BYU Law Review

Volume 1986 | Issue 3 Article 16

9-1-1986

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Japan's New Equal Employment Opportunity Law: Real Weapon or Heirloom Sword?

Scholars sometimes compare law in Japan to an heirloom sword that is no more than an ornament or a prestige symbol used to make Japan appear respectable in Western eyes; it is taken out and shown to outsiders but is rarely, if ever, used.[1] This analogy accurately reflects Japan's inability to legally prevent sexual discrimination. Although the Japanese Constitution[2] specifically prohibits governmental sex discrimination,[3] and other laws require equal pay for equal work,[4] serious discrimination continues in Japan.

Various groups have tried to enact anti-discrimination legislation, but have failed for one reason or another.[5] However, the Japanese legislature recently passed the Equal Employment Opportunity Act (EEOA),[6] which calls for equality in job recruitment, training and promotion, and provides for equal working hours and equal access to fringe benefits provided by employers. This comment first examines the EEOA in light of the tradi-

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1. *E.g.*, T. KAWASHIMA, NIHONJIN NO HOISHIKI (JAPANESE LEGAL CONSCIOUSNESS) 47 (1967); Stevens, *Japanese Legal Systems and Traditions*, in CURRENT LEGAL ASPECTS OF DOING BUSINESS IN THE FAR EAST 13 (R. Allison ed. 1972).

2. Japan's present constitution, promulgated in 1946, was heavily influenced by General Douglas MacArthur and the Occupation Forces. It reflects not only the idea of equal rights for women, but also the concept of human rights as a whole, both of which are concepts foreign to traditional Japanese thought. Y. NODA, INTRODUCTION TO JAPANESE LAW 190, 195 (A. Angelo trans. 1976).

3. *See infra* notes 19-20 and accompanying text.

4. "The employer shall not discriminate women against men concerning wages by reason of the worker being a woman." Rōdō Kijun Hō (Labor Standards Act [hereinafter LSA]) art. 4, Law No. 49 of April 7, 1947; *see infra* notes 23-27 and accompanying text.

5. In 1976, a proposed bill (which included sanctions for violation) would have added "sex" as a prohibited type of discrimination to Article 3 of the LSA. Article 3 presently provides that "[n]o employer shall discriminate against or for any worker by reason of nationality, creed or social status in wages, working hours and other conditions." LSA, *supra* note 4, at art. 3.

6. This new law was passed by the Japanese legislature on May 17, 1985, with an effective date of April 1, 1986. The official name of the law in Japanese is *Kōyō no Bunya ni Okeru Danjō no Kinto na Kikai Oyobi Taigu no Kakuhō re Joshi Rōdōsha no Fukushi Zoshin Hō* (An Act for the Enhancement of the Welfare of Working Women, Including the Assurance of Equality of Opportunity and Treatment for Men and Women in Employment). The official English abbreviation is "Equal Employment Opportunity Act" [hereinafter EEOA]. All citations will be to the original Japanese text of the law; translations into English are by Kaoru Oba.

tional Japanese attitudes towards law and women, and the existing labor laws which it supplements and amends. It next examines the EEOA amendments to these laws, and the probable effect these amendments will have on Japanese society. The comment concludes that although the EEOA seems to introduce significant changes, the new law will probably not have great practical effect; the role of formal law in Japan and traditional Japanese attitudes towards law and women may well frustrate its implementation. However, the EEOA has focused society's attention on women's issues, and is thus a step[7] toward equal opportunity.

I. BACKGROUND: OVERVIEW OF JAPANESE CULTURE

Like most Japanese statutes, the EEOA can only be fully understood in the context of Japanese culture. One of the important initial aspects of that culture is that the "Japanese do not like law."[8] Except for lawyers and those possessing some refined knowledge of law, Japanese generally view law as an instrument of state-imposed constraint.[9] Law is thus synonymous with pain or penalty.[10]

In addition, the legal codes of other countries have heavily influenced Japanese law.[11] Several of these foreign laws were adopted wholesale without adapting them to Japanese society. Thus, a disparity developed between the laws as written in the books and the normal practices of Japanese society. A key to understanding the role of Japanese law lies in understanding this disparity, which is best described in the Japanese notions of *tatemae* and *honne*: *tatemae* is "the desired appearance of things," and *honne* is the "actual condition, the real thoughts, the motives that one has."[12] The inevitable disparity between

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7. For a fuller discussion of the importance that Japanese attach to doing things gradually and by steps, see *infra* note 102 (discussion of *nemawashi* (root binding)).

8. Y. NODA, *supra* note 2, at 160.

9. The association of law with constraint may be in part due to the fact that Japanese law descended from early Chinese codes, which were almost exclusively penal. Kim & Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L. & COMP. L.Q. 491, 504 (1979).

10. Y. NODA, *supra* note 2, at 159.

11. The laws and legal systems of France, Germany, England and the United States have been particularly influential. Y. NODA, *supra* note 2, at 41-62.

12. F. GIBNEY, MIRACLE BY DESIGN 12 (1982); *see also* W. AMES, POLICE AND COMMUNITY IN JAPAN 2 (1981) (the distinction between what is really occurring and what is professed to be occurring is most aptly expressed in the Japanese dichotomy of *tatemae* and *honne*).

these two concepts does not trouble the Japanese,[13] although they do try to satisfy the *honne* without compromising—at least on the surface—the *tatemae*.

In Japan, formal law is often more *tatemae* than it is *honne*. One observer comments that "[t]he rule of thumb seems to be that a man chooses to obey or disobey a law on the basis of the extent to which it accords with the facts of human existence [the *honne*]."[14]

This discrepancy between law and reality is at least partially responsible for the Japanese preference for conciliation (or mediation) as a method of dispute resolution. Professor Kawashima points out that "a wide discrepancy has existed between state law and the judicial system on the one hand, and operative social behavior on the other. Bearing this in mind, we can understand the popularity and function of conciliation procedure as an extra-judicial means of dispute resolution in Japan."[15]

This preference for mediation also results from the Japanese concept of harmony. Japanese culture is built on the spirit of *wa* (harmony or accord), and the resolution of a dispute requires the restoration of *wa* and mutual understanding.[16] The Japanese do not automatically take a dispute to court if they cannot work out a solution between themselves: "To their minds, settlement of disputes without arguing their points of view in a reasoned way and without fighting out their cases to the finish in court, is of supreme virtue."[17]

In this context, informal conciliation becomes crucial because "[i]t is obvious that a judicial decision does not fit and

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13. Diverse ideas introduced at different times and from different cultural settings have been able to coexist in the Japanese mind without any difficulty. The new idea is not structured with the preexisting ideas, which in turn were not structured with each other. Y. NODA, *supra* note 2, at 170 (citing M. MARUYAMA, NIHON NO SHISŌ (JAPANESE THOUGHT) 4 (1961)). Thus, in the Japanese mind, new formal laws (which are the *tatemae*) can coexist with preexisting ideas and informal rules (which are the *honne*).

14. I. BEN-DASAN, THE JAPANESE AND THE JEWS 99 (R. Gage transl. 1972).

15. Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 40 (A. von Mehren ed. 1963). Informal methods are also preferred because formal legal processes (such as litigation) emphasize the conflict between the parties, assign a moral fault which can be avoided in a compromise solution, and lead to a decision which makes clear who is right or wrong. Simply put, one of the parties will inevitably lose face, a result that can be avoided in a compromise solution achieved through mediation or conciliation. *Id.* at 41-43.

16. *Id.* at 44.

17. H. TANAKA, INTRODUCTION TO THE STUDY OF POSITIVE LAW (3d ed. 1974), *quoted in* THE JAPANESE LEGAL SYSTEM 261 (H. Tanaka ed. 1976).

even endangers relationships . . . . Because of the resulting disorganization of traditional social groups, resort to litigation has been condemned as morally wrong, subversive and rebellious."[18]

In summary, Japanese behavior does not readily conform to formal laws which are not in accordance with the realities of society. Therefore, any anti-discrimination law which is not founded in the realities of Japanese society will be likely to fail in application and merely provide Japanese society with an unreal appearance of modernity. This seeming aversion to formal law coupled with the Japanese need to achieve harmony results in the popularity of mediation as a method of dispute resolution. It is in light of these preferences that this comment will next examine the labor laws which preceeded the EEOA and the EEOA amendments to that law.

II. Pre-EEOA Law

The EEOA consists primarily of amendments to the already-existing Labor Standards Act (LSA) and the Working Women's Welfare Law (WWWL). In order to understand the impact of these amendments, a familiarity with some of the provisions of the pre-existing laws is necessary. Previous laws dealing with sex discrimination include the Kenpō (Japanese Constitution), the LSA, the WWWL and Article 90 of the Civil Code.

A. The Constitution

Unlike the United States Constitution, the Japanese Constitution explicitly prohibits discrimination on the basis of sex. Article 14 of the Constitution declares that "[a]ll of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin."[19]

This provision, largely a product of General MacArthur's influence after World War II,[20] introduced the concept of sexual equality into the Japanese legal system. But the provision is an example of *tatemae*: it maintains a respectable facade for Western eyes, but the Japanese seldom use it to combat discrimination.

Judicial construction of the clause has significantly weak-

18. Kawashima, *supra* note 15, at 278; *see also* Y. Noda, *supra* note 2, at 159.
19. Kenpō (Constitution) art. 14.
20. *See supra* note 2.

ened its potential impact. In *Moriaki v. Chief of Tateyama Ward*,[21] the Supreme Court held that this provision "is to be construed as prohibiting differentiation *without reasonable grounds therefor*. It does not prohibit some differential treatment in view of the nature of the matter."[22] Thus, instead of prohibiting discrimination, the constitution has been judicially construed to permit "reasonable" discrimination.

B. The Labor Standards Act

1. Article 4

Chapter VI of the Labor Standards Act (LSA) contains regulations of women's working conditions, most notably a provision mandating equal pay for equal work.[23] Like the EEOA, Article 4 of the LSA was promulgated in response to an international treaty.[24] The Japanese government cites this provision to support claims that it is trying to improve the situation of working women.

The Ministry of Labor claims that "[g]uidance and inspection are carried out to ensure the strict observance of equal pay for equal work,"[25] but Japan still ranks lowest among the industrialized nations in the ratio of women's to men's wages.[26] The primary reason is that women are prevented from ever reaching an "equal" position meriting equal pay.[27]

2. Protective Provisions

The LSA also contains several provisions limiting women's work in various ways. For example, these provisions limit women's holiday or overtime hours.[28] Also, women are not usually allowed to work underground or in what are termed "dangerous and harmful jobs."[29]

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21. 18 Sai-han Minshū 676, 678 (May 27, 1964).

22. *Id.* at 678 (emphasis added).

23. LSA, *supra* note 4, art. 4.

24. International Labor Organization Treaty No. 100 (Equal Remuneration).

25. Ministry of Labor, Official English Summary of the EEOA 1 (1984).

26. Japan Times, Dec. 4, 1984, at 4, col. 3.

27. Professor Frank Upham sums up the crux of the equal pay issue: "The problem, however, is getting equal work." F. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 184 (draft scheduled for publication in 1987).

28. LSA, *supra* note 4, art. 61.

29. *Id.* at arts. 63-64. Other examples of protective measures include not allowing women to work for six weeks after childbirth, providing them two thirty-minute nursing

Proponents of these restrictions argue that they are necessary for the "protection" of women and of maternity. Opponents maintain that the restrictions are just a thinly veiled means of legally discriminating against women, and are no longer necessary.[30]

C. *Working Women's Welfare Law*

The purpose of the Working Women's Welfare Law (WWWL) of 1972 was to "further the welfare and improve the status of working women."[31] The WWWL focuses on eliminating discriminatory employment practices and improving women's vocational abilities through counseling, vocational guidance and training. Amendments to those provisions constitute a significant part of the new EEOA.[32]

D. *Civil Code Article 90*

Article 90 of the Minpō (Civil Code) does not expressly prohibit sex discrimination, but it has been the primary legal weapon in the battle for equal opportunity employment. It provides that "[a] juristic act which has for its object such matters as are contrary to public policy or good morals is null and void."[33] Japanese courts have used it to strike down discriminatory employment contracts requiring women to retire upon marriage or pregnancy.

The court's reasoning in *Suzuki v. Sumitomo Cement Co.*[34] typifies how Japanese courts have used Article 90 in sex discrimination cases. In order to be hired, the female plaintiff Setsuko Suzuki signed a mandatory agreement requiring that she retire when she married. When she married five years later, she was fired because she refused to resign. The court decided that such a forced agreement "unreasonably" restricted a female employee's freedom to marry and that such "unreasonable discrimination" was "against public policy" and thus null and void under Article 90.[35]

Article 90 analysis focuses on the reasonableness of discrim-

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periods and leave for women who "suffer heavily" during menstruation. *Id.* at arts. 65-67.

30. *See infra* note 82 and accompanying text.

31. JAPAN MINISTRY OF LABOR, THE STATUS OF WOMEN IN JAPAN 22 (1983).

32. *See infra* notes 40-77 and accompanying text.

33. MINPŌ (Civil Code) art. 90, Law No. 89 of 1896 and Law No. 9 of 1898.

34. 17 Rōshū 1407 (Tokyo D. Ct. Dec. 20, 1966).

35. *Id.* at 1420.

inatory conduct. If discrimination is unreasonable then it is "contrary to public policy" and thus void. However, Article 90 may leave too much discretion to the courts. Japanese courts are not bound by prior factual determinations of reasonableness, so a plaintiff cannot rely absolutely on courts to follow earlier decisions. Furthermore, Article 90 is not capable of reaching beyond explicit sex-based policies to more subtle areas of discrimination such as job assignment, layoffs, on-the-job training and promotion. Nonetheless, Article 90 has been the most successful legal means of fighting discrimination in Japan.

Thus, even before the passage of the EEOA, Japanese law supposedly barred sexual discrimination, required equal pay for equal work, and refused to enforce discriminatory "juridical acts" which contravened public policy. However, these safeguards against discrimination are easily sidestepped. The constitution permits "reasonable" discrimination. The equal pay provision does not require employers to extend equal work to females. And plaintiffs have no assurance that a discriminatory act will be viewed as so unreasonable by the courts as to be "contrary to public policy." Some pre-EEOA labor provisions, such as the "protective" measures in the LSA, are even discriminatory on their face. A statutory provision such as the EEOA would seem to be the best way to deal with these problems, but the EEOA stops short of being an effective weapon in the fight against discrimination.

III. The EEOA Provisions

The EEOA is based upon a U.N. resolution calling on signatory countries to undertake "all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."[36] The Japanese government felt both domestic[37] and

36. United Nations Convention Concerning the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) (107th plen. mtg.) art. 2(f), at 193, 195, U.N. Doc. A/34/830 (1979) [hereinafter U.N. Convention].

37. The domestic pressure came from an increasing number of lawsuits being brought under Article 90, *see* F. Upham, *supra* note 27, at 190-213, and from an increasing number of young Japanese women frustrated by the difficulty in obtaining employment positions equal to their levels of skill and education (the Japanese government White Papers for 1980 recognized that women university graduates face difficulties in finding jobs "because of the limited number of corporations that employ them." White Papers of Japan 1980-81, at 164 (1982).

international[38] pressure to sign the resolution and to then ratify it by enacting similar provisions in Japanese law.

Although Japan signed the resolution, it is doubtful whether government officials actually desired to alter national labor law. Nevertheless, to the extent possible under present Japanese customs and practices,[39] the EEOA attempts to ensure equal employment opportunities for women.

A. Amendments to the Working Women's Welfare Law

The original Working Women's Welfare Law suggested various ways to improve the position of the female worker,[40] but rarely imposed more than a "duty" upon employers not to discriminate. The strongest measure requires only that an employer "shall endeavor" to follow the provisions.[41] The EEOA's amendments to the WWWL provide two different standards to be applied to discriminatory activity by employers. Similar to the WWWL, the first standard provides that in recruiting, hiring, assigning and promoting workers, employers "*should endeavor*" to treat female workers "on an equal footing with male workers."[42] Second, the EEOA amendments require that when providing training and fringe benefits, and in establishing mandatory retirement guidelines, employers "*shall not* treat female workers discriminatory [sic] from male workers on the ground that they are women."[43] Although it would appear that

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38. Japan is generally viewed as a country that is not avanced in its treatment of women: "For a country considered with most modern competitors in the global business arena, Japan's internal business environment remains an old-line bastion of male supremacy." New York Times, Feb. 24, 1985, at C1, col. 2. "In economic terms, Japan is an advanced country. But when it comes to the status of women, it's an underdeveloped nation," insists Mitsuko Yamaguchi, director of the Women's Suffrage Center, which promotes women's rights. 1984 Reuters Ltd., Jan. 15, 1984. According to the Director of the Ministry of Labor Women's Bureau, Japan would never have enacted an equal employment opportunity law before the end of the U.N. decade for women without the U.N. Convention.

39. *See supra* text accompanying notes 8-22 and *infra* text accompanying notes 47-76, 84-86, 90-93, 102.

40. Japan specialist Ezra Vogel characterizes the law as a "mere public relations" effort by the Japanese government. Informal conversation with Harvard University Professor Ezra Vogel (January 28, 1986).

41. *Id.*

42. EEOA, *supra* note 6, at art. 7. (emphasis added). In comparison, the U.N. Resolution calls for measures to ensure "the right to free choice of profession and employment, the right to promotion [and] job security." U.N. Convention, *supra* note 36, art. 11(1)(c), at 195.

43. EEOA, *supra* note 6, at art. 8. This provision is not as specific as the U.N. Reso-

the EEOA prohibits employer discrimination in training, fringe benefits and non-discriminatory retirement provisions, in reality neither of the two standards is likely to have much effect.

1. *The "Should Endeavor" Provisions*

The major weakness in the "should endeavor" provisions is that the victim of discrimination has no real remedy. The provision "does not provide a legal basis to demand damages,"[44] and the EEOA's mediation process does not extend to violations of the recruitment and hiring provisions.[45] Additionally, the "should endeavor" language is vague and is open to varying interpretations. For example, in the recruiting context the language might not even prohibit the common practice of advertising jobs "for males only," or "for females only." Employers could argue that they are "endeavoring" to give equal opportunity, but that changes must be gradual and consensual.[46]

Discrimination in job assignment and promotion, more than in hiring, poses serious problems to female workers in Japan.[47] Japanese men oppose placing women in business positions equal or superior to those of men.[48] A Mitsubishi spokesman explained why his company placed all ninety female college graduates hired in 1982 in secretarial or clerical positions: "They were hired under the category of secretarial work. We cannot go ahead with a higher-ranking recruitment at a time when many

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lution, which calls for measures to ensure "the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training." U.N. Convention, *supra* note 36, art. 11(1)(c), at 195.

44. Interview with the Chief Guidance Clerk, Policy Planning Divisions, Women's Bureau, Ministry of Labor, in Tokyo, Japan (June 17, 1985).

45. Labor ministry officials explain that the EEOA's mediation process does not extend to recruitment and hiring violations because "there would be too many cases." *Id.*

46. Consensus is the favored means of decision-making within a Japanese group. Reich, *Public and Private Responses to a Chemical Disaster in Japan: The Case of Kanemi Yusho*, 15 LAW IN JAPAN 112 (1982).

47. F. UPHAM, *supra* note 27, at 186 (it is in the area of recruitment and promotion of women for managerial positions that employment discrimination is most stark and uncompromising); J. ABLEGGEN, MANAGEMENT AND WORKER: THE JAPANESE SOLUTION 145-46 (1973) (women are usually asigned to low-grade, uninteresting positions, where they are often referred to as *shokuba no hana* ("office flowers")).

48. Results of a November 1985 survey of 1000 households revealed that a majority of men (62.2%) said that women "perform worse than men," and only 3.6% felt that women would be suitable in positions superior to men. *Nikkei* High Tech Report 7 (Dec. 23, 1985). *See also Asahi Shimbum*, Jan. 3, 1986, at 1, col. 1 (68% of men who felt that it is acceptable for women to work stated that they would not want to work under a woman).

people find it improper for women to be at business negotiations."[49] This statement reinforces the notion that societal attitudes prevent Japanese women from equal opportunity in job placement and promotion.

Economics is yet another reason for discrimination in job assignment and promotion. If a woman employee is kept in a low-responsibility, low-skill job, employers can feel justified in keeping her salary at low levels. Critics of equal pay for women argue that for identical work, women's salaries (at least starting salaries) are not much lower than men's.[50] However, this argument ignores the central problem: women are rarely allowed to do identical work, meaning that they are often kept in low-paying, low-status, low-skilled jobs. Women are not given the opportunity to break into higher, more prestigious jobs, especially if they are classified as "part-time" workers, who receive lower wages and fewer benefits,[51] rather than as "regular" or "full-time" workers.[52] This distinction is significant because women comprise more than eighty percent of all part-time workers in Japan.[53]

The big Japanese companies employ large numbers of part-time workers.[54] Directors of those companies actively resist the enactment of any law requiring more pay for women because resultant increased costs could eliminate some of their competitive advantage.[55] It is largely due to the influence[56] of these big com-

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49. O'Reilly, *Women: A Separate Sphere*, TIME, Aug. 1, 1983, at 68-69.

50. *Id.*

51. Part-time workers receive only one-half to three-fourths of the wages and only about 20% of the bonuses (bonuses make up about one-third of the compensation a full-time worker receives) that full-time workers receive. Only 10% of part-time workers receive retirement pay and only 25% get paid vacations. *Sex Discrimination*, JAPAN LAWLETTER 81 (July-Aug. 1983).

52. These designations are deceptive because part-time employees often work essentially the same number of hours that full-time workers are on the job. The primary difference is that full-time workers are hired with the intent that they be with the company for life and are thus given extensive on-the-job training. On the other hand, part-time workers are not hired with such intentions and seldom receive extensive training.

53. *Sex Discrimination*, JAPAN LAWLETTER 81 (July-Aug. 1983).

54. Yoko Sano, Professor of Business at Keio University, notes that firms hire a large number of part-time female workers: "It's very convenient for firms to hire low-paid female workers and have them quit. Women provide companies with a flexible, low-cost work force to supplement the men who form the core of their full-time, permanent staff." Reuters Ltd., Sept. 2, 1985, BC cycle.

55. Women part-time workers have been called the secret of Japan's vaunted lifetime employment system. "Women part-time workers are holding down the entire Japanese wage scale," claims Emiko Shibayama, a specialist in women's labor. O'Reilly, *supra* note 49, at 69. "Use of part-time women workers is part of Japan's international eco-

panies that the EEOA contains only a duty to "endeavor" to avoid discrimination instead of an express prohibition against discrimination.[57]

However, even such prohibitory language is not sufficient to override the cultural and economic biases which perpetuate discriminatory practices in Japan. Merely imposing a duty not to discriminate will not change Japanese women's job assignments and promotions. Such advancement in women's rights will only come through social progress and through change in the employment system itself. In Japan, this type of change can occur only over time.[58]

2. *The "Shall Not Discriminate" Provisions*

The EEOA amendments also provide that employers shall not discriminate against women when providing on-the-job training, fringe benefits to employees, or in establishing mandatory retirement guidelines.[59] These provisions, even though expressly prohibiting discrimination, do not provide for penal sanctions for their violation. As with discrimination in job assignment and promotions, discrimination can be very difficult to prove because companies can usually provide some non-sex-based reason for the discrimination.[60] And even if the discrimination were clear, many Japanese women may not dare[61] de-

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nomic strategy for the 1980s." *Id.*

56. Before the law was passed, Director of the Labor Ministry's Women's Bureau Ryoko Akamatsu recognized the strong influence of big business: "Without the agreement of big business, Parliament is unlikely to pass any law." Reuters Ltd., Jan. 15, 1984, Sunday BC cycle.

57. New York Times, Feb. 24, 1985, at C1, col. 2 (noting that the law was fiercely opposed by Japanese employers, "who managed to remove most of its sanctions").

58. Brown, *Japanese Approaches To Equal Rights For Women: The Legal Framework*, 12 LAW IN JAPAN: AN ANNUAL 29, 55 (1979) (contending that real equality for Japanese women will require major departures from traditional Japanese values and major changes in the structure of the Japanese employment system).

59. EEOA, *supra* note 6, arts. 9-11.

60. Prior to promulgation of the EEOA, employers used the distinction between full-time and part-time workers to justify denial of benefits. Employers claimed that female employees do not merit equal benefits because they are usually part-time (and theoretically do not work as many hours as full-time workers) or lower-level full-time employees without the "heavy responsibility" that male workers have.

61. Normally Japanese people do not fight for individual rights. They deem it much more noble to work for the betterment of the entire group. *See supra* notes 15-18 and accompanying text. Also, "suing one's own company while still a member is a radical, threatening act to fellow employees as well as to management, and is a severe limit on the number of available, willing plaintiffs." F. UPHAM, *supra* note 27, at 204.

mand equal benefits for equal work because they fear they will upset their employers or lose their jobs. Without the threat of penal sanctions for violations, the individual provisions are not strong enough to cure the ills which they address and which they may cause in isolated cases.

One common criticism of equal employment opportunity legislation is that "it would disrupt the lifetime employment system, the pearl of Japanese labor practices."[62] Together with job assignment and promotion, on-the-job training is an integral part of Japan's tenure-based lifetime employment system. Mitsugu Yamamoto[63] served on the Ministry of Labor Advisory Council for the EEOA and strongly opposed the new law:

> Unlike other Western countries, our employment system is not based on classification by occupation. While in Western countries employers hire qualified personnel to fill job openings, Japanese companies employ new faces in what we call life-long employment practice, train them for a considerable period of time and place them in various posts according to their talents.[64]

Such training is usually reserved for male "full-time" employees, but without it women cannot achieve greater opportunities and upward mobility into management positions.[65] It is interesting to note that, according to the Ministry of Labor, the strength of a company's opposition to the new law directly correlates to the extent that company uses women as short-term, supplementary labor.[66]

From the perspective of male management in Japan, train-

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62. *Nihon Keizai Shimbun* (Japan Economic Journal) Oct. 13, 1984, at 3, col. 1.

63. Yamamoto is a senior official of the National Federation of Small Businesses.

64. Japan Times, March 24, 1984, at 1, col. 5.

65. The Ministry of Labor conducted a survey on the employment situation of women. 4800 companies with over 30 employees participated; 70% of them provided training for administrative positions to men only. *Kyōdō* News Service, June 25, 1985. The refusal of Japanese companies to give better training to their women employees in part provoked the declaration that "[i]n short, one could call life-time employment sex discrimination enshrined for Japan's elite. Under this system women workers in the leading companies of the world's most powerful economy are resigned to serving tea, making xerox copies and arranging appointments, etc. for their male co-workers." Japan Times, March 24, 1984, at 1, col. 5. *See also* Gould, *Labor Law in Japan and the United States: A Comparative Perspective*, 6 INDUS. REL. L.J. 1, 13 (1984) (noting that women, who constitute approximately 40% of the work force, are not generally beneficiaries of *shushin kōyō* (permanent employment) or the privileges that go with it).

66. *Nihon Keizai Shimbun* (Japan Economic Journal) Oct. 13, 1984, at 3, col. 1. The Ministry of Labor noted that this correlation is most obviously present in steel, aluminum and petrochemical companies.

ing women and giving them responsible jobs with comparable salaries is wasteful: "Women won't work overtime and they'll have to quit when they get married anyway. From the company's viewpoint, it's just a waste of money."[67] This reluctance to train women is understandable in light of the accepted practice of pressuring women to retire early or keeping them as part-time or lower level full-time employees. Companies benefit from the resulting high turnover in women employees because it continually brings in new young workers who, under Japan's tenure-based wage system, can be paid much lower wages.[68]

The EEOA also provides that employers shall not discriminate against women "with regard to the loaning of funds for building or purchasing a house and certain other fringe benefits prescribed by a Labor Ministry Ordinance."[69] In Japan, one must usually be a *setainushi* (head of the family) in order to borrow money or rent public housing.[70] Because companies are reluctant to treat women as family heads,[71] women have difficulty securing housing loans. The mere requirement, without penalty, that they not be discriminated against in this regard, may be insufficient to cure this longstanding problem.

Likewise, the EEOA prohibits employer discrimination against women "with regard to mandatory retirement age and dismissal of workers," and provides that "employers shall not stipulate marriage, pregnancy or child-birth as the reason for the retirement of female workers."[72] The EEOA also prohibits employers from dismissing female employees on the grounds that they have married, become pregnant, given birth to a child or taken maternity leave.[73]

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67. Japan Times, March 24, 1984, at 1, col. 5.

68. *See supra* note 54.

69. EEOA, *supra* note 6, art. 10. This provision is not as extensive as the U.N. Resolution, which calls for measures to ensure women "the right to all benefits that men get," and to ensure the right to "family benefits" and the right to bank loans, mortgages and other forms of financial credit. U.N. Convention, *supra* note 36, art. 11(c), 13(a) & (b), at 195-96.

70. Asakura, Shimoi, Sugano, Nakajima & Hanami, *Legal Theme of Equal Treatment: A Discussion Meeting*, 819 JURISUTŌ (Jurist) 310 (Aug. 1-15, 1984).

71. *Id.* at 312.

72. EEOA, *supra* note 6, art. 11. It is significant that in this area the provisions of the EEOA are broader than the corresponding provisions of the U.N. Convention. The Convention prohibits discrimination only in dismissals, whereas the EEOA prohibition extends to mandatory retirement age and retirement as well as dismissals. U.N. Convention, *supra* note 36, art. 11(2)(a), at 196.

73. EEOA, *supra* note 6, art. 11.

These provisions make no change in existing law. Past court decisions,[74] based primarily upon Article 90, have already held that employers cannot discriminate against women by dismissal or forced retirement upon marriage, pregnancy or childbirth. Such dismissals are deemed to violate public policy and are void under Article 90.

Thus, the five EEOA amendments to the Working Women's Welfare Law do not have much legal significance—they still do not provide an independent basis for legal action. The Ministry of Labor has indicated that an employee could bring suit if the provisions for equal treatment in training, fringe benefits and retirement are violated,[75] but that the court's decision would still be based on the Article 90 consideration of whether the discrimination was "unreasonable" or contrary to public policy.[76]

Even if a female employee brought suit, the most significant effect that the EEOA may have in such cases is that the judge may possibly use the EEOA's provisions as guidelines in determining what is "contrary to public policy or good morals."[77]

B. Amendments to the Labor Standards Act

The EEOA's amendments to the Labor Standards Act are much more specific than the amendments to the Working Women's Welfare Law. The new LSA amendments abolish what have traditionally been considered "protective" laws. The amendments abolish several prohibitions on female labor and allow women to work underground, to work overtime and on holidays and, in certain circumstances, to work at night.[78]

Because these amendments are specific and unambiguous, their effect will likely be more immediate and tangible than that of the amendments to the WWWL. Already, several career women in Japan have praised this portion of the EEOA as "having broken the barrier to male-dominated territory."[79]

Despite their specificity, these amendments are not free from controversy. Proponents of these laws insist that the laws are necessary to protect women and the institution of the family.

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74. See Suzuki v. Sumitomo Cement Co., 17 Rōshū 1407 (Tokyo D. Ct. Dec. 20, 1966), and the entire *Sumitomo* line of cases discussed in Brown, *supra* note 58.

75. Interview with Chief Guidance Clerk, *supra* note 44.

76. *Id.*

77. *Id.*; Asakura, *supra* note 70, at 823.

78. EEOA, *supra* note 6, art. 64-2(1).

79. *Nihon Keizai Shimbun* (Japan Economic Journal) May 21, 1985, at 2, col. 3.

They cite the U.N. Resolution provision that measures "aimed at protecting maternity shall not be considered discriminatory."[80] But opponents of protective laws point to the Resolution's provision that "protective legislation" be reviewed periodically in the light of scientific and technological knowledge and be revised, repealed or extended as necessary,[81] and claim that improved working conditions and employee health have eliminated the rationale for the "protective" measures.[82]

The overall effect of loosening these protective measures is uncertain. Women may be able to work longer hours and better compete with men for job placement and advancement, but on the other hand, employers could further discriminate against women by making them work longer hours without increased pay.[83]

C. Alternatives to Formal Legal Processes

The strongest criticism of the EEOA is that it does not punish violators. But the lack of sanctions is not unusual, given the traditional Japanese aversion to formal law and the strict exaction of legal penalties.[84] Instead of sanctions, the EEOA provides for informal methods of resolving discrimination problems. This section will examine the EEOA's provisions for administrative guidance and mediation as alternatives to the formal legal processes of lawsuits and sanctions.

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80. U.N. Convention, *supra* note 36, art. 4(2), at 195.

81. *Id.*, art. 11(3), at 196.

82. Recognition that some of Japan's labor laws may be excessively "protective" came as early as 1970, when the Tokyo Chamber of Commerce recommended abrogation of such protective provisions in order to help ease the labor shortage at the time. The chairman of the Chamber Committee, which surveyed 12,000 major metropolitan companies, called the old regulations "obsolete" and mere "excuses" for discriminating against women in job advancement. D. ROBINS-MOWRY, THE HIDDEN SUN: MODERN WOMEN OF JAPAN 181-82 (1983).

83. Labor groups are unhappy because, they say, for every female corporate manager who benefits from no longer being confined to a legal maximum of six overtime hours a week, there will be many working-class women who suffer under the burden of enforced extra labor. They also claim that even now employers often ignore the six hour limit. *Japan's Women Win Scuffle in Equality War,* New York Times, May 18, 1985, at 1, col. 1.

84. Noda, *The Far Eastern Conception of Law,* 2 INT'L ENCYCLOPEDIA COMP. L. 134 (1971).

1. Administrative guidance

The EEOA authorizes the Minister of Labor, when he deems necessary, to issue "guidelines" for employers to follow with respect to recruitment, hiring, job assignment and promotion.[85] Such guidelines would not be "laws" *per se*, but would be more in the nature of *gyōsei shidō* ("administrative guidance"), which is a "common Japanese regulatory technique that, although generally nonbinding in a strictly legal sense, seeks to conform (by pressure or coercion) the behavior of regulated parties to broad administrative goals."[86]

Administrative guidance has proven to be an effective way of regulating behavior on an informal level. However, this technique may have little effect on sexual discrimination. The success of administrative guidance in introducing reform depends on the extent to which the Ministry of Labor considers equal employment an important administrative goal.[87] Only if the Labor Ministry accords importance to the goal of achieving equal opportunity for women,[88] and does not view the EEOA as an act of *tatemae*, will the guidelines and resultant pressure be effective.[89]

2. Conciliation through mediation commissions

Japanese people prefer conciliation and mediation as opposed to litigation to achieve social control or dispute settle-

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85. EEOA, *supra* note 6, art. 12.

86. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 926 (1984).

87. Telephone interview with Kazuo Seguno, Professor of Law at Tokyo University and Harvard Law School, March 4, 1986.

88. Japanese Labor Law specialist Kazuo Seguno believes that the Ministry of Labor will consider equal employment opportunity to be an important administrative goal. But Seguno also believes that Ministry of Labor will not want to introduce drastic changes that could disrupt Japan's core lifetime employment system. When asked whether companies would conform to the administrative guidance, Seguno explained that in addition to pressure from the government, the companies would also feel pressure from the press: "If a group announces discrimination in the newspaper, the firm will fear damage to its reputation." *Id.*

89. "[W]hile the law lacks penalties, the Government can apply considerable pressure. In a consensus-forming, controversy-shunning society like Japan, Government 'Jawboning' could be an effective tool." New York Times, May 18, 1985, at 1, col. 1. On the other hand, if Labor Ministry officials do not consider equal employment opportunity an important goal, then weak guidelines could follow, accompanied by little or no pressure to conform. Indeed, the entire success of the law may depend upon how vigorously the Ministry of Labor interprets and enforces the law through administrative guidance. F. UPHAM, *supra* note 27, at 201.

ment.[90] The EEOA's mediation provisions clearly reflect this preference.

Traditionally, "informal" conciliation was carried out by mutual friends of the parties, or by a "big figure" in the community,[91] but in the last forty years, conciliation procedures have increasingly appeared in legislation.[92] This type of conciliation is referred to as *chōtei*. *Chōtei* calls for a public entity (rather than a private party) to stand between the disputants in an effort to resolve the dispute by their mutual consent.[93] The EEOA provides for this type of conciliation.

The EEOA also provides that a female employee and her employer should first try to settle any employment discrimination dispute between themselves.[94] The parties may also seek advice, counsel or recommendations from the Director of the Prefectural Women's and Young Worker's Office.[95]

Additionally, the EEOA establishes an "Equal Employment Opportunity Mediation Commission" to which the parties may apply for mediation.[96] The Commission is empowered to formulate a mediation plan, but, as with all mediation or conciliation in Japan, the Commission can only recommend and encourage that the parties accept the plan. The parties are under no legal obligation to follow the commission's recommendation, reflecting the Japanese preference to govern themselves by informal rather than formal rules.

3. *Potential problems with the mediation process.*

Although mediation and conciliation have been successful in resolving disputes and maintaining social order in Japan, problems still exist with the mediation process in the context of sexual discrimination. Because of its informal nature, the typical mediation process would seem to be more *honne* than *tatemae*. "There is a tendency among some of the conciliation commissioners to pay little regard to legal rules as a guide for settling

90. "[L]awsuits based upon the codes are still a relatively small part of social control or dispute settlement in Japan even today." 2 D. HENDERSON, CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN 190 (1965).

91. H. TANAKA, *supra* note 17, at 492.

92. D. HENDERSON, *supra* note 90, at 190.

93. H. TANAKA, *supra* note 17, at 492.

94. EEOA, *supra* note 6, art. 13.

95. *Id.*, arts. 14, 15.

96. *Id.*, arts. 16-20.

disputes."[97] There is no assurance that the commissioners will consider the law, even if just as a guideline, in making their decisions. This would be especially true in the case of the EEOA mediation commissions. All three appointed commissioners are laypersons, whereas a typical commission consists of one judge and two laypersons.[98]

The danger of the mediation commission becoming no more than a facade is especially real in sexual discrimination cases. If mediation commissioners disregard the law (the EEOA), their decisions will probably rest upon the customs and mores of Japanese society which have traditionally treated women as belonging in the home (or, if in the labor force, as being only supplementary labor). In addition, mediation commissioners are typically chosen from among the more prominent members of the community (usually men), and their decisions or mediation plans tend to favor traditional institutions and reflect conservative values.[99] Therefore, even the process of conciliation, which is often used successfully in other areas, may not help women in the Japanese labor market achieve equality.

IV. Conclusion

The EEOA in its final form managed to please almost no one. It represents a compromise between women's groups, who wanted the law to expressly prohibit discrimination and to provide penalties for violation, and employers' groups, who wanted to block passage of the law entirely. Nevertheless, the EEOA is a step towards equality; the Minister of Labor sees the law as "a starting point for women's employment conditions and elimination of discrimination against them."[100] Ryoko Akamatsu, former head of the Ministry of Labor Women's Bureau, admitted that she was "not 100% satisfied" with the law, but claimed it was significant "that the Parliament got around to passing a law of any kind."[101]

The EEOA is a step in the right direction, but it may not immediately become an effective legal weapon in fighting discrimination. Like the heirloom sword, the law may become one

97. Kawashima, *supra* note 15, at 41.
98. H. Tanaka, *supra* note 17, at 497.
99. Kawashima, *supra* note 15, at 43.
100. Daily *Yomiuri*, April 26, 1985, at 2, col. 3.
101. New York Times, May 18, 1985, at 1, col. 1.

more example of *tatemae*. Even the EEOA's informal conciliation procedure may not help women achieve equality until Japan's traditional attitudes about women change. A group of prominent employers maintains that business practices "reflect the views of society" and that government "simply cannot legislate away mores and customs that are ingrained in the culture."[102] Such significant changes will not be effected only by legislation, but will require the passage of time and the evolution of sociological values. The true significance of the EEOA is the role it will play in this process of gradual change in Japan.

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102. New York Times, Feb. 24, 1985, at C1, col. 2. Inayama, the chairman of the powerful *Keidanren* (Japan Federation of Economic Organizations), a leading organization of the country's most powerful companies, insisted that the new law was not necessary because "a woman's place is in the home raising children." *Nihon Keizai Shimbun,* (Japan Economic Journal) March 13, 1984, at 5, col. 3. The chairman of the *Nikkeiren* rejected the EEOA's provisions, insisting that "just because they do these things in other countries, that alone is not enough reason to do it here." *Id.*, June 13, 1983, at 3, col. 1.

Although mores and customs cannot be legislated away, the EEOA is an important step in the process of change. The Japanese firmly believe that change should be made gradually and with the consensus of all. This concept of gradual change is referred to as *nemawashi* (the practice of transplantation), and is one of the most distinct characteristics of Japanese decision-making methods. *Nemawashi* involves digging around a tree a few years before it is actually transplanted and wrapping the roots repeatedly so that the roots are preserved and ready to grow in different ground. Figuratively, *nemawashi* refers to the ground work to enlist support or to secure informal consent from the people concerned. JAPANESE BUSINESS GLOSSARY 28 (1983).