required a reasonable presumption. Where there was a great wage disparity between men and women (in some cases between leftist workers and workers not on that wing), the judicial decisions, in view of difficulty of proof on employees' side, held that it was deemed to be the product of discrimination on the grounds of sex (or creed), unless the employer offered specific proof that it was based on differences in the contents of the jobs or the individual employees' poor performances¹¹.

Thus, courts struck down not only overtly discriminatory wage policies but also covertly discriminatory policies. In contrast, where the payment of a family allowance depended on whether he or she is a head of household supporting family members "in fact," it was not held unreasonable in light of the family allowance's object and was not considered to constitute discriminatory treatment against women¹². Although apparently more men could comply with this "head of household" requirement than women, this type of wage system which uses

⁷ Wages as a means to satisfy workers' needs have developed under the guidance of the Japanese government during the War, when it wanted individual workers to fully perform their occupational duties. These systems continued after the War at trade unions' assertion, since workers were hard pressed to support themselves and their families then. Keiichiro Hamaguchi, "Nenrei Sabetsu" 79-3 *Horitsu Jiho* 53 (2007).

⁸ Sugeno, *supra* note 5, 162; Araki, *supra* note 6, 106ff.

⁹ The *Sanyo Bussan* case, Tokyo District Court (16 Jun 1994) 651 *Rohan* 15.

¹⁰ The *Iwate Ginko* case, Sendai High Court (10 Jan 1992) 43-1 *Rominshu* 1.

¹¹ The *Shiba Shinyo Kinko* case, Tokyo High Court (12 Dec. 2000) 796 *Rohan* 5.

¹² The *Nissan Jidosha* case, Tokyo District Court (26 Jan. 1989) 40-1 *Rominshu* 1.

sex-neutral criteria could not be judged as unlawful without the concept of indirect discrimination.

C. Scope of application

1. “Freedom of Contract” Supremacy

An important issue concerning Article 3 of the LSA has been whether an employer may deny employing a worker because of the worker’s beliefs or creed, nationality or social status.

The Mitsubishi Jushi Case¹³ involved denial of employment of a worker who hid his campus activism history at a job interview. The firm refused to hire him because it came out that he had been telling a lie at the interview. Denial of employment for such reasons was asserted to violate the principle of equal treatment in the LSA as well as the constitutional guarantees of freedom of beliefs (Art.19) and the equality clause (Art.14). The Supreme Court stated that fundamental human rights prescribed by the constitution did not directly apply to the acts of private persons. Moreover, the court handed down the verdict that the principle of equal treatment in the LSA was limited to post-hiring working conditions, and did not restrict hiring. In this way, the limitation of the principle of equal treatment articulated in the LSA, which came from Article 27 of the Constitution, was revealed¹⁴.

2. Sex-Based Practices other than Wage Discrimination:

The reach of Article 4 of the LSA was restricted to sex wage discrimination, since it was considered at its enactment that a conclusive anti-sex discrimination act would have contradicted the LSA’s protective provisions for women such as prohibition of night work. However, the then widespread discriminatory practices, that is to say, mandatory retirement upon marriage or an earlier retirement age only for women was nullified because of disturbance of the public order (Civil Code Art.90¹⁵) imbued with the ideal of Article 14 of the Constitution prohibiting discrimination on the basis of sex.

On another front, this case law was not effective in eliminating all types of sex discrimination. For instance, female-targeted redundancy dismissal was held not to be illegal because of business necessity¹⁶. Wage disparity between men and women did not was held not to be against public policy in the firms with sex-segregated personnel system for men and women¹⁷. In such a case, wage disparity was considered merely a result of discrimination against women during the process of hiring and therefore out of the reach of the case law for equal treatment¹⁸.

D. Forbidden Grounds

Article 3 of the LSA put only three grounds in the catalogue of discrimination. Discrimination on other grounds, such as age, disability and sexual orientation, was not

¹³ The *Mitsubishi Jushi* case, Supreme Court (12 Dec. 1973) 27-11 *Minshu* 1536.

¹⁴ The Supreme Court has maintained this attitude, holding that the Trade Union Act, in connection with the prohibition of employers’ unfair labor practices did not clearly bar employers from refusing to hire workers because of their being union members. The *JR* case, Supreme Court (22 Dec. 2003) 57-11 *Minshu* 2335. That is why Japan have not ratified the Discrimination (Employment and Occupation) Convention (ILO No. 111) yet.

¹⁵ This article can be invoked to nullify a contractual provision repugnant to the public order and good morals of the society.

¹⁶ The *Koga Kogyo* case, Supreme Court (15 Dec. 1977) 968 *Rokeisoku* 9.

¹⁷ The *Nihon Tekko Renmei* case, Tokyo District Court (4 Dec. 1986) 37-6 *Rominshu* 512.

¹⁸ Wage gap between male and female was 64.2% according to the wage survey in 2005. JILPT, *Kokusai Rodo Hikaku* 268 (2007).

covered. In its legislative process it was argued that age-based practice, such as low wages for younger workers, should be banned. Yet, since age-based employment practice was then widespread, this opinion was not adopted.

Against this legal background, employers, could lawfully maintain or begin to set mandatory retirement systems after World War II¹⁹. The practice of mandatory retirement at the age of 50 or 55, which appeared during the recession in the early 20th century as a means of company restructuring, was once abolished during the war, and revived again, because of intensive restructuring of the superfluous workforce. Trade unions also accepted mandatory retirement systems as desirable to acquire employment security and household wages until that age.

When all of the workers in a firm participated in a trade union which concluded a collective agreement containing a mandatory retirement clause, employers could retire those workers by the normative effect of the agreement (Trade Union Act Art.16). In addition, firms could resort to changes of “work rules” in cases where no trade unions existed at the workplace or where trade unions at the workplace opposed the introduction of mandatory retirement. “Work rules” are what should be drawn up by employers who continuously employ 10 or more workers with respect to specified items (the LSA Art.89). The Supreme Court stated while the unilateral imposition of disadvantageous working conditions by newly drawn up or changed work rules is not permitted, nevertheless because firms need to unify working conditions, when particular work rules are reasonable, the new rules should be applied to workers including those who do not give consent to the rules^{20,21}. The court tested the reasonableness of mandatory retirement at the age of 55 under this work rules theory, and decided that the mandatory retirement systems, which enable employers to maintain appropriate personnel systems under seniority-based wage systems, could not be said to be unreasonable.

On the other hand, employment security until mandatory retirement had been realized through restraints on dismissals²². Following Japan’s defeat in the War, when there was shortage of food and employment opportunities, Japanese courts had recognized a need to protect workers from arbitrary dismissals by invoking the general clause of abuse of rights (Civil Code Art.1, Para.3). Employers have not been able to turn to dismissals if they were not admitted as the ultimate means to attain particular objectives.

A mandatory retirement age, from which workers could not escape through their own efforts, could be argued to be unlawful as overt discrimination. However, the test which mandatory retirement systems had to pass was merely a reasonableness test. The mandatory retirement system was approved as an integral part of the Japanese employment system, such as age/seniority wage systems, under this test. In addition, the age-based wage, which can be classified as “reverse age discrimination,” was not discussed in terms of its legality at all. It can be summed up that the employment policy approach was taken to deal with age-based employment practices.

¹⁹ A “mandatory retirement age” signifies a system that causes employment contract relations to terminate automatically, regardless of the worker’s wishes, when the worker reaches a certain age.

²⁰ The *Shuhoku Basu* case, Supreme Court Grand Bench (25 Dec. 1968) 22-13 *Minshu* 3459.

²¹ Regarding the work rules doctrine, see Araki, *supra* note 6, 51ff. This doctrine was codified in Articles 7,9, and 10 of the Labor Contracts Act which was introduced in November of 2007.

²² Regarding the development of this doctrine, Araki, *supra* note 6, 17ff.

IV. The Gradual Development of Employment Discrimination Legislation

A. Sex Discrimination Law

1. The Equality Act: from “Duty to Endeavor” to Compulsory Duty

The Equal Employment Opportunity Act (the Equality Act) was enacted in 1985 to conquer limits found in Article 4 of the LSA and the public policy theory mentioned above²³. The government’s effort to ratify the United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979) contributed to its enactment.

The original Equality Act, however, still indicated its character of the employment policy approach. First, while provisions with respect to training and education, fringe benefits, and retirement and dismissals were mandatory, employers were merely obliged to “endeavor” to treat men and women equally during the processes of recruiting, hiring, assignment and promotion. Second, the objective of the act was to “promote the welfare” of female workers and thus the act was construed as protecting only women. This interpretation, combined with the weakness of the “duty to endeavor” clause, allowed employers to hire only men for main career positions and pay high wages to them, while on the other hand employing only women for auxiliary positions and paying lower wages to them. This typical practice was judged not to constitute a tort even after its enactment²⁴. Then there was strong opposition that it conflicted with the traditional male-centered employment practices. Accordingly, it started as a product of compromise.

On the other hand, the “duty to endeavor” clauses were effective in changing workplace culture and building social consensus that women should be given equal employment opportunities. Courts also considered female workers’ interests in a sexual harassment case holding that rumors disseminated by a male boss about a particular female worker’s wide acquaintance invades the female worker’s interest for comfortable work environment and constituted a tort (Civil Code Art.709).²⁵ The court ordered the male worker and his employer to pay compensation for non-economic damages to the female worker.

Accordingly, there was no strong opposition when the Equality Act was reinforced in 1997²⁶, adding a mandate of equal treatment at the time of recruitment and hiring, assignment and promotion, and the special provision that employers have to take measures to prevent sexual harassment and set in place grievance procedures for workers who are harassed (Art.11)²⁷.

2. Current Act: Conclusive Employment Discrimination Law

In June 2006, a bill reinforcing the Equality Act was passed and took effect in April 2007. The amended act prohibits not only discrimination against women but protects men as well as women from “discrimination on the basis of sex” (Articles 5-6).

²³ Regarding the development of the Equality Act, see Takashi Araki, “Equal Employment And Harmonization Of Work And Family Life: Japan’s Soft-law Approach”, 21 *Comp. Labor Law & Pol’y Journal* 451 (2000); Araki, *supra* note 6, 108ff; Hiroya Nakakubo, “ ‘Phase III’ Of The Japanese Equal Employment Opportunity Act” 4-3 *Japan Labor Review* 9 (2007).

²⁴ The *Nomura Shoken* case, Tokyo District Court (20 Feb. 2002) 822 *Rohan* 13.

²⁵ The *Kabushikigaisha Hei Kikaku* case, Fukuoka District Court (16 Apr. 1992) 607 *Rohan* 6.

²⁶ The protection for women in the LSA, such as the ban on night work, was abolished at the same time.

²⁷ Labor participation rates of women rose between 1980 and 2004, especially for the age bracket from 25 to 29, 49.2% rose to 74.0%. JILPT, *supra* note 18, 57.

The material scope of regulations were extended to “placement” including the “allocation of duties” and “grant of authority,” the “demotion” of workers, “change in job type or employment status” “encouragement of retirement” and “renewal of the labor contract” (Art.6) as well as recruiting and hiring, promotion, education and training, fringe benefits, and retirement and dismissal. New provisions were added to prohibit pregnancy or maternity-related discrimination (Art.9). Thus employers should not discriminate on the grounds of sex at almost all stages of employment unless they could demonstrate legitimate reasons justifying differential treatment.

The guidelines issued by the Ministry of Labor provide only narrow justifications; the following acts are permitted as positive actions and occupational requirements.

- a Favorable treatment for women in employment categories where women are substantially underrepresented (positive action).
- b Unfavorable treatment against men or women if:
 - b-1-1 requirements of authenticity call for the assignment of only a man or woman in the arts or entertainments;
 - b-1-2 requirements of security call for the assignment of only a man in a guarding role;
 - b-1-3 any other occupational characteristic, such as religious or moral, or work in a sports competition, calls for the assignment of only a man or woman, where there is the same degree of necessity as in the aforementioned items.
- b-2 statutes prohibit employers from assigning a man or woman to particular work²⁸.
- b-3 a job requires work in a particular foreign country whose manners and customs are so different that a man or a woman could not exercise his or her ability.

If a worker is treated unfavorably, she or he may take the procedure of the act to solve her or his dispute, asking for assistance (advice, guidance, or recommendations) from the Prefectural Labor Bureau and for mediation by the Dispute Adjustment Commission (Articles 17 and 18). They can also bring a suit claiming for nullification of unfavorable treatment against them and for damages²⁹.

In sum, it can be analyzed that the revisions of the Act brought a shift from the employment policy approach to the human rights approach in that: the purpose of the act became “the prohibition of discrimination on the basis of sex”; the scope of its application was extended to all aspects of employment; regulations against discrimination became mandatory³⁰.

²⁸ The LSA provides that an employer may not have a woman on underground work, work, heavy-materials lifting and work in places where harmful gas or dust (ex.lead) is generated (Art.64(2) and 64(3) Para.2); only women could be licensed to perform midwives (Health Nurses, Midwives and Nurses Act Art.3)

²⁹ They are not considered be entitled to claim for hiring or promotion, since employers’ discretionary acts should be respected and cannot be ordered by courts.

³⁰ This does not mean that there are no regulations or program to encourage women to work. Harmonization of work and family life has become an urgent policy issue with the declining fertility rate (1.32 in 2006). For instance, the LSA provides female workers with the right to 14 weeks of maternity leave (Art.65). The Child Care Act provides that a worker can make a request for parental leave for his or her child who is less than 1 year old (Art.5). While these leaves are unpaid, 60% of the previous income is paid during the maternity leave from the Health Insurance system; 40% of the previous income is paid during the parental leave from the Employment Insurance system. For details, see Araki, *supra* note 6, 119; Michiyo Morozumi, “Special Protection, Equality, And Beyond: Working Life And Parenthood Under Japanese Labor Law”, 27 *Comp. Labor Law & Pol’y Journal* 513 (2006).

3. Remaining Task: Indirect Discrimination

The most significant, but most criticized in the revision was the introduction of a new concept, so-called “indirect sex discrimination” into the Equality Act (Art.7).

This provision is applied to 1) a criterion concerning a person’s condition other than the person’s “sex” and 2) regarding matters listed in Article 5 or 6 (in the process of hiring, promotion and so forth), 3) which are specified by the Ordinance of the Ministry of Health, Labor, and Welfare (hereinafter “Minister of Labor”) as measures that may cause discrimination in effect by reason of sex, considering the proportion of men and women who satisfy the criterion and other factors. 4) Employers shall not take these measures except in cases where there is a legitimate reason, such as cases where it is specifically required for the purpose of performing the job in question or for the purpose of employment management of the firm³¹.

The significant feature of this new indirect sex discrimination concept is that it limited its application to “the measures specified by the Ordinance of the Minister of Labor.” Following the passage of the revised act, the Ministry issued a new ordinance including the following items (Art.2 of the Ordinance).

- 1) applying a criterion concerning body height, weight or physical capacity when recruiting or hiring workers
- 2) in the case of the employer adopting a dual career ladder system, requiring workers to be able to accept future transfers with a change of residence when recruiting or hiring workers or
- 3) requiring workers to have experiences of job relocation when deciding their promotion.

On the other hand, Article 7 does not apply, for instance, when a firm requires a college degree (such as engineering or literature) at the time of recruitment; adopts the criterion of “head of household” with regard to fringe benefits; differentiation in terms and conditions between part-time workers and regular workers. However, if a lawsuit is filed, a judge may decide these practices to be unlawful by turning to Article 90 or 709 of Civil Code. As the Ministry itself said, applicable items listed in the Ordinance will be reviewed in consideration for the development of the court cases in the future.

The background against which this concept was introduced into the bill was that the prohibition of indirect discrimination became an international trend. The concluding comments of the CEDAW (The UN Committee on the Elimination of Discrimination against Women) to Japan in 2003 recommended that domestic law incorporate a definition of discrimination against women to include direct and indirect discrimination. A committee of experts set at the Ministry released its report in 2004, which stated that prohibiting such discrimination was crucial for securing the equal treatment of men and women in employment. Meanwhile, employers showed concern about legal uncertainty. As a product of compromise, the scope of the provision was confined to the above three cases, which were officially

³¹ This article prescribes as follows. “An employer shall not take measures concerning the recruitment and hiring of workers or any of the matters listed in the items of the preceding Article which apply a criterion concerning a person’s condition other than the person’s sex and which are specified by the Ordinance of the Ministry of Health, Labor and Welfare as measures that may cause a discrimination in effect by reason of sex, considering the proportion of men and women who satisfy the criterion and other matters, except in cases where there is a legitimate reason to take such measures, such as where said measures are specifically required for the purpose of performing the relevant job in light of the nature of that job, or cases where such measures are specifically required for the purpose of employment management in light of the circumstances of the conduct of the employer’s business.” Regarding its meaning and effect, see Nakakubo, *supra* note 23, 15ff.

recognized to cause unfavorable outcomes for female workers³².

Furthermore, whether the new concept has a profound impact on employment practices depends on courts' interpretation of a "legitimate reason" to adopt these measures. One reason for the large wage disparity between men and women has been that firms adopt employment management differentiated by career track; a track for workers who carry prospective jobs and could be transferred to far workplaces has been chosen mainly by male workers; and another track for workers who carry auxiliary jobs at workplaces limited to the commutable area was chosen by female workers. Whether this separate employment management (the case of (2) above) can be corrected through new indirect sex discrimination concept or not is not completely articulated by Article or the Ordinance, thus being left to courts' interpretation of Article 7.

The Minister of Labor has given guidelines for cases in which it is recognized that no legitimate reason exists; in the case of 2) above, for instance, a company cannot claim to have a legitimate reason if it has no branches or regional offices in wide areas and has no plans to have transfers in the foreseeable future; work experience in various regions or in local factories are not necessary to perform management jobs; personnel rotation is not necessary for its business operation. These cases, however, can give rise to responsibility for damages even under the former Equality Act, since it can be said that an employer "deliberately" adopted the meaningless employment category to disguise sex discrimination. In the case that the separate track is genuine, whether female workers with auxiliary jobs can invoke Article 7 to recover the pay difference is uncertain.

Thus, it is anticipated that the indirect discrimination concept will be nurtured in the course of accumulated court decisions and the Ordinance and Guidelines revisions in the future.

B. Improvement of Terms and Conditions for Part-time Workers

1. Legal Background

The other major reason for wage disparity between both sexes is that many women work as part-time workers³³. There is a huge difference in wages between part-time and regular workers, since part-time workers receive no age-based pay rises, bonuses or retirement allowances;³⁴ and part-time workers fill about half the number of female workers³⁵.

Japan has had no explicit provision prohibiting discrimination against part-time workers. According to the general theoretical interpretation of "social status," prohibited as a ground for discrimination by Article 3 of the LSA, the classification of "part-time worker" is not contained, since "social status" was intended to restrict differences in treatment based on the

³² Regarding the criticism against the confinement of indirect discrimination to certain cases, see Mutsuko Asakura, "Kintoho no Nijunen" Sayaka Dake & Shigeto Tanaka (eds.), *Koyo Shakai Hosyo to Gender* 35, 43 (2007).

³³ Regarding the legal protection for part-time workers, see Kazuo Sugeno & Yasuo Suwa, "Part-Time And Other Non-Regular Workers In Japan: An Issue In A System Centered On The Internal Labour Market" JILL Forum Paper No.8 (1997); Mutsuko Asakura, "Gender And Diversification Of Labour Forms In Japan," in Joanne Conaghan and Kerry Rittich (eds.), *Labour Law, Work, And Family: Critical And Comparative Perspectives* 177 (2005).

³⁴ The wage gap between full- and part-time workers (female) was 65.7% according to the wage survey in 2003. JILPT, *supra* note 18, 269.

³⁵ According to the part-time workers (defined as workers whose working time is less than regular workers) survey in 2006, rates of part-time workers rose from 22.8% in 2001 to 25.6% in 2006. 46.1% of female workers work part-time, while 11.2% of male workers part-time.

ground from which workers cannot escape by an exercise of one's own will³⁶. Furthermore, it was hard to restrict discrimination against part-time workers through the concept of indirect sex discrimination on the grounds that women predominate among part-time workers. Article 4 of the LSA prohibiting wage discrimination between men and women has not been interpreted as prohibiting indirect discrimination. In the revised Equality Act, the items of indirect sex discrimination were limited to the three cases mentioned above.

From a comparative perspective, it might seem odd that part-time workers are not covered by the same collective agreements as regular workers in the same establishment. As mentioned above, a collective agreement has a normative effect on an individual employment contract only when he or she is a union member. Part-time workers, who usually do not participate in regular workers' unions, do not enjoy the same working conditions. Although Article 17 of the Trade Union Act provides that the effect of a collective agreement concluded with the majority union are extended to members of the other union or non-union members, this extension of collective agreements is limited to the "same type of workers" in the same establishment. The general binding effect is not exerted on part-time workers who are not construed as the "same type of workers" as regular workers.

Another way to redress the wage disparity has been that part-time employees resort to the provision of torts to claim for damages. Especially in cases of "quasi-part-time work," where part-timers perform the same work for almost the same hours as regular employees, differentiation in wages was raised as an unfair practice. In the Nagano District Court's Ueda Branch in 1996, there was a case in which female non-regular workers, who worked in production line nearly full-time and underwent renewals of their fixed-term contracts, received far lower compensation than regular employees³⁷. This decision stated that if the wage amount was below the 80% of the wage of regular workers with the same years of service, this would contravene the ideal of equal treatment underlying the provisions of the LSA, and constitute a tort (Civil Code Art. 709). Those employees could demand the damages covering up to 80% of the wage difference.

On the other hand, in a case of letter-delivering part-time employees with three-month terms, who engage in almost the same work for almost the same working time as the regular employees, but received only half the amount of the regular employees' wages, courts did not affirm the plaintiffs' claim for damages, stressing that the ideal of equal treatment did not exist and that the decision of which wage systems should be adopted in each employment category should be left to firms; thus the principle of freedom of contracts should be applied³⁸.

Thus to redress the wage disparity, legislation that demands equal treatment of regular workers and non-regular employees is required. This discrimination-based approach is being gradually developed in recent years.

2. Statutory Regulations: "Duty to Endeavor"

The Part-Time Act enacted in 1993 to improve part-time workers' conditions had required employers to consider only the "balance" between part-time workers and regular workers. The Research Group set at the Ministry issued a report in 2002 stating the need for labor and management to reach a consensus to bring about "treatment proportionate to work performed" regardless of whether employees are regular or part-time, and the need to create

³⁶ Sugeno, *supra* note 5, 150.

³⁷ The *Maruko Keihoki* case, Nagano District Court Ueda Branch (15 Mar. 1996) 690 *Rohan* 32.

³⁸ The *Nihon Yubin Teisou* case, Osaka District Court (22 May 2002) 830 *Rohan* 22.

“Japanese rules for equal treatment” suited to the particular Japanese situation. On the other hand, this report stated that prompt enactment of these equal treatment rules would be difficult, and only guidelines were introduced in 2003 as follows:

- (1) when personnel systems are not different from those of regular employees, employers shall endeavor to guarantee equal treatment including unification of methods for deciding terms and conditions of employment”;
- (2) when those systems are different, they shall treat employees in accordance with the degree of difference.

The underlying idea in this report was as follows. Regular employees’ age/seniority-based wages enable them to maintain the same amount of wages irrespective of flexible transfers and to be motivated for long-term employment. On the other hand, even if part-time employees’ job functions are the same as regular employees, part-time employees are expected neither to work over a long term nor to accept transfers with a change of residence. Under this circumstance, there is a case where differential treatment between regular employees and part-time employees can be reasonably justified even if their job contents are comparable. On the other hand, some cases show a large wage disparity despite that there is no difference with respect to responsibilities (case (1) mentioned above). In other cases there is lack of proportionality; that is to say, too much differentiation in terms and conditions considering the real difference in their responsibility (case (2) mentioned above).

Two reasons were put forward to explain why this policy was adopted: effective use of human resource and a correction of the wage gap. In some cases, for instance, older workers and women with high skills might not even start working as part-time employees if they are not fairly treated. In addition, part-time employees unsatisfied with unjustified treatment against them will not be motivated to work satisfactorily. Unreasonable treatment because of the employment category may lead to ineffective use of human resources. Further, among part-time workers are not only persons who put work-life balance before career development, but also persons who entered this employment type involuntarily because of lack of employment opportunities following long-term recession after the collapse of the bubble economy.

Since this act only prescribed that proprietors could receive administrative guidance, it was not generally construed as a basis invoked to demand equal treatment with regular workers.

3. Current Act: Mixture of “Duty to Endeavor” and Compulsory Duty

With the increasing social concern about the enlarged income gap among nations and the intensified struggle between two major political parties, an important revision of the Part-Time Act was adopted in June of 2007 making the rule (1) above mentioned into compulsory one. The current act regulates working conditions of “part-time employees with the same job functions” by dividing them into three types.

First, with regard to “part-time employees with the same job functions” “who shall be equated with regular employees” a proprietor shall not engage in discriminatory treatment with respect to decision of pay, implementation of education and training, access to welfare benefit facilities and other treatment against them (Art.8 Para.1). This provision covers part-time employees (1) who engage in work with the same contents and the same level of responsibility such as over-time work (hereinafter “job functions”) as the regular employees employed in the same establishment (hereinafter “part-time employees with the same job functions”), 2) under indefinite contracts with the proprietors and 3) whose job functions and placements are, in view of the practices in the establishment and other contexts, possible to be

changed within the same limits as those of regular employees, during a total period until the part-time employees' relations with the proprietors terminate. Indefinite labor contracts shall embrace definite labor contracts, which in view of social order should be identified as indefinite labor contracts, through definite contracts' repeated renewals (Art.8 Para.2). Part-time employees under this category can demand equal treatment with regular employees relying on this provision.

Second, there lies the intermediate category of "part-time employees with the same job functions." With regard to employees who comply with the requirement (1) "part-time employees with the same job functions," but do not satisfy the requirement (2) indefinite contracts and (3) transferability, proprietors incur only "administrative duty" "duty to endeavor" and "duty to consider."

In a case where proprietors implement the education and training for regular employees to provide them with abilities necessary to perform the employees' job functions, they must implement the same ones for their part-time employees under this category (Art.10 Para.2), but part-time employees will not be able to demand equal education invoking this article in a lawsuit. In addition, proprietors have merely "a duty to consider" giving them the chance to access to welfare benefit facilities (facilities for meals, workers lounges) which are accessible by their regular workers (Art.11). Furthermore, when this category of part-time employees' job contents and placements are, in view of the practices in the establishment and other contexts, possible to be changed within the same limit as those of regular employees, but only during a certain period of employment with the proprietors (i.e., closer to the first category), a proprietor "shall endeavor" to decide the wages of part-time workers under the same system as the regular employees' system (Art.9 Para.1). Failure to fulfill these duties is taken into consideration in the process of assistance (advice, guidance, or recommendations) from the Prefectural Labor Bureau and for mediation by the dispute Adjustment Commission(Art.21-22; the "duty to endeavor" is excluded from this process).

Third, with regard to part-time employees not falling under the first or second category, proprietors incur only "duty to endeavor." They shall endeavor to decide wages and implement education and training for part-time employees in due consideration of part-time workers' job functions, job performance, their motivation, ability or experience, while considering balance with regular employees (Art.9 Para.2, Art.10 Para.2) as well as having the duty to consider with respect to welfare benefit facilities (Art.11).

Other means to improve part-time employees' status were taken. With regard to all the categories of part-time employees, to promote their conversion into regular employees, proprietors shall take one of the measures; when they recruit workers, they shall notify the job contents and terms and conditions to their part-time employees; or when they assign new regular workers, they shall give a chance for part-time employees to make a request for engagement in that work; or they shall implement tests for the conversion of part-time employees with certain qualifications (Art.12). Proprietors have an obligation to explain considerations pertinent to all the duties mentioned above (Art.13).

Furthermore, the Labor Contract Act which was introduced in November of 2007 to codify several judge-made doctrines on labor contracts, eventually included the provision as follows, as a product of negotiations between the two major parties.

Article 4 (2) At the conclusions or changes of labor contracts employers and employees shall consider the balance in accordance with actual conditions of employment.

Since this provision is positioned at the "principle" part, which usually sets no rights or

obligations but only spiritual or ideal provisions, and thus its meaning and effect is ambiguous, there is only the possibility that this law's idea of proportionality is imbued with the interpretation of the tort clause (Civil Code Art.709).

Thus, to put it briefly, differential treatment between regular employees and part-time employees with the same job functions are not unlawful under the act in both cases where the latter's contracts are not indefinite or where their possibility of transfers is not comparable with regular employees. Given that only apparently arbitrary treatment is absolutely forbidden, and other differential treatment is regulated by non-intrusive administrative procedures, it can be said that the employment policy approach has been taken in case of discrimination on the grounds of employment category. This approach, which might be evaluated as inadequate to the task of bringing about proportionate treatment, meanwhile, seems fit to attain policy objectives, such as efficient utilization of human resource or redress of wage gaps.

C. Stabilization of Employment for Older Persons

1. Raise of Mandatory Retirement Age to the Age of 60

Promoting the employment of older persons has become an important political and economic concern in Japan as mentioned above³⁹. In 1986 was passed the Older Persons Act⁴⁰, which required employers to "endeavor" to set a retirement age of 60 years old or over by lifting up the then widespread retirement age of 55 years. With trade unions' strong assertions, administrative guidance and promotions provided to employers, and the subsidies from the Employment Insurance, mandatory retirement age at the age of 60 was realized in most firms. The 1994 revision of the Older Persons Act finally mandated the mandatory retirement age to be 60 or older providing that when a mandatory retirement age is set by an employer, it cannot be "below the age of 60" (Art.8 (former Art.4)).

2. Measures for Persons between the Age of 60 and 65

As the population rapidly ages, it became inevitable to increase the age limit for the commencement of old-age pensions. The pensionable age has been raised from 60 to 65 since 2001. Therefore, employment security for workers aged between 60 and 65 became an urgent concern. First, the revision of the Older Persons Act of 1990 created employers' duty to "endeavor" to continue employment of those who reached the age of 60 and are below 65. In order to provide economic incentives, the employment stabilization programs under the Employment Insurance Act subsidize employers who continue employing workers past the age of 60. Since this effort-making provision was not so effective, the revision of the act of 2004 finally transformed it into compulsory one as follows (Art.9).

In cases where the employer fixes the retirement age (limited to under 65 years old), he or she shall conduct any one of the measures listed in the items below in order to secure stable employment for older workers until the age of 65:

- (1) raising the retirement age;
- (2) introduction of a continuous employment system (refers to the system of

³⁹ Labor force participation rate in 2004 was 76.3% for the age bracket 55 to 59; 54.7% for the bracket 60 to 64. JILPT, *supra* note 18, 68.

⁴⁰ Regarding the developments of the Older Persons Act, see Kazuo Sugeno & Yasuo Suwa, "The Changing Japanese Labour Market And Legal Adjustments: The Retirement System" JILL Forum Paper No.3 (1994); Hideyuki Morito, "Graying Japan, Swaying The Policymaker," 16-1 *The International Journal Of Comparative Labour Law And Industrial Relations* 25 (2000); Noboru Yamashita, *Act Concerning Stabilization of Employment of Older Persons*" 4-3 *Japan Labor Review* 71 (2007).

continuing to employ an older person wishing to be employed following employee's retirement); or

(3) abolition of the retirement age.

“Continuous employment systems”, for example, include conclusions of fixed-term contracts with retiring employees at the age of 60.

Meanwhile, this provision reflects the reserved attitude of the government toward the promotion of employment of older persons. First, the effect of violation of this provision is vague. A firm which does not introduce any measures for securing employment for older persons may receive administrative guidance or recommendation, but can retired persons file a lawsuit to demand that ex-employers not retire them, or rehire them? The Ministry of Labor officially states that the above provision merely obliges employers to introduce measures, but not give individuals rights to demand employment. There is a possibility that courts examine individual cases in view of work rules theory, considering that the firms have not yet introduced measures for securing employment for older persons, and they might order employers to pay compensation for non-economic damages to the retired employees; however, Article 9 will not enable courts to nullify a mandatory retirement age in every case.

In addition, Article 9 allows employers to select the employees who can continue working after mandatory retirement age when it has designated the standards concerning older persons who are subject to the continuous employment system by a contract concluded with a labor union organized by a majority of workers or by a written agreement concluded with the person representing a majority of the workers (Art.9 Para.2)⁴¹.

Thus this act neither abolishes the mandatory retirement age nor extends employment of all workers to the age of 65. In the legislative process, the business environment amidst global competition and diverse employment management were referred as a reason to give employers flexibility. Mandatory retirement, as an exit of long-term employment and seniority-based wages, has been an integral part of Japanese employment system. There were concerns that its abolishment would have disrupted general employment practices significantly.

3. Reinforcement of Regulations on Age Limits for Hiring

Apart from mandatory retirement, regulations against age limits for hiring have been reinforced in recent years. Subsequent to the collapse of the bubble economy, persons over 40 years of age, once unemployed, found it difficult to find new jobs because employers often set age limits for recruitment. In addition, persons in their 30s—so-called “older younger persons”—who had found it quite difficult to obtain a job at the time of their graduation, have sometimes not been able to obtain stable employment yet since then. The normal recruiting practices in Japanese firms⁴² had an adverse impact on those workers. In the case of long-term regular workers, recruitment activities usually begin during the year prior to graduation. New recruits enter their companies immediately following graduation from school. Thus “older younger persons” who graduated from high schools or colleges many years ago, met difficulties even in the current relatively upward economy.

Under this circumstance, labor economists and trade unions began to contend that Japan should introduce anti-discrimination laws to abolish the practice of imposing such age limits.

⁴¹ According to the survey in 2006, 93% of firms with 300 workers or more introduced the continuous employment system rather than elimination or extension of mandatory retirement age. Eighty percent of these firms established selection criteria.

⁴² See Araki, *supra* note 6, 59-60.

Thus, the Measure Act was revised to provide that proprietors must, when it is regarded as necessary in order for workers to effectively display their abilities, “endeavor to provide equal opportunity” to workers in relation to recruitment and employment, irrespective of age (Art.7). When proprietors set age limits for recruitment, officials of public employment organizations could ask them to write in reasons for those limits on their help-wanted ads.

However, guidelines of the Ministry set 10 justifiable reasons, for example, cases where age limits are necessary to keep an appropriate age balance among the workforce, where wage systems would have to be modified because age-related pay systems in the establishment are not suitable for hiring middle-aged or older persons. Therefore, this provision was criticized for having the character of being a “duty to endeavor” and having too many exemptions⁴³. Thus the 2004 revision of the Older Persons Act obliged proprietors to explain for the reasons for the age limits to applicants. Furthermore, in June of 2007, the provision of the Measure Act was revised to be compulsory as follows.

Article 10. Proprietors must, when it is regarded as necessary under the Ordinance of Ministry of Welfare and Labor in order for workers to effectively display their abilities, provide equal opportunity to workers in relation to recruitment and employment, irrespective of age, in accordance with the Ordinance of Ministry of Welfare and Labor.

This provision was reinforced in that when employers deny employing persons on the grounds of workers’ age, it will constitute a tort (Civil Code Art.709). However, the Ordinance issued on this article maintained relatively broad exemptions; in the following cases proprietors can

- (1) set age limits for hiring in accordance with mandatory retirement age;
- (2) recruit only young graduates to give them skill developments over a long period of their service;
- (3) hire persons in the particular underrepresented age bracket in view of succession of skills and knowledge;
- (4) employ only persons at the age of 60 or above or the persons in certain age brackets, the employment of which is encouraged by employment policies.

In addition, in the following situations in which even sex discrimination can be justified, proprietors can set age limits.

- (5) there is a requirement for authenticity in the arts or entertainments;
- (6) there is a statutory age limit for the particular work.

Moreover, this provision does not clearly cover indirect age discrimination, recruitments only for new graduates, age-neutral practices, will not be construed as unlawful per se.

Over all, regulations on age-based treatment appear to be merely patchwork rather than a conclusive anti-age discrimination law. Employers enjoy the possibility of maintaining age-based practices such as age-based pay. “Reverse age discrimination” is not an issue. Mandatory retirement at the age of 60 is still lawful with the introduction of continuous employment systems until the age of 65. Age limits for hiring can be set if they are exempted for reasons listed in the Ordinance. Here again, however, the employment policy approach has been taken as a suitable means to stabilize the employment of older persons.

⁴³ Hideyuki Morito, “Koyo Seisaku Toshiteno ‘Nenrei Sabetsu Kinshi’,” in Atsushi Seike (ed.), *Syogai Geneki Jidai No Koyo Seisaku* 85, 126 (2001).

D. Promotion of the Employment for Disabled Persons

With the international movement, promotion of the employment of disabled persons also has increasingly become an important issue. The principal act has been the Disabled Persons Act firstly adopted in 1960⁴⁴. The act requires the State, local public bodies and proprietors to employ a certain proportions of physically disabled or mentally disabled persons (). The number is determined by a rate fixed by the government ordinance; the employment rate for the state and local bodies is 2.1%; and for ordinary employers, 1.8%. Employers are required to report the employment situation of disabled persons to the Ministry once a year (Art.43 Para.5). The Minister may order an employer who has not achieved the required rate to formulate a hiring plan for disabled persons (Art.46). If that plan is not put into effect, it can make recommendations as to the proper execution of the plan.

The purpose of the Disabled Persons Act is to contribute to the occupational stability of the disabled⁴⁵ rather than regulate discrimination. Thus, firms can lawfully deny hiring qualified persons with disability by reason of their disability as far as the firms satisfy the requirements of employment rates for disabled persons or even when they do not satisfy it, all they have to do is merely pay the contribution⁴⁶. Thus also in the arena of disability law, the employment policy approach has prevailed in Japan.

V. Case Law

To understand the Japanese employment discrimination law correctly, complementary judge-made laws should be mentioned, although the results of their decisions are not certain depending on individual cases and judges' evaluations.

A. Age-based Practices

1. Older Persons-Targeted Redundancy

Whether older workers-targeted redundancy is unlawful or not depends on the application of adjustment dismissals doctrine. The revision of the LSA in 2003 provided that an objectively unreasonable or socially unacceptable dismissal was an abuse of the right to dismiss (Art.18(2))⁴⁷. With regard to employment adjustment dismissals, judicial decisions have been handed down that any adjustment dismissal is an abuse of the right to dismiss unless it meets the following four requirements. There must be business necessity; the employer is obligated to take various measures to avoid adjustment dismissals, such as implementation of transfers; the selection of those workers to be dismissed must be made on reasonable criteria; proper procedures are taken, such as consultation with trade unions.

Older workers-targeted redundancy triggered a discussion on whether the selection criteria "older workers" was reasonable or not, and satisfied the third requirement or not.

⁴⁴ The act was originally enacted as the act for "Physically Disabled Persons." The 1987 revision also covered mentally disabled persons.

⁴⁵ The Article 2 defines "disabled persons" as "those who, because of physical, intellectual and/or mental impairment, are subject to considerable restriction in their vocational life, or have great difficulty in leading a vocational life, over a long period of time".

⁴⁶ Proprietors with more than 300 workers must pay contributions for the employment of the disabled persons when they do not meet the employment rate in accordance with the reduced numbers (Arts.53 and 54). Meanwhile, when they exceed the standard rate, they are paid allowances (Arts.49 and 50).

⁴⁷ The "abuse of dismissal rights" doctrine was codified in the Labor Contract Act (Art.16) in 2007.

There have been several cases where its reasonableness was affirmed. The judges ruled that older workers' dismissals were necessary to save money because their wages were relatively high. However, in a recent case the court struck down the dismissal because older workers usually found it difficult to obtain new jobs, their ability did not deteriorate as a result of aging, and their disadvantages should at least be compensated by special early retirement allowances⁴⁸.

2. Wage-cuts

Another example of disadvantageous age-based practices is the wage-cut for the elderly⁴⁹. Traditional age- or length of service-based wage systems are being transformed into performance-based pay in recent years through changes of work rules or conclusions of collective agreements. The "Daishi Ginko Case" was the first where the Supreme Court showed their decision on this issue. The wages of those between the age of 55 and 60 were reduced in exchange for the extension of workable age from the age of 58 to 60⁵⁰. Courts weighed the disadvantage for the worker against the business necessity for changing the working conditions, considering interests of employment extension, and consequently decided that the reduction of wages as a reasonable modification has binding effect on workers. On the other hand, in the second Supreme Court case, where the wages of the elderly were cut by 30-40% of those paid under the former systems while wages of younger workers were increased, a decision was reached that the disadvantages were too great, and unfair in that only older employees were disadvantaged⁵¹.

Thus in cases of redundancy or reduction in wages targeting older employees, although there were no statutes prohibiting these practices and the tests which are applied here were no more than reasonable tests, some age practices could be nullified by courts' decisions.

B. Protection from Dismissals against Disabled Persons

Although there is no statute prohibiting discrimination on the grounds of disability, doctrine of abusive dismissal rights can fill the gap. One recent case involved a dismissal of a sand gathering driver with one weak eye which could not be corrected with eyeglasses⁵². Courts nullified the dismissal on the ground that the driver was qualified for the work, because the worker passed the skill test at the time of starting working at the company and had continued working for eight years and had just renewed the special driver's license at the time of the dismissal.

However, the level of protection based on this theory was not so high as that of anti-disability discrimination law with the concept of reasonable accommodation. For instance, a dismissal against a dental hygienist who visited many elementary schools on the grounds that she injured her spine and had to use a wheelchair was affirmed⁵³. She advocated that if pupils also had been seated in chairs, she would have been able to check their teeth. Courts held that this time-consuming way would not be effective for group dental checkups, and affirmed the effect of her dismissal.

⁴⁸ The *Varig Nihon Sisha* case, Tokyo High Court (19 Dec. 2001) 817 Rohan 5.

⁴⁹ Shinya Ouchi, "Restructuring Of Enterprises And Protection Of Working Conditions of Middle-Aged And Elderly Employees In Japan," 30 *Kobe University Law Review* 29 (1996).

⁵⁰ The *Daishi Ginko* case, Supreme Court (28 Feb. 1997) 51-2 *Minshu* 705.

⁵¹ The *Michinoku Ginko* case, Supreme Court (7 Sep. 2000) 54-7 *Minshu* 2075.

⁵² The *San Sekiyu* case, Sapporo High Court (11 May 2006) 938 *Rohan* 68.

⁵³ The *Yokohamashi Gakko Hokenkai* case, Tokyo High Court (19 Jan. 2005) 890 *Rohan* 58.

VI. Concluding Remarks

Japanese employment discrimination law has not been so strong an instrument to abolish discrimination as that in, for instance, the US or EU. The most serious issue is perhaps that Japanese courts have been conservative about the regulations on discrimination during the process of hiring. Besides the Equality Act on sex discrimination, there has been no legislative attempt to overturn the courts' decisions. In Japan, principle of freedom of contract predominates over the equality principle with regard to hiring process. Business interests are superior to human rights to equality, thus in this regard the employment policy approach and the human rights approach were intermingled in Japanese employment discrimination law.

Apart from this, Japanese law is prominent in that even sex discrimination has been gradually developed into a powerful "human rights approach." The Equality Act at the time of its enactment included many "duty to endeavor" clauses in consideration of then dominant employment practice such as short length of service of female workers, as a result of (voluntary in some cases) retirement upon marriage or childbirth. Formation of social consensus was necessary for these clauses to become compulsory.

This incremental approach seems to be reproduced in other types of discrimination recently: the concept of indirect sex discrimination is limited to only three types of treatment; regulations on age limits for hiring evolved from a "duty to endeavor" to be compulsory, allowing, however, employers to set age limits if there are justifiable reasons, such as an age balance of the workforce; mandatory retirement has not been yet eliminated completely. Regulations on equal treatment to part-time workers are only applied to part-time workers under indefinite contracts whose jobs, responsibilities are identical with those of regular workers. In addition, the Japanese employment discrimination law has left certain matters to the consultations between management and labor. For example, regulations on mandatory retirement age allow labor-employer agreements to set criteria about whose employment can be extended beyond mandatory retirement age.

The Japanese approach illustrated here might be supported as an effective means in a consensus-based society. On the other hand, opponents may criticize it as taking only lukewarm measures giving priority to management prerogatives.

Four points should be represented here, however.

First, equality issues being discussed currently can be considered as areas in which employers should enjoy a relatively broad margin of discretion. Age-based treatment affects everyone in the society, and is reasonable in some cases. Workers can choose their status as regular or part-time workers, at least in a theoretical sense. If widespread employment practice and labor market conditions could be taken into consideration in deciding whether these types of discrimination should be banned or not, it should be noted that these practices are deeply rooted in Japanese employment culture. A mandatory retirement age has been considered an integral part of the Japanese long-term employment system. In Japan, the typical work style of regular employees is not suitable for employees with family responsibilities because of their overtime work and broad work areas. That is why part-time workers or workers with auxiliary jobs are considered not to be in comparable situations with regular workers in many cases. Thus it has been difficult to declare that all the differences between different categories of employment are unfair.

Second, even with no compulsory anti-discrimination acts against certain types of discrimination, when particular acts are unfair from the judge's viewpoint, they can order

employers to compensate damages or nullify acts invoking the general clause such as public order (Art.90 of Civil Code), abuse of rights (Art. 1), and tort (Art.709). They can also turn to the labor contract doctrine such as reasonable tests of work rules.

Third, seemingly weak regulations, such as “duty to endeavor”, can play an important role in the development of discrimination law. Philosophies of “duty to endeavor” or “ideal provisions” in some statutes could be imbued with the interpretation of general clauses of the Civil Code. Especially in cases of indirect discrimination, there have been high expectations of the judicial role in the legislative process. Moreover, administrative efforts based on such clauses will contribute to consensus building among labor, management and citizens in the future.

Fourth, equality matters are thus addressed through the employment policy approach rather than the human rights approach in Japan. While this approach is sometimes weak in securing rights of individuals, it allows us to enjoy flexibility in selecting appropriate policies to attain the purposes of promotion of women, older people and the like, in view of built-in employment practices and labor market situations.