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EASTERN TWISTS ON WESTERN CONCEPTS: EQUALITY JURISPRUDENCE AND SEXUAL HARASSMENT IN JAPAN

Leon Wolff†

Abstract: A rich source of Japanese jurisprudence on sexual equality underlies Japan's emerging law against sexual harassment. With no law specifically outlawing sexual harassment, academics and the courts have invoked the principle of sexual equality to support their conclusion that Japanese law carries an implicit prohibition against acts of sexual harassment. In developing a legal case against sexual harassment, Japanese courts and academic commentators have introduced novel constructions of equality. The key innovations include relational equality, inherent equality and quantifiable equality. In presenting some of these Japanese contributions to equality jurisprudence, the hope is that feminist discourse on equality can take place in a broader context—a context that does not ignore the Eastern cultural experience.

I. INTRODUCTION

A. Sexual Harassment and Sexual Equality in Japan

The emerging Japanese law[1] against sexual harassment has re-ignited[2] discussion in Japan on the essence of sexual equality. The renewed

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1 The first judicial statement on sexual harassment was by Judge Akimoto of the Shizuoka District Court. Since the defendant in that case did not enter a defense, the judge issued a default judgment upholding the plaintiff's claims. Judgment of Dec. 20, 1990, Shizuoka District Court, 745 HANREI TAIMUZU 238, 580 RÔDÔ HANREI 17 (1991) [hereinafter *Shizuoka Sexual Harassment Case*]. The second sexual harassment case—but the first contested case—was decided by the Fukuoka District Court. Judgment of Apr. 16, 1992, Fukuoka District Court, 783 HANREI TAIMUZU 60, 607 HANREI JIHÔ 49, 607 RÔDÔ HANREI 6 (1992) [hereinafter *Fukuoka Sexual Harassment* Case]. The *Osaka Sexual Harassment Case* is the latest published decision on sexual harassment as of this writing. Judgment of Aug. 29, 1995, Osaka District Court, 893 HANREI TAIMUZU 203 (1996) [hereinafter *Osaka Sexual Harassment Case*].

2 Notions of sexual equality have already been explored in a long line of sex discrimination cases commencing in the 1960s. For an overview of these cases, *see* Catherine W. Brown, *Japanese Approaches to Equal Rights for Women: The Legal Framework*, 12 LAW IN JAPAN 29 (1979); FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 124-65 (1987). Paradoxically, the passage of the Equal

attention to sexual equality stems in large part from the fact that Japan does not have an enactment outlawing sexual harassment. With no specific statute or code provision explicitly prohibiting acts of sexual harassment, academics[3] and the courts[4] have been forced to invoke the principle of sexual equality—a constitutionally enshrined mandate[5] as well as a general standard permeating the entire fabric of the Japanese legal system.[6] They conclude that sexual harassment, as a form of sex discrimination, is in violation of Japanese law. Importantly, Japanese scholars and judges have engaged equality discourse to determine the content and scope of the principle of sexual equality and, from that, ascertain whether or not sexual

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Employment Opportunity Act, Law No. 113 of June 16, 1972, which came into force on April 1, 1986, has slowed down the number of cases brought to the courts, mostly because the Act does not provide for legally enforceable rights. Masako Kamiya, *A Decade of the Equal Employment Opportunity Act in Japan: Has It Changed Society?*, 25 LAW IN JAPAN 40, 60 (1995).

[3] The academic scholarship on sexual harassment has greater significance than merely presenting possible legal interpretations of a new social problem: in Japan, academic theories often can have a significant influence in shaping the development of the law, arguably more so than in the United States or Australia. *See* HIDEO TANAKA, JITTEI HÔGAKU NYÛMON [INTRODUCTION TO POSITIVE LAW] 188 (1966).

The academics writing on sexual harassment come from diverse backgrounds. They include law professors (*e.g.*, Hiroko Hayashi is a professor at Fukuoka University), law lecturers (*e.g.*, Satoru Aono is a lecturer at Meiji University), bureaucrats (*e.g.*, Masaomi Kaneko works for the Tokyo Labor and Economics Bureau), and feminist lawyers (*e.g.*, Mizuho Fukushima). *See* Hiroko Hayashi, *Shokuba ni okeru sekushuaru harasumento e no hôteki taiô* [*The Legal Response to Sexual Harassment in the Workplace*], 956 JURISUTO 42 (1990); Hiroko Hayashi, *Sekushuaru harasumento to songai baishô seikyû* [*Sexual Harassmet and a Civil Damages Suit*], 1291 RÔDÔ HÔRITSU JUNPÔ 16 (1992); Satoru Aono, *Sekushuaru harasumento no fuhô kôi sekinin—Fukuoka Sekushuaru Harasumento Jiken (Heisei 4.4.16 Fukuoka Chihan)* [*Liability for Unlawful Acts of Sexual Harassment—the Fukuoka Sexual Harassment Case (Judgment of the Fukuoka District Court, April 16, 1992)*], 166 KIKAN RÔDÔHÔ 198 (1993); Masaomi Kaneko, *Sekushuaru harasumento to wa nanika* [*What is Sexual Harassment?*], 1228 RÔDÔ HÔRITSU JUNPÔ, 4 (1989); Masaomi Kaneko et al., *Sekushuaru harasumento no hôritsu mondai* [*Sexual Harassment as a Legal Issue*], 956 JURISUTO 12 (1990); Mizuho Fukushima, *Sekushuaru harasumento to hô* [*Sexual Harassment and the Law*], 1228 RÔDÔ HÔRITSU JUNPÔ 16 (1989). For a profile on Fukushima, see Louise do Rosario, *Mizuho Fukushima: Petite Lady Lawyer Fights Sex Harassment*, FAR E. ECON. REV., Aug. 12, 1993, at 86.

[4] At the time of writing, there have been four published decisions in which the courts have upheld, either in whole or in part, the plaintiff's claims for relief on the basis of sexual harassment: the *Shizuoka Sexual Harassment Case*, *supra* note 1, the *Fukuoka Sexual Harassment Case*, *supra* note 1, the *Kanazawa Sexual Harassment Case*, Judgment of 26 May, 1994, Kanzawa District Court, 650 RÔDÔ HANREI 8 (1994), and the *Osaka Sexual Harassment Case*, *supra* note 1. Two courts, however, have ruled against the plaintiffs: the *Tokyo Sexual Harassment Case*, Judgment of Apr. 11, 1994, Tôkyô District Court, 655 RÔDÔ HANREI, 44 (1994), and the *Yokohama Sexual Harassment Case*, Judgment of May 24, 1995, Yokohama District Court, 670 RÔDÔ HANREI, 20 (1995).

[5] KEMPÔ § 14.

[6] *Fukuoka Sexual Harassment Case*, 1426 HANREI JIHÔ 49, 65 (1992). *See also* Leon Wolff, *The Fukuoka Sexual Harassment Case—A Japanese Mabo? A Jurisprudential Analysis of Judicial Function in Japan*, 1994 AUSTRALASIAN L. STUDENTS' ASS'N ACAD. J. 71, 77-79.

harassment violates this principle. It is from this part of their reasoning that a fountain of different constructs of equality as a justificatory principle forbidding acts of sexual harassment have evolved.

This article will argue that these Japanese constructions of sexual equality represent an important contribution to the wider scholarship on equality jurisprudence. Part II of this article first places this Japanese jurisprudence on sexual equality in context by briefly overviewing existing Western feminist theories on sexual equality. This overview will serve as a backdrop against which the Japanese contributions can be judged. This part highlights three key Western feminist approaches to equality—the *gender-blind*,[7] the *gender-kind*[8] and the *power-reassign*[9] approaches. Part III shifts attention eastward to Japan. This part explores the recent development of a judge-made[10] law against sexual harassment in Japan and how this has spurred a re-invigorated Japanese interest in theories on sexual equality. Part II shows that a rich source of Japanese jurisprudence on sexual equality lies embedded[11] in the Japanese scholarly articles and judicial opinions on sexual harassment; scholars both in the West[12] and in Japan[13] have yet to tap this source.

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[7] My own term. *See* discussion *infra* Part II.

[8] My own term. *See* discussion *infra* Part II.

[9] My own term. *See* discussion *infra* Part II.

[10] It is commonly assumed that the Japanese judiciary is a "paragon of restraint." Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of—Stability?*, 43 U.C.L.A. L. REV. 635, 636 (1996). There is now an emerging view that Japanese courts play an important role in creating new norms. *See id.* at 637 n.4. I have argued, however, that it is misleading to view judicial function as an 'either or' choice between activism (judges make the law) and passivity (judges follow the law). Rather, there is a hybrid model of law in which judges *develop* law—by exploring the whole context of the legal system to derive principles which would justify new concrete rights and duties. It is submitted that Japanese judge-made law, at least so far as sexual harassment is concerned, tends to fit within this model. Wolff, *supra* note 6.

[11] In exploring the legal dimensions of sexual harassment, judges and academics have engaged equality discourse as a tool for their analyses. Equality, however, has never formed a discrete topic of study. Accordingly, the Japanese models of equality described in this article are *implicated*, rather than specifically stated, in the academic literature and judicial decisions.

[12] For instance, Patterson, in her casenote on the *Fukuoka Sexual Harassment Case*, does not explore how the court viewed the essence of sexual equality in reaching its decision. Nancy Patterson, *No More Naki-Neiri? The State of Japanese Sexual Harassment Law: Judgment of April 16, 1992, Fukuoka Chihô Saibansho, Heisei Gannen (1989) (wa) No. 1872, Songai Baishô Jiken (Japan)*, 34 HARV. INT'L L.J. 206 (1993).

[13] Except for some Japanese feminist scholars, few academics have attempted to state—explicitly, at any rate—their vision of sexual equality. *See also* discussion *supra* note 11. For a feminist work which more directly confronts the issue of sexual equality in light of the growing consciousness in Japan of the

Part IV focuses on some of the Japanese constructions of sexual equality that have emerged from the recent academic attention to, and judicial opinions on, sexual harassment. These Japanese models contain varying shades of similarity and contrasts with existing Western notions. The value of the Japanese models lies in how the similar models[14] have found different expression in the Japanese context and how the dissimilar models[15] transport equality jurisprudence into completely new territory. Specifically, Part IV outlines three core Japanese conceptions. The first Japanese theory of sexual equality is that equality is a *relational* concept.[16] This model posits that equality is determined whether or not men and women are treated in exactly the same way. The second approach views equality from a contrary perspective, maintaining that equality is not relational but rather *inherent*.[17] This exposition of equality holds that women are only equal if they are free to express their intrinsic "personhood"—including their femaleness—without limitation or threat of disadvantage. The third view is that equality is a *quantifiable*[18] notion—a model that further subdivides into different strands depending on whether *power*, *economic utiles*, or *decency and good manners* is regarded as the appropriate measurement of equality. It is these different Japanese models of equality which, while clearly relevant to Japanese black letter discrimination law, have deeper importance to, and wider implications for, equality jurisprudence.

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social problem of sexual harassment, see Yumiko Ehara, *'Sekushuaru harasumento no shakai mondaika' wa nani o shite iru koto ni naru no ka [Highlighting Sexual Harassment as a Social Problem]*, *in* SEKUSHUARITI [SEXUALITY] 105 (Teruko Inoue et al. eds., 1995).

14 For instance, the Japanese model of relational equality has parallels to the Western gender-blind approach to equality. *See infra* parts II, IV(A).

15 For instance, the Western gender-blind and gender-kind approaches require some degree of comparison between men and women—the gender blind approaches mandates that differences between the sexes should be ignored; the gender-kind approach insists that the differences between the sexes should be recognized and taken into account. *See infra* part II. By contrast, the Japanese model of inherent equality involves no comparison betwen the sexes since, according to the model, equality must inhere in all individuals. *See infra* parts II, III(B).

16 Importantly, since the principle of sexual equality has been a tool in pursuing legal theories on sexual harassment—rather than a discrete topic of study—these Japanese models of sexual equality are not explicitly stated by the academics or the judges. Rather, they are *indirectly* employed as part of the texture of their arguments. *See* discussion *supra* note 11. Therefore, the terms *relational*, *inherent* and *quantifiable* are meant to identify these different implied visions of equality; they are the author's own terms.

17 *See* discussion *supra* note 16.

18 *See* discussion *supra* note 16.

B. *Japanese vs. Western Notions of Equality*

These different Japanese models of sexual equality have particularly important implications for feminist scholarship. Many feminist scholars[19] have noted the dangers of gender essentialism—"the notion that a unitary, "essential" women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[20] As Harris points out, this tendency toward gender essentialism denies multiplicity of experiences and silences voices not within the "norm."[21] Harris argues that the "norm" is that of the white woman.[22] Perhaps, more accurately, it is that of the white, *Western* woman. For one "reality of experience" largely ignored[23] in Western feminist writings is culture.

Specifically, feminist dialogue on the jurisprudence of equality has been taking place almost exclusively within a Western socio-political and cultural framework. This is particularly evident in the way feminist theorists have conceived their theories by endorsing, rebutting or developing the arguments and views of other mainly Western feminists.[24] It is also apparent in their choice of statutes, case law, and other legal materials from predominantly Western legal traditions—especially American and Canadian—as points of reference for their theories.[25] On the

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19 *E.g.*, Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644 (1990); Elizabeth V. Spelman, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1988); Katherine T. Bartlett, *Feminist Legal Methods*, 103 HAR. L. REV. 829 (1990).

20 Harris, *supra* note 19, at 585.

21 Harris, *supra* note 19, at 615.

22 Harris, *supra* note 19, at 615.

23 This is changing. Feminists are beginning to explore the experiences and voices of women from Eastern cultures. *See, e.g.*, WOMEN OF JAPAN AND KOREA (Joyce Gelb & Marian Lief Palley eds., 1994).

24 Harris herself does this by criticizing the works of Catharine MacKinnon and Robin West, both American feminists, to highlight the extent of gender essentialism in feminist scholarship. Harris, *supra* note 19, at 585. *See also* Titia Loenen, *Comparative Legal Feminist Scholarship and the Importance of a Contextual Approach to Concepts and Strategies: The Case of the Equality Debate*, 3 FEMINIST LEGAL STUD. 71 (1995) (comparing U.S. and European/Dutch approaches to equality).

25 *E.g.*, Diana Marjury, *Strategizing in Equality*, *in* AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 320, 325-7 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991) (discussing the Canadian Charter of Rights and Freedoms). Loenen, *supra* note 24 (discussing American and Dutch statutes and cases).

other hand, literature in English on equality from non-Western perspectives in sadly lacking. This has unduly limited equality discourse.

My purpose in this article is to expand the parameters of feminist dialogue on equality by introducing some non-Western perspectives on equality. In particular, my goal is to focus on Japanese contributions to the jurisprudence of equality. This jurisprudence has blossomed, especially recently, as both academics and the courts have attempted to define the nature of sexual equality to determine whether or not there is an unwritten Japanese law which prohibits sexual harassment. My hope is that by presenting some of these contributions, equality discourse can take place in a broader context—a context that does not ignore different historical, cultural, political, ideological and legal experiences. After all, equality is an international concern—most legal communities promise equal justice for all but do not delineate what is involved in the notion of equality.[26] Hopefully, these contributions will encourage feminist theorists to explore new dimensions and depths to equality so that it can be used more effectively as a concept "to advance women's interests, identify and recognize violations of their rights and lead to effective remedies."[27] As Marjury powerfully explains,

> It is vital that women continue to theorize about the meaning of equality. . . ; that women continue to expose and denounce their oppression; that feminists continue to question women's participation in the legal process and raise the specter of cooptation; that women continue to struggle to be heard within male discourse. Far from being seen as mutually exclusive, these strategies must be recognized as mutually supportive. Possibly in this way, through feminist process and methodology, women will be able to operationalize equality. We will not be merely defining equality through legal analysis and theory making; we will be trying to improve women's lived realities.[28]

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[26] Mary Gaudron, J., *Towards a Jurisprudence of Equality*, address to the Bar Readers' Course, Brisbane, July 20, 1994.

[27] Kathleen E. Mahoney, *International Strategies to Implement Equality Rights for Women: Overcoming Gender Bias in the Courts*, 1993 AUSTL. FEMINIST L.J. 115, 120.

[28] Marjury, *supra* note 25, at 337.

To accommodate these more general hopes, I do not intend to "debate"[29] or advance a particular view on which is the better theory. Rather, my objective is to provide insights into Japanese constructs of equality in order to share information and further knowledge on this area of jurisprudence as part of a wider process of consciousness-raising.

II. WESTERN MODELS OF SEXUAL EQUALITY

Equality is a slippery notion. Despite its omnipresence in political and legal debate, equality is "hard to describe, even more difficult to define."[30] It is, as Justice Gaudron[31] laments, "an infuriatingly elusive concept."[32] This frustration with the indeterminacy of equality, however, has not deterred Western theorists, ranging from liberal egalitarians to feminists, from grappling with the concept in an effort to give it some concrete content. Their work has resulted in a veritable rainbow of approaches to defining equality.

This diversity of definitions is particularly apparent in feminist theory generally and feminist jurisprudence specifically. Feminists have applied many different lenses in their attempts to theorize on the essence of equality. Some feminist theorists, for example, have adopted a *gender-blind*[33] approach. Borrowing elements from the liberal egalitarian tradition,[34] these theorists argue that equality refers to identical treatment.[35] With the ideal that "all human beings are born free and equal in dignity and

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[29] Marjury argues that "debating" is male and involves point scoring at an opponent's expense rather than shedding light on a topic under discussion; sharing information, she submits, is "female" and more constructive to enhancing knowledge and developing new ideas. *Id.* at 320-21.

[30] Gaudron, J., *supra* note 26.

[31] Justice Mary Gaudron is the first—and, as of this writing, the only—female justice sitting on the High Court of Australia.

[32] Gaudron, J., *supra* note 26.

[33] Sheehy refers to this as the symmetrical approach to equality. Elizabeth A. Sheehy, *Personal Autonomy and the Civil Law: Emerging Issues for Women, in* THE HIDDEN GENDER OF LAW 3-4 (Regina Graycar & Jenny Morgan eds., 1990). Sohrab calls this the equal treatment model. Julia Adiba Sohrab, *Avoiding the 'Exquisite Trap': A Critical Look at the Equal Treatment/Special Treatment Debate in Law*, 1 FEMINIST LEG. ST. 141, 142 (1993).

[34] *See, e.g.*, Gareth Evans, *Benign Discrimination and the Right to Equality*, 6 FED. L. REV. 26, 36-42 (1974).

[35] Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RIGHTS L. REP. 175 (1982).

rights,"[36] this theory calls for "the elimination of legal or other distinctions between the sexes and promotes gender-neutral, strictly identical treatment of men and women."[37]

Others, however, have placed twists on this strict egalitarian approach and argue in favor of a *gender-kind*[38] approach. Thus, certain theorists maintain that substantive equality demands that women's special needs in relation to their actual and immutable biological differences must be taken into account to prevent disadvantage vis-à-vis men.[39] Others develop this further by insisting that equality must accommodate more fully the myriad differences between men and women: the function of equality, according to this approach, is to uphold and respect the specificities of sexuality. A more expansive argument[40] holds that equality must not only accommodate but also accept gender differences; equality, in short, must ensure "the equal validity of men's and women's lives"[41] and guarantee that "gender differences, perceived or actual, [are] costless relative to each other, so that anyone may follow a male, female or androgynous lifestyle according to their natural inclination or choice without being punished for following a female lifestyle or rewarded for following a male one."[42]

A third approach is the *power re-assign*[43] approach. This advocates that power and advantages are biased in favor of men and, accordingly, equality requires the reversal of subordination of women by re-assigning benefits. These three general approaches, however, represent but a slice of the cake of Western feminist jurisprudence on equality—and, what is more, there are numerous variations within each of these approaches.

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[36] *Universal Declaration of Human Rights* G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

[37] Sheehy, *supra* note 33, at 3.

[38] Sheehy refers to this as an asymmetrical approach to equality. Sheehy, *supra* note 33, at 4. Sohrab calls this the special treatment model. Sohrab, *supra* note 33, at 142.

[39] *See generally.*, Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986). ELIZABETH WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN (1980).

[40] Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

[41] *Id.* at 1313.

[42] *Id.* at 1297.

[43] Sheehy calls this the subordination approach. Sheehy, *supra* note 33, at 4. *See also* CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215-34 (1989).

III. WHY SEXUAL HARASSMENT IN JAPAN?

In Japan, the most recent[44]—and most dynamic[45]—developments in theories on sexual equality have occurred against the backdrop of Japan's emerging law on sexual harassment. It is for this reason that I analyze Japanese contributions to the jurisprudence of sexual equality by focusing on the law against sexual harassment.

Unlike Australia,[46] the United States,[47] and other jurisdictions,[48] Japan does not have a statute specifically prohibiting acts of sexual harassment. Ueno argues that this reflects the lack of awareness on the part of the Japanese people of the nature of sexual harassment as a social problem.[49] This, she suggests, is partially due to the fact that a Japanese word for "sexual harassment" (*sekushuaru harasumento*,[50] commonly abbreviated as "*seku hara*") did not become part of commonly accepted

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[44] Since the 1960s, the courts have decided a series of cases striking down discrimination against women in such diverse areas as wage differentials, hiring procedures, promotion opportunities and retirement practices. *See supra* note 2 and references cited therein. The sexual harassment cases "represent[] the latest judicial development in ensuring equitable treatment for women in the workplace." Wolff, *supra* note 6, at 74.

[45] Paradoxically, the Equal Employment Opportunity Act, Law No. 113 of June 16, 1972, which came into force on April 1, 1986, has slowed down the judicial impetus in upholding equal treatment for women in the workplace. For instance, at the date of writing, no case has been brought before the courts on the basis of the Act. Kamiya suggests that this is mostly because the Act does not provide for legally enforceable rights. Masako Kamiya, *A Decade of the Equal Employment Opportunity Act in Japan: Has It Changed Society?*, 25 LAW IN JAPAN 40, 60 (1995). The sexual harassment litigation, however, is bringing the courts back into the field of women's rights and reinvigorating academic interest in the topic of sexual equality. *See infra* discussion part III.

[46] Sex Discrimination Act 1984 (Cth) secs. 28A-L.

[47] Strictly speaking, the United States does not have an enactment specifically prohibiting acts of sexual harassment. However, Title VII of the Civil Rights Act of 1964 does include a general prohibition against discrimination on the basis of sex. 42 U.S.C. § 2000e-2(1)(a) (1996). In 1986, the Supreme Court held that sexual harassment can constitute discrimination on the basis of sex and is therefore violative of Title VII. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

[48] *E.g.*, New Zealand has the Human Rights Act (NZ) sec. 62 and the Employment Contracts Act (NZ) secs. 26, 29.

[49] Mamiko Ueno, *Introduction* to Part II: *Sei bôryoku* [*Sexual Violence*], *in* SEKUSHUARITI [SEXUALITY], *supra* note 13, at 104. Ueno maintains that the Japanese feminist movement has been instrumental in 'problematizing' sexual harassment—that is, bringing the issue into the public consciousness. *Id. See also* Ehara, *supra* note 13.

[50] Sometimes, the word is rendered 'sekusharu harasumento.' *See, e.g.*, Yoshiharu Moronaga, *Sekusharu harasumento* [*Sexual Harassment*], JURISUTO, Dec. 15, 1990, at 10. The neologism became so popular that it won a gold award for Best New Word, 1989. Mamiko Ueno, *Sekushuaru harasumento kara kojin no jiritsu o kangaeru* [*Considering the Independence of the Individual in Light of Sexual Harassment*], HÔGAKU SEMINÂ, May 1990, at 56.

language use until 1989.[51] Accordingly, sexual harassment remains a relatively foreign concept to most Japanese people.[52] Even in academic circles, sexual harassment was only introduced as a topic of academic interest in 1983.[53]

Interest in the problem of sexual harassment surged, however, in 1989[54] when the first sexual harassment case was filed in the Fukuoka District Court. Newspapers[55] and popular magazines[56] carried numerous articles and commissioned surveys[57] on sexual harassment. Some surveys revealed that as many as six out of ten working women had been sexually harassed during the course of their working lives.[58] Books proliferated: "[i]n 1990 alone some ten separate books on sexual harassment appeared, including 'guides' for male coworkers that ranged from sensitization and consciousness-raising strategies to more basic 'how not to' and 'how not to get caught' guidebooks."[59] There was even a prime-time made-for-television movie in which the female character encounters sexual harassment in the workplace.[60]

This popular interest spurred feminist lawyers[61] and labor law specialists[62] to probe the problem of sexual harassment and analyze possible legal remedies. Law journals[63] filled quickly with their analyses; some

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51 Ueno, *supra* note 50, at 56.

52 Akira Okuyama, *shokuba ni okeru sekushuaru harasumento—nichibei ryôkoku ni miru saikin no jittai* [*Sexual Harassment in the Workplace—Recent Trends in the United States and Japan*], HÔRITSU NO HIROBA, June 1990, at 33, 38.

53 Tatsuki Akimoto, *Amerika ni miru sukushuaru harasumento* [*Sexual Harassment in the United States*], RÔDÔ HÔRITSU JUNPÔ, Nov. 1990, at 22.

54 YÛKO NAKASHITA ET AL., SEKUSHUARU HARASUMENTO [SEXUAL HARASSMENT] i (1987).

55 Patterson, *supra* note 12, at 220.

56 NAKASHITA ET AL., *supra* note 54, at 7-8.

57 NAKASHITA ET AL., *supra* note 54, at 7-20 (summarizing the results of many of the surveys).

58 NAKASHITA ET AL., *supra* note 54, at 17 (summarizing the results of a survey commissioned by the magazine Nikkei Ûman [Nikkei Woman]).

59 Sandra Buckley, *A Short History of the Feminist Movement in Japan*, *in* WOMEN OF JAPAN AND KOREA, *supra* note 23, at 177.

60 *Id.*

61 *See* discussion *supra* note 3.

62 *See* discussion *supra* note 3.

63 In 1990 alone, the following legal articles were published: Akio Chiba, *Sekushuaru harasumento o kangaeru* [*Reflecting on Sexual Harassment*], 41 RÔDÔ HÔGAKU KENKYÛ KAIHÔ, 1 (1990); Toshiaki Hasegawa, *Kawaru byôdôkanto sekushuaru harasumento* [*Sexual Harassment and Shifting Perspectives on Equality*], HÔGAKU SEMINÂ, May 1990, at 56; Hayashi, *supra* note 3; Masaomi Kaneko et al., *Sekushuaru*

major legal periodicals even published special editions dedicated to the theme of sexual harassment.[64] Faced with no explicit law outlawing sexual harassment, the academics typically argued that the practice of sexual harassment, as a form of sex discrimination, offends a fundamental principle in the Japanese law of sexual equality.[65] In pursuing this argument, the academics invariably defined[66] sexual harassment consistently with international definitions[67] as unwarranted, unsolicited and unreciprocated attention of a sexual nature, which either is accompanied by threats or promises of benefits, or creates a hostile working environment. Since such behavior is patent discrimination against women and thereby contravenes the principle underlying the legal system of sexual equality, Japanese law, they concluded, carries an inherent prohibition against acts of sexual harassment.

The courts'[68] responses to the problem of sexual harassment have been more circumspect. Judgments have see-sawed—from decisions cautiously recognizing[69] the illegality of sexual harassment to reactionary responses, including the dismissal of the complainant's suit for evidentiary

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harasument no hôritsu mondai [*Sexual Harassment as a Legal Issue*], JURISUTO, June 1, 1990, at 12; Kiyoko Kinjô, *Sekushuaru harasumento to danjo koyô kikai kintôhô*, JURISUTO, June 1, 1990, at 37; Yoshiharu Moronaga, *Sekusharu harasumento to hôteki kyûsai* [*Legal Relief for Sexual Harassment*], JURISUTO, June 1, 1990, at 165; Akira Okuyama, *Sekushuaru harasumento to ihôsei handan no kijun* [*Sexual Harassment and the Criteria for Determining its Illegality*], JURISUTO, June 1, 1990, at 51; Okuyama, *supra* note 52; Akira Okuyama, *Hôritsu mondai toshite no sekushuaru harasumento* [*Sexual Harassment as a Legal Problem*] HÔGAKU SEMINÂ, Mar. 1990, at 49 [hereinafter, *Hôritsu mondai*]; Higashiko Sogabe, *Shokuba ni okeru seiteki iyagarase no jittai to shomondai* [Sexual Harassment in the Workplace: The Facts and the Issues], JIYÛ TO SEIGI, June 1990, at 52; Shizuko Sugii, *Shinkoku na jinken shingai—sekushuaru harasumento* [*Sexual Harassment: A Serious Infringement of Human Rights*], 246 HÔ TO MINSHUSHUGI 40 (1990); Shizuko Sugii, *Sekushuaru harasumento no hôteki kentô* [*A Legal Analysis of Sexual Harassment*], 81 HÔ NO SHIHAI 32 (1990); Ueno, *supra* note 50.

64 RÔDÔ HÔRITSU JUNPÔ, a leading journal on labor law issues, published a special edition on sexual harassment in 1989 (issue no. 1228); in 1990, JURISUTO, a general law journal, followed by publishing its own special issue (issue no. 956).

65 *E.g.*, Kinjô, *supra* note 63, at 39 (1990); Moronaga, *supra* note 50, at 10; Hideki Nagata, *Sekusharu Harasumento ni Yoru Seisabetsu* [*Sexual Harassment as Sex Discrimination*], HÔGAKU SEMINÂ, July 1, 1992, at 130.

66 *E.g.*, Hayashi, *supra* note 3, at 43-44; Kaneko, *supra* note 3, at 5; Moronaga, *supra* note 50, at 11.

67 *See, e.g.*, the Guidelines on sexual harassment issued by the Equal Emplyment Opportunity Commission in 1980. 29 C.F.R. § 1604.11 (1996). *See also* Sex Discrimination Act 1984 (Cth) sec. 28A (Austl.).

68 *See* discussion *supra* notes 1 and 4.

69 *E.g.*, the court in the *Fukuoka Sexual Harassment Case*, in holding that the plaintiff was entitled to relief for verbal acts of sexual harassment, did not even mention the word 'sexual harassment' in the text of the judgment. *Fukuoka Sexual Harassment* Case, *supra* note 1.

reasons[70] or the upholding of the defendant's counter-claims.[71] Most recently, the courts have re-affirmed the unlawfulness of sexual harassment.[72] However, as a general trend, the courts have accepted the basic tenor of the scholars' arguments, recognizing that acts of sexual harassment may constitute a tort under Article 709 of the Civil Code.[73] Currently, sexual harassment litigation[74] has not progressed beyond the District Court level.[75] Despite their lack of precedential value,[76] however, these lower court decisions represent early Japanese judicial attempts to grapple with the problem of sexual harassment and to dress it in its proper legal clothing. More importantly, the sexual harassment decisions—and the scholarly works discussing sexual harassment—have relied upon different models of sexual equality as part of their reasoning and analysis. The next part describes these models and the legal settings in which they were etched.

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[70] *Yokohama Sexual Harassment Case*, *supra* note 4.

[71] *Tokyo Sexual Harassment Case*, *supra* note 4.

[72] *Osaka Sexual Harassment Case*, *supra* note 1.

[73] *See especially Shizuoka Sexual Harassment Case*, *supra* note 1; *Fukuoka Sexual Harassment Case*, *supra* note 1; *Kanazawa Sexual Harassment Case*, *supra* note 4; and *Osaka Sexual Harassment Case*, *supra* note 1.

[74] The common perception is that the Japanese rarely bring their disputes to court. Foote, *supra* note 10, at 636. Although some have claimed that this is due to a peculiarly Japanese cultural aversion to litigation, Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, *in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41 (Arthur von Mehren ed., 1963), other scholars point to institutional barriers in bringing suit in Japan, such as high court costs, court delays and lack of enforcement procedures, John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. OF JAPANESE STUD. 359 (1978). There are also barriers specific to bringing sexual harassment suits. First, as the *Tokyo Sexual Harassment*, *supra* note 4, and *Yokohama Sexual Harassment Cases*, *supra* note 4, illustrate, allegations of sexual harassment are difficult to prove. Second, there is the social disapprobation women encounter when instituting sexual harassment suits. Patterson, *supra* note 12, at 215.

However, sexual harassment litigation is on the increase. At the end of 1995, there were about twenty cases pending in Japanese courts. *Kotoba no Seku Hara ni mo Mesu* [*Court Probes Verbal Sexual Harassment*], NIHON KEIZAI SHIMBUN, Nov. 27, 1995, at 11.

[75] The defendant has appealed the decision in the *Osaka Sexual Harassment Case*, *supra* note 1, thereby opening up the possibility of a future High Court decision on sexual harassment.

[76] Although there is no formal doctrine of precedent in Japan, courts, as a matter of practice, tend to respect prior decisions. *See* TANAKA, *supra* note 3, at 157-58.

IV. JAPANESE MODELS OF SEXUAL EQUALITY

A. *Relational Equality*

The first model of equality is *relational*[77] equality. This model holds that equality is tested by determining whether women are being treated in the same way as men. Thus, equality is a relative exercise, involving a comparison of the treatment of women to that received by men and requiring that both sexes are meted out the same burdens and preferences. There is to be no arbitrary differentiation based on sex. This model, however, implicitly recognizes that the standard of comparison is male (women are to be treated the same as men) rather than female (men are to be treated the same as women) or androgynous (men and women are to be treated according to the same, abstract, asexual criteria). The rationale for this model appears to be pluralism—a relativistic democratic ideal which "denie[s] absolute truths, remain[s] institutionally flexible and critical, value[s] diversity, and [draws] strength from innumerable competing subgroups."[78]

As the most widely supported model on equality by Japanese academics, this model relies on implanting elements of foreign law—especially American influences—and international law into the domestic Japanese legal environment. Architects of this model such as Okuyama,[79] Fukushima,[80] Hayashi,[81] Moronaga,[82] Sogabe,[83] and Nakagawa,[84] all commence their arguments with a consideration of Chapter VII of the

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77 My own term. *See* notes 16 and accompanying text.

78 E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 211 (1973), *quoted in* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L.J. 1177, 1188 (1990).

79 *See* Okuyama, *supra* note 63. Okuyama is a professor at Seijô University.

80 *See* Fukushima, *supra* note 3. Fukushima is a Japanese attorney. *See supra* note 3.

81 *See* Hayashi, *supra* note 3.

82 *See* Moronaga, *supra* note 50. Yoshiharu Moronaga is a Japanese attorney, member of the *Daini Tôkyô Bengoshikai* [Second Tokyo Bar Association] and Deputy Chairperson of the *Rysei no Byôdô ni Kansuru Iinkai* [Committee for the Equality of the Sexes].

83 *See* Sogabe, *supra* note 63. Higashiko Sogabe is a Japanese attorney and member of the *Daini Tôkyô Bengoshikai* [Second Tokyo Bar Association].

84 *See* Jun Nakagawa, *Sekusharu harasumento* [*Sexual Harassment*], 45(6) HÔRITSU NO HIROBA 54 (1992). Nakagawa is professor emeritus at Hiroshima University.

American Civil Right Act,[85] as further defined in the Equal Employment Opportunity Commission's Guidelines issued in 1980,[86] and the basic provisions of the United Nations Convention on the Elimination of All Forms of Discrimination against Women.[87] Unaminously, they interpret American and international law as proscribing any conduct in which women are treated differently from men. Sexual harassment, which subjects women to a different and more adverse working environment and working conditions, is a classic instance of such arbitrary differential treatment.

Japanese writers then translate this prevailing international and American construct of equality as identical treatment in domestic legal terms. For example, they argue that sexual harassment would constitute a tort since, as a form of sex discrimination, it is a "juristic act" which offends "public policy and good morals" under article 70 of the Civil Code. They further maintain that sexual harassment, although not specifically covered in the Equal Employment Opportunity Act, would come within its objects of "securing equal opportunity and equality of treatment of women in the work force in line with the principle of equality guaranteed by the Japanese Constitution."[88] Moreover, a duty on employers under the Labor Standards and Welfare Act to provide a "safe working environment for all employees"[89] would mean that companies would have to implement active policies to combat sexual harassment since it subjects women to an adverse working environment.

This popular thesis, however, has been overwhelmingly rejected by the courts.[90] The courts, for example, have dismissed international and foreign legal trends as irrelevant to the Japanese legal experience.[91]

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[85] 42 U.S.C. § 2000e-2(a)(1) (1996).

[86] 29 C.F.R. § 1604.11 (1996).

[87] 18 December 1979, 34 UN GAOR Supp. (No. 21) (A/34/46) at 193, UN Doc. A/RES/34/180 (entry into force September 3, 1981).

[88] *Koyô no bunya ni okeru danjo no kintô na kikai oyobi taigu no kakuho to joshi rôdôsha no fukushi no zôshin ni kansuru hôritsu* [An Act to Promote the Welfare of Female Workers by Providing for Equality of Opportunity and Treatment in Employment for Women], § 1 (Law No. 45 of 1985).

[89] *Rôdô kijunhô* [Labor Standards and Welfare Act], § 3 (Law No. 47 of 1949).

[90] *See supra* notes 1 and 4.

[91] The Fukuoka District Court, for example, refused to consider foreign legal developments and the Convention on the Elimination of All Forms of Discrimination Against Women despite an express invitation to do so by the plaintiff in her Statement of Claim. *See Fukuoka Sexual Harassment Case, supra* note 6. The plaintiff's Statement of Claim is reproduced in the *Fukuoka Sexual Harassment Case, supra* note 6, at 54.

Moreover, they reject the significance of the Equal Employment Opportunity Act since it does not provide actionable claims nor enforceable civil remedies for women who have suffered discrimination. The act merely requires employers to "strive" to stamp out discriminatory practices in recruitment, hiring, job assignment, promotion, training, employee benefits and retirement and dismissal policies; there are no precisely defined standards of conduct and no penalties for breaches of the duty to provide equal treatment to women.[92] The courts have also chosen not to rely on the "public policy and good morals" provision of the Civil Code to outlaw sexual harassment, even though it has been used in a string of cases in the 1970s and 1980s to stamp out other discriminatory practices.[93] Even the duty to provide a safe working environment has been given a different interpretation than that advanced by the academics.[94] By stripping the popular academic argument of its essential planks in this way, the courts have thereby rejected the relational theory of equality.

B. Inherent Equality

The second main Japanese model is the direct opposite of the first. The non-relational or *inherent*[95] model of equality considers that equality is not a comparative exercise involving a consideration of whether or not the treatment of women stands on the same level as the treatment of men; rather, equality subsists inherently—it exists when both men and women are free to express their personhood, including their sexuality, without restriction.[96] Under this model, sexual harassment denies women full equality because it dehumanizes and undervalues them as human beings, subjecting them either to unwelcome sexual advances or to a malevolent working environment. It therefore limits their ability to participate freely in society generally and in the work force specifically.

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92 For an overview of Japan's Equal Employment Opportunity Act, *see* Lorraine Parkinson, Note, *Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 COLUM. L. REV. 604 (1989). For a more critical assessment, *see* Kamiya, *supra* note 2.

93 *See supra* note 2.

94 The judgment in the *Fukuoka Sexual Harassment Case*, for example, imposes a stronger duty on employers than merely ensuring a "safe" workplace; they must ensure that the work environment is also "hospitable." *See Fukuoka Sexual Harassment Case*, *supra* note 6, at 64.

95 My own term. *See* note 16 and accompanying text.

96 Ueno, *supra* note 50, at 56.

Ueno[97] is the most forceful advocate of this model. Although she makes fleeting reference to the Convention on the Elimination of All Forms of Discrimination against Women as recognizing "on an international level . . . the inherent principle that women . . . are of equal worth as men,"[98] Ueno relies most heavily on Japanese constitutional law to support her theory. Ueno's thesis is that article 14 of the Japanese constitution, which guarantees sexual equality, should be interpreted in light of article 13 which provides that "all people shall be respected as individuals . . . and their right to life, liberty, and the pursuit of happiness shall . . . be the supreme consideration in legislation and in other governmental affairs."

Ueno argues that the guarantee of sexual equality, when read in conjunction with article 14, means that women have the right to respect as free and independent individuals. This not only includes the right to social, political, economic and cultural freedoms but also sexual self-determination.[99] These constitutional abstract rights, Ueno writes, are given concrete legal force by virtue of article 70 of the Civil Code which proscribes juristic acts which are contrary to good morals and public policy. Thus, she concludes, any act which violates this construction of the constitutional guarantee of sexual equality—including acts of sexual harassment—is actionable under civil law.

A similar view of sexual equality, albeit with a slightly different legal rationale, was advanced by the Fukuoka District Court in the *Fukuoka Sexual Harassment Case*.[100] This case concerned acts of verbal sexual harassment perpetrated by the defendant, the Editor-in-Chief at a publishing house, against the plaintiff editorial assistant. The acts of sexual harassment consisted of spreading rumors and making defamatory comments about the plaintiff's private sexual behavior to other employees, executive officers and even the company's business clients. The comments ranged from allegations that the plaintiff was, at various times, having affairs with a senior officer of the company, an employee cover designer, two staff reporters and a business client, to assertions that the plaintiff had uncontrollable sexual urges and was a mere pleasure seeker who led a pornographic lifestyle. When management refused to intervene despite the

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97 Ueno, *supra* note 50, at 56.

98 Ueno, *supra* note 50, at 57.

99 Ueno, *supra* note 50, at 58.

100 Fukuoka Sexual Harassment Case, *supra* note 1.

plaintiff's repeated requests, the plaintiff reluctantly resigned from the company and instituted a civil suit against both the defendant and the defendant publishing house. The court found for the plaintiff, holding that sexual equality was not only a constitutional guarantee but a legal principle permeating the entire Japanese legal system. The court reasoned that, consistent with this principle of sexual equality, certain "personal rights"—such as the right to respect, the right to a reputation both as an individual and as a woman, and the right to work in a hospitable working environment—inhere in all women. Violations of these rights could amount to an "unlawful act" within the meaning of article 709 of the Civil Code and thereby be actionable as a tort:

> The natural conclusion is that the defendant liable under article 709 of the Civil Code for unlawful acts. This is so on the grounds that *he created an inhospitable working environment for the plaintiff* as a result of his statements directed to the plaintiff and other persons associated with the business of the defendant company on occasions related to the business of the defendant company (whether at the workplace itself or outside it) *casting aspersions* on the plaintiff's private sex life and her sexual inclinations . . . .
>
> Such acts by the defendant, viewed as a whole, amount to, first, acts calculated to *blacken the estimation by others of the plaintiff as a working woman* by both alluding to her private life—and especially her personal relationships—and criticizing her inclinations as if they were uncontrollable in front of persons associated with the defendant company at the actual workplace . . . ; and, second, acts *calculated to blacken the estimation by others of the plaintiff* by spreading rumors about the plaintiff's relationships . . . . These two acts . . . were both aimed at *undermining the estimation by others of the plaintiff as a working woman*, and ultimately forced her to resign her position . . . . Without a doubt, all this was against the wishes of the defendant and injured her *reputation* as well

> as her other *personal* rights. These acts also caused the *working environment to deteriorate* . . . . (emphasis added).[101]

The same result was achieved in the most recent sexual harassment case, the *Osaka Sexual Harassment Case.*[102] In this case, the President of a medium-sized freight company questioned a newly-recruited eighteen year old female employee about her virginity and the sexual behavior of students at her high school. The President remarked how he "wanted" the plaintiff and that he would bring some money to work the next day so they could spend a night at a hotel. The plaintiff suffered physical symptoms as a result of this verbal harassment and was unable to return to work. She eventually resigned after less than four months working at the company. Judge Tsuji held that the defendant President was liable for unlawful acts of sexual harassment. This was on the basis that the defendant engaged in a deliberate campaign to disorient the plaintiff with sexually suggestive words and actions. The harassment in question, concluded the judge, was clearly against the plaintiff's will, violated her right "to be respected as a woman,"[103] and subjected her to a malevolent working environment.[104]

C. *Quantifiable Equality*

The third Japanese model of equality is *quantifiable*[105] equality. This model holds that equality can be quantified by reference to certain identifiable units of measurement. According to this construct, if males possess the same number of units as women, then sexual equality has been achieved. Unlike the relational equality which compares standards of treatment of women in relation to men, the quantifiable model is a balancing exercise which necessitates that the two sides of the scales—one with the male bundle of units, the other with the female bundle of units—is in perfect equilibrium. Accordingly, there is no male standard against which female equality is determined; all that is required is that the units of

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101 Fukuoka Sexual Harassment Case, *supra* note 6, at 75.

102 Osaka Sexual Harassment Case, *supra* note 1.

103 Osaka Sexual Harassment Case, *supra* note 1, at 205.

104 Osaka Sexual Harassment Case, *supra* note 1, at 205.

105 My own term. See note 16 and accompanying text.

measurement on either side balance in weight. In short, this is a model of equality as equilibrium.

Quantifiable equality has three strands. The strands differ depending on the unit of measurement which is adopted in order to determine the state of equilibrium. Thus, the first strand regards power as the operative unit of measurement; the second strand deems economic utiles as the appropriate unit of measurement; and the third—and perhaps most unusual—employs a cultural unit of good manners.

1. Power Strand of Quantifiable Equality

The *power* strand of quantifiable equality holds that equality is measured by reference to the equivalence of social advantages and preferences enjoyed by both sexes. Sexual harassment, which amounts to the social and economic oppression of women either by creating a hostile or uncomfortable working environment or by forcing women to submit to unfavorable conditions in order to maintain their jobs or seek promotion opportunities, is therefore sex discrimination because the male oppressor has assumed a dominating power advantage over the subordinated female victim.

This construction, at first glance, seems very similar to the power-assign approach in Western feminist jurisprudence, especially MacKinnon's subordination principle.[106] It is tempting to assume, therefore, that Japanese academics have adopted and adapted this model to their own domestic law. The assumption, however, is misplaced. Although most Japanese academics writing on sexual harassment in Japan rely heavily on American case law and the works of American scholars, especially MacKinnon, as a launching pad for developing their own ideas and theories,[107] no Japanese academic has adopted wholesale, or even in part, the power-assign approach.

Rather, the power strand of quantifiable equality is a purely judicial construct. It was first advanced, as a matter of substantive law, in *the Shizuoka Sexual Harassment Case*.[108] In this case, the plaintiff was a

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106 MacKinnon, *supra* note 43.

107 *E.g.*, Kaneko, *Sekushuaru harasumento no hôritsu mondai* [Sexual Harassment as a Legal Issue], *supra* note 3; Moronaga, *supra* note 50; Nagata, *supra* note 65; Okuyama, *supra* note 52; and Sogabe, *supra* note 63.

108 *Supra* note 1.

female hotel employee and the defendant was Chief of Accounts and the plaintiff's immediate superior. The defendant subjected the plaintiff to sustained acts of sexual harassment, including touching her while demanding that she go with him to a motel so he could "see her naked" and kissing her repeatedly against her will. The plaintiff sued the defendant for both the loss of her job (she was forced to resign when rumors spread around the hotel about her presumed affair with the defendant) and for non-pecuniary losses including psychological anguish, insomnia and loss of appetite. Judge Akimoto of the Shizuoka District Court held that the "nature, mode, method and means"[109] of the defendant's behavior constituted an "unlawful act" within the meaning of article 709 of the Civil Code. It was unlawful, declared Judge Akimoto, because the defendant had oppressed and disadvantaged the plaintiff by "treating her as a mere object of pleasure, a plaything, rather than as an individual with a human character."[110]

A similar reasoning process was applied in the *Fukuoka Sexual Harassment Case*,[111] but this time as a matter of procedural law. In determining whether the plaintiff editor had suffered any loss, the court noted that the plaintiff had also contributed to the uneasy working relationship between herself and the defendant Editor-in-Chief. Nevertheless, the court held that the defendant was more culpable because the balance of power between himself and the defendant was tipped firmly in the defendant's favor. The court used the evidentiary technique of judicial notice to find that the plaintiff, as a working woman in Japanese society, was a member of a traditionally oppressed group in society and therefore held a lighter stock of power units:

> However, the defendant's acts were not necessarily the only cause for the worsening work environment. The plaintiff's attitude, actions and character also contributed to the stand-off between herself and the defendant. Conscious of her own abilities and the defendant's irresponsibility, the plaintiff viewed the defendant as a rival; she also aimed to be the key player in the defendant company, attempting to place all

109 745 HANREI TAIMUZU 238, 239 (1991).

110 *Id.*

111 *Supra* note 1.

> persons associated with the defendant company (whether inside or outside) under her influence. In giving judgment, I must give due regard to these circumstances. In such a situation, it is inevitable that both parties will engage in injurious conduct and slander. However, *in light of the position of working women in modern society and the view of women held by men occupying managerial positions in companies*, I feel compelled in this case to find that the defendant acted unlawfully by criticizing the plaintiff's private life as his main means and ends of resolving their stand-off and ostracizing the other party (emphasis added).[112]

2. *Economic Strand of Quantifiable Equality*

The *economic* strand of quantifiable equality holds that equality is defined in terms of economic consequences. If a particular act or course of behavior results in a greater economic detriment to one party than to another, then this constitutes sex discrimination. Applying this reasoning, the architects of this construct conclude that since sexual harassment has a more adverse impact on women than men in terms of job security, job satisfaction and promotion opportunities, it is unlawful discrimination on the basis of gender.

The proponents of this economic strand of quantifiable equality are typically Japanese labor law specialists who invoke public policy and labor legislation to buttress their position. For instance, Yamada points out that acts of sexual harassment force many women to leave their jobs.[113] If they resist unwelcome sexual advances, they are denied legitimate promotion, training and job allocation opportunities. As demonstrated in the *Shizuoka Sexual Harassment Case*,[114] female victims of sexual harassment can also suffer psychological trauma, shame, insecurity and, in severe cases, invasion of bodily integrity and assault. Women are therefore denied the right to a safe, comfortable and equitable working environment on the same terms as men. They are accordingly denied certain economic benefits which

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112 *Supra* note 6, at 63-64.

113 Yamada, *supra* note 63, at 32. Shôji Yamada is a professor at Chuô Gakuin University.

114 *Supra* note 1.

men enjoy. As a matter of public policy, therefore, sexual harassment is not only socially reprehensible but also economically inequitable.

Fukushima,[115] Kinjô,[116] Moronaga,[117] and Okuyama[118] encrust the public policy arguments with a discussion of Japanese labor law. Specifically, they refer to two key labor law statutes—the Labor Safety and Welfare Law[119] and the Equal Employment Opportunity Act[120]—which together guarantee a safe, secure and equitable working environment for all employees. Thus, article three of the Labor Safety and Welfare Law compels employers to provide a safe working environment and to ensure the maintenance of minimum working conditions; whereas the Equal Employment Opportunity Law provides generally that employers either must, or should strive to, achieve equality in pay, hiring, retirement, training and promotion opportunities. Since sexual harassment threatens the well-being and the job opportunities of women, they argue, it is contrary to the spirit and content of Japanese labor law. Labor law, in short, demands equal distribution of economic utiles between men and women, and this is threatened by sexual harassment.

3. *Cultural Strand of Quantifiable Equality*

The *cultural* strand of quantifiable equality is given voice by Hasegawa in her strongly-worded article *Danjo koyô byôdôhô wa bunka no seitaikei o hakaisuru* [*The Equal Employment Law will Destroy Cultural Ecology*].[121] Although Hasegawa was chiefly concerned with equal opportunity in the work place, her comments on sexual equality are equally applicable to sexual harassment. Hasegawa argues that equitable gender relations are achieved through a country's "cultural ecosystem."[122] In her view, the respective roles of males and females in a country is "integral to

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115 Fukushima, *supra* note 3.

116 Kinjô, *supra* note 63. Kiyoko Kinjô is an attorney and a professor at Tsuda Juku University.

117 Moronaga, *supra* note 50.

118 *Hôritsu mondai*, *supra* note 63.

119 *Rôdô kijunhô* [Labor Standards and Welfare Act], § 3 (Law No. 47 of 1949).

120 The Equal Employment Opportunity Act, Law No. 113 of June 16, 1972.

121 CHUÔ KORON, May 1984, at 78. Michiko Hasegawa is an associate professor at Saitama University (For a translation of her article, see Michiko Hasegawa, *Equality of the Sexes Threatens Cultural Ecology*, ECONOMIC EYE, June 1984, at 23.).

122 *Id.* at 81.

and inseparable from"[123] the very fabric of a nation's cultural ecosystem and should not be interfered with through legal processes. Pressure by Western countries to change a country's culture, norms and customs, as demonstrated in articles 2(f), 3 and 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women,[124] represents Western cultural arrogance, forcing all nations to subscribe to a particular Western vision of appropriate behavior. Such pressure should be resisted, she claims, because it threatens the quintessential fabric of the victim state's cultural ecosystem.[125]

Instead of acceding to Western visions of equality, Hasegawa maintains that gender equilibrium is adequately regulated through the forces of unspoken culture.[126] Although Hasegawa does not specify the nature of these cultural forces, other cultural anthropologist scholars, both Western and Japanese, have attempted to describe these autothcaneous cultural traits. Kawashima,[127] for example, paints Japanese personal relations as harmonious and consensual where disputes, should they arise, are resolved by mutual understanding. Parker[128] points to the Japanese preference for group relationships over individual satisfaction, which leads to personal interdependence, mutual trust and group harmony. Kim and Lawrence[129] refer to social ideals such as *giri* (social obligation) and *ninjô* (human compassion), which, they suggest, are effective enough to control human behavior without the need for legal rules.

Therefore, Hasegawa concludes, good manners, as required by Japanese culture, will ensure that women and men are treated with equal respect within the Japanese culture ecosystem.[130] Breaches of cultural norms and rules will lead to social penalties. The force of Western-inspired law, therefore, is unnecessary.

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123 *Id.* at 82.

124 *Supra* note 87.

125 Hasegawa, *supra* note 121, at 87.

126 Hasegawa, *supra* note 121, at 82.

127 Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan, in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY (Arthur Taylor von Mehren ed., 1963).

128 Richard B. Parker, *Law and Language in Japan and in the United States*, 34 OSAKA U. L. REV. 47, 47-48 (1987).

129 Chin Kim & Craig M. Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 INT'L. & COMP. L.Q. 491, 498-501 (1979).

130 Hasegawa, *supra* note 121, at 86-87.

It is submitted, however, that the argument Hasegawa constructs is problematic for three reasons. These reasons tend to diminish the value of her argument to feminist discourse on equality. First, Hasegawa proposes a paternalistic solution (namely, that respect for women can occur through cultural forces within a patriarchal Confucian society) to a paternalistic problem (namely, men harassing women purely on the basis of their gender). Second, her view that culture is strong enough to withstand anti-social behavior against women does not match social reality, where recent surveys of the extent of sexual harassment in Japan indicate that almost sixty percent of women have been sexually harassed in their working lives.[131] Third, her thesis accords with the *nihonjinron* tradition[132]—which maintains that Japan's culture is distinctive and unparalleled in the world.[133] This theme of cultural uniqueness is now largely discounted as a "vapidly reiterated"[134] myth.

These problems, however, must not hide the important challenge Hasegawa poses to feminist theory: how should gender equality be reconciled with respect for cultural traditions? Hasegawa points to the dangers of importing foreign political ideals into a cultural environment with differently nuanced assumptions and values. She suggests that redefining the interdependence between the sexes by replacing existing cultural norms with outside rules can, in the Japanese cultural context, transform male-female relations from one of "harmony and co-operation" to "competition and antagonism."[135] Hasegawa's conclusion is that the integrity of Japan's cultural identity should be protected against Western-sponsored ideals.[136]

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131 NAKASHITA ET AL., *supra* note 54, at 17.

132 For a comprehensive attack on the *nihonjinron* tradition, see PETER N. DALE, THE MYTH OF JAPANESE UNIQUENESS (1986).

133 Hasegawa mentions argues that cultures are indigenous to each society and should not be "touched from the outside." Hasegawa, *supra* note 121, at 80. She then applies this thesis to Japan, concluding that Japan should resist passing an equal employment law conceived in a different cultural setting. Such a law, she states, will destroy Japan's cultural ecology. *Supra* note 122, at 87. Key assumptions underpinning her argument—the ostensible uniqueness of the Japanese culture, the homogenous nature of Japan's cultural ecosystem, and a hostility to interference from outside—are hallmarks of the nihonjinron tradition. See DALE, *supra* note 132, at 5.

134 DALE, *supra* note 132, at 5.

135 Hasegawa, *supra* note 121, at 87.

136 Hasegawa, *supra* note 121, at 87.

Of course, Hasegawa's conclusion is not the only possible resolution to the conflict between equality and culture. An alternative answer would be to subjugate cultural considerations in order to ingrain a right to equality, perhaps as part of a vision to "liberally transform"[137] Japanese society. Or maybe the solution lies elsewhere—somewhere between the two extremes of importing wholesale Western values of sexual equality and entrenching an existing cultural ecosystem. As Hasegawa herself admits, culture is not immutable.[138] Culture can also ebb and flow with changing times. Thus, if equality is to be regulated through culture, then arguably through a gradual process of consciousness-raising and periodical re-evaluation of community standards, Japan's Confucian culture can manage male-female relationships according to shifting and constantly-evolving precepts. This process could convert Japan's closed communitarianism—which, Inoue[139] argues, stifles the recognition of the rights of those in the community who do not have power, such as women—into a more open form of communality.[140]

At any rate, the cultural strand of quantifiable equality is likely to prove the most controversial model of equality. This is precisely because of the push-and-pull involved between the equality ideal and cultural identity. In my view, the model, *as Hasegawa expresses it*, has serious shortcomings. This does not undermine, however, the overarching significance of the model—which lies in the way it highlights the tension between equality and culture.

V. CONCLUSION

Japanese scholarship into the problem in sexual harassment, which surged in 1989, has had a spin-off benefit. It has forced both leading Japanese academics and the courts to develop theories on the nature of sexual equality in order to develop a possible legal response to the problem. (In the cultural strand of quantifiable equality, the conclusion, however, was that a legal response was not necessary as cultural forces are sufficient to regulate appropriate standards of conduct.).

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137 Setsuo Miyazawa, For the Liberal Transformation of Japanese Legal Culture: A Review of the Recent Scholarship and Practice (1995) (unpublished manuscript).

138 Hasegawa, *supra* note 121, at 87.

139 Tatsuo Inoue, *The Poverty of the Rights-Blind Communality: Looking Through the Window of Japan*, 1993 B.Y.U. L. REV. 517.

140 *Id.* at 550-51.

For each model of equality, a different legal basis served as inspiration. Thus, proponents of the relational model of equality cite international and foreign legal trends; the architects of the inherent model rely on Japanese constitutional law; and advocates of the quantifiable model find support variously in tort law and evidence (power strand), labor law and public policy (economic strand) and the Japanese cultural ethos (cultural strand).

The various Japanese models of equality may prove of interest to Western feminist theorists in a number of ways. The points of divergence from and intersections with Western theories on equality should be of particular interest. For example, it is interesting to note that relational equality, which is popularly used by Australian and American courts to outlaw acts of sexual harassment, has not found favor in Japanese courts. The different methods of legal reasoning behind the equality formulations may also provide useful source of future study. Why, for example, do Japanese courts refuse to consider international law as part of the interpretation of domestic law? And could judicial notice, which played such an important role in the Fukuoka Sexual Harassment case, be applied with equal effect by Japan's Western cousins?

Moreover, the interplay of equality theory with other areas of feminist study—such as rights discourse, culture and adjudication—should provide yet another fertile source of theoretical development. Thus, the inherent model of equality relies heavily on "personal rights" for its theoretical support; the cultural strand of quantifiable equality justifies non-intervention of the legal process on the basis of the dynamics of Japanese Confucian culture; and the courts in the *Shizuoka*,[141] *Fukuoka*,[142] and *Osaka*[143] *Sexual Harassment* cases have played crucial roles, arguably in an activist capacity,[144] in developing theories of sex equality and sex discrimination and in upholding a woman's right to be free from sexual harassment.

My aim in this essay was to broaden the parameter of the debate on sexual equality. Perhaps I have succeeded only in illustrating that equality can take on many, diverse forms, even within the limited context of one

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141 Shizuoka Sexual Harassment Case, *supra* note 1.

142 Fukuoka Sexual Harassment Case, *supra* note 1.

143 Osaka Sexual Harassment Case, *supra* note 1.

144 See discussion *supra* note 10.

country's response (Japan's) to one particular form of sexual discrimination (sexual harassment). Even so, these Japanese models should be useful to feminists in developing, improving, re-interpreting or even re-inventing the essence of equality. After all, as Abella succinctly puts it: "[e]quality is evolutionary, in process as well as substance, it is cumulative, it is contextual, and it is persistent."[145]

145 Rosalie Silberman Abella, *The Dynamic Nature of Equality, in* EQUALITY AND JUDICIAL NEUTRALITY 4 (Sheilah L. Martin & Kathleen E. Mahoney eds., 1987).