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THE 2006 REVISIONS TO JAPAN’S EQUAL OPPORTUNITY EMPLOYMENT LAW: A NARROW APPROACH TO A PERVERSIVE PROBLEM

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Abstract: In June 2006, Japan changed its approach to employment discrimination by amending the Equal Employment Opportunity Law (“EEOL”). The change was prompted by increased gender discrimination litigation, domestic economic pressures relating to the low birth rate, a stagnant economy and declining labor force, and criticism from the United Nations. The revised law attempts to address several of the shortcomings of the old law. First, Japan has made the law applicable to all workers rather than just to women workers. Second, the revisions expand the scope of the law by including a section on indirect discrimination. Third, the revisions provide greater protection for workers who take childcare and family leave by prohibiting employers from effectively denying employees’ rights to child care leave.

While these revisions to the EEOL indicate a positive conceptual shift in employment discrimination law in Japan, they appear to fall short in three areas. First, the provisions on indirect discrimination are too narrowly drafted. Second, the childcare leave provisions fail to place an affirmative duty on employers to act. Third, the enforcement measures are still too weak. To correct these problems, a more general legal definition of indirect discrimination should be drafted, regulations should be issued to assist employers in providing more accommodating work environments for parents who exercise their right to child care leave, and the enforcement provisions of the law should be strengthened.

This comment traces the development of the EEOL in Japan and highlights the issues that the old versions of the law did not address. It then discusses the specific changes in the 2006 revisions, their strengths and shortcomings, and recommends certain changes.

I. INTRODUCTION

Setsuko Honma, a Japanese woman and gender-rights litigant, proclaimed the 2006 Revisions to Japan’s Equal Opportunity Employment Law “useless.”¹ She was not alone in her disappointment. Honma was one of five women who sued her employer, the Kanematsu Corporation, for its discriminatory dual-track career system.² The employees claimed that

¹ The author would like to thank Professors Andrew Pardieck and Veronica Taylor for their guidance and advice, and the editorial staff of the Pacific Rim Law and Policy Journal for their tireless work and encouragement. Finally, I would like to thank my husband Kevin for his support and understanding throughout this process.
² The dual-track career system is a practice among many of Japan’s larger employers. They separate their regular, full-time employees into two tracks, a managerial track and a clerical track. Men are predominantly placed on the managerial track and enjoy better pay and better opportunities for advancement and promotion. Employers argue the distinction is not made on the basis of gender but on other characteristics such as educational background, performance on examinations, ability to work long
Kanematsu’s dual-track system kept women in lower paying jobs than their male colleagues who were doing the same work. The Tokyo District Court, however, dismissed the suit in November 2003, stating that the two-track system does not violate any law or legal principle because it theoretically still allows female employees to move into the managerial track.3

Honma’s disappointment reflects the fact that Japan’s recent revision to its employment discrimination law, while a slight improvement, falls far short of addressing the larger issues of gender inequality in Japanese employment. Those issues include the pervasive employer practice of indirect discrimination, the Equal Employment Opportunity Law’s (“EEOL”)4 weak enforcement mechanisms, and the inability (or lack of ‘choice’) of many women to continue working after becoming pregnant. These are not simply human rights issues, but are also issues of economic productivity: women make up roughly 48% of the workforce in Japan, and are often left with little choice but to quit working or accept menial employment.5  International pressure from the United Nations6 combined with domestic pressure from a slow economy and falling birth rate7 to influence Japan’s decision to implement the newest revisions to the EEOL. However, the new law remains incomplete. Specifically, the scope of the law’s indirect discrimination provision is too narrow, the childcare provisions fail to place an affirmative duty on employers to accommodate child-rearing parents, and the enforcement mechanisms remain too limited.

overtime hours, etc. Those placed on the clerical track perform duties with less responsibility, are not eligible for advancement into management positions and are given less pay and benefits. A 1990 Ministry of Labor survey found that 3.7% of women were on the managerial track as opposed to 99% of men. See Galen T. Shimoda, Japan’s New Equal Employment Opportunity Law: Combating Sexual Harassment in the Workplace, 16 TRANSNAT’L LAW. 215, 224 (2002).


These revisions were partially a response to concerns brought to light in 2003 by the U.N. Committee on the Elimination of Discrimination Against Women. The Committee published a report that urged Japan to address indirect discrimination in the workplace, including the dual-track employment system and the hiring of predominantly women as non-regular workers. Nakamura, supra note 1, at ¶ 17.6 Many view Japan’s declining fertility rates and aging population with heightened concern. It is widely reported by the Japanese media that the declining birth rate may result in labor shortages and a large number of elderly in need of public support. This may reduce economic productivity and undermine Japan’s position as an economic power on the global stage. This situation has prompted policy makers to encourage better utilization of the female workforce. See Patricia Boling, Family Policy in Japan, 27 J. SOC. POL’Y 173, 175 (1998).
This comment discusses the inefficacy of the 2006 revisions to the EEOL (“2006 Revision”)\(^8\) and recommends further revisions to meet the goal it establishes. Part II outlines the development of gender discrimination law in Japan. Part III summarizes three main aspects of the 2006 Revision: provisions addressing indirect discrimination, childcare leave, and legal enforcement. Part IV examines the inadequacies of the 2006 Revision. Part V suggests additional steps that law and policymakers can take to further the EEOL’s effectiveness in curbing gender discrimination in the Japanese workplace.

II. JAPAN’S GENDER DISCRIMINATION LAWS HAVE NOT PREVENTED OR ELIMINATED GENDER STRATIFICATION IN THE WORKPLACE

Japan’s anti-discrimination laws have their roots in Article 14 of the Japanese Constitution.\(^9\) Article 14, however, “does not directly regulate conduct between private parties.”\(^10\) Subsequent legislative and judicial actions have implemented the principle of Article 14 with respect to employment discrimination. These actions include the Labor Standards Law,\(^11\) the public order doctrine, and the EEOL. However, these actions have been largely ineffective at eliminating gender discrimination in several areas of employment, necessitating the 2006 Revision. This section traces the background of gender discrimination law leading up to and through the passage of the EEOL. It also examines two previous versions of the EEOL, briefly summarizes their contents, and introduces the issues left unresolved.

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\(^8\) Kōyō no bunya ni okeru danjyo kintō na kikai oyobi taigū no kansuru hōristu oyobi rōdō kijun hō no ichibu o kaisei suru hōristu [Law on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment and Revising a Part of the Labor Standards Law], Law No. 82 of 2006 [hereinafter 2006 Revision].

\(^9\) Article 14 states, “All 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. Kenpō, art.14, para.1, translated in Curtis J. Milhaupt, J. Mark Ramseyer & Mark D. West, THE JAPANESE LEGAL SYSTEM: CASES, CODES AND COMMENTARY 738 (2006).


A. Japan’s Labor Standards Law Prohibits Gender Discrimination Only as to Wages

Passed in 1947, the Labor Standards Law provides only limited protections against gender discrimination. It mandates equal treatment in employment between men and women only with respect to wages. An employer may not discriminate in wages “by reason of the worker being a woman.” That is, under the Labor Standards Law, a woman may be paid differently for performing the same tasks as a male employee so long as the employer can provide some real justification other than the employee’s gender or gender stereotypes.

The Labor Standards Law’s major shortcoming is that it fails to address gender discrimination outside of wage considerations. The law does not prohibit gender-based discrimination with respect to hiring, firing, promotion, or any other part of the employment relationship. An earlier version of the law also ensured differential labor treatment among men and women because it barred women from performing holiday work, night work, hazardous and noxious work, and mining work. Under the Labor Standards Law, Japanese employers developed various legal—yet discriminatory—employment practices that favored male employees over women. These included discrimination based on gender in hiring or promotion and the requirement that female employees retire upon marriage.

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13 The Labor Standards Law is the basic statute regulating individual labor relations. It covers employment contracts, payment of wages, working hours, rest days, annual paid leave, protection of children and pregnant women, workers compensation, etc. See id. at 632.
14 See id. at 636.
16 Id. at 161-62.
17 Id. at 161.
18 This has gradually been amended and special protections abolished. Those that have been abolished include special protections for women with regard to overtime work and night work, and more recently mining work. Yamakawa, supra note 12, at 636.
19 Sugeno, supra note 15, at 163. I am referring here mainly to the dual-track employment structure explained above, as well as the growing part-time and non-regular worker population, 90% of whom are female. See Charles Weathers, Temporary Workers, Women and Labour Policy-Making in Japan, 16 JAPAN FORUM 423, 425 (2004).
1. **Japanese Courts Have Invoked the Public Order Doctrine to Punish Discriminatory Employer Practices**

To remedy the inadequacies of the Labor Standards Law, the courts have developed a legal principle based on Article 90 of the Civil Code called the “public order doctrine.” Article 90 of the Civil Code nullifies any juristic act whose “object . . . is contrary to public policy or good morals.” The courts have applied this doctrine to enforce the Constitutional principle of equality (Article 14) between private individuals.

Japan’s courts began applying the public order doctrine to gender discrimination cases beginning in the 1960s. The courts first invalidated systems that required women to resign from their employment upon marriage. The courts also invalidated practices such as mandatory early retirement for women (often age 30), and requiring women to quit upon pregnancy or the birth of a child. The courts continue to apply this doctrine today.

Although the courts have taken an aggressive approach to some areas of labor law, they have been reluctant to use the public order doctrine to invalidate employers’ discriminatory practices with respect to promotion and initial hiring. The Tokyo District Court articulated the courts’ view, stating that while unreasonable sex discrimination in wages and mandatory retirement violates public order, “the failure of an employer to grant an equal

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21 Sugeno, supra note 15, at 163.
24 Id. at 131, citing Suzuki v. Sumitomo Semento K.K., 17-6 Rōminshū 1407 (Tokyo D. Ct., Dec. 20, 1966) (invalidating Sumitomo Cement’s decision to fire a female employee for her refusal to retire upon marriage because this restricted a woman’s freedom to marry and therefore violated Article 90 of the Civil Code).
25 Id. at 133, citing Tokyū Kikan Kōgyō, 20 Rōshū 715 (Tokyo D. Ct. Jul. 1, 1969) (invalidating employer’s mandatory retirement policy for women who reached age 30).
26 Id., citing Matsuro v. Mitsui Shipbuilding Corp., 22 Rōshū 1163 (Osaka D. Ct., December 10, 1971) (invalidating employer’s mandatory retirement policy for women upon marriage or upon the birth of her first child).
28 For example, the courts have actively developed judicial protections for job security. See Foote, supra note 22, at 683.
29 See id. at 672.
opportunity in recruitment and hiring [is] not a violation of public order.”\textsuperscript{30} The court went on to state that employers have historically been thought to enjoy broad freedom of choice in hiring.\textsuperscript{31} The Tokyo District Court’s statements illustrate the general sentiment among Japanese courts with respect to hiring and promotion.\textsuperscript{32}

\textbf{B. The Original Version of the EEOL Was Inadequate at Eliminating Gender Discrimination in Employment}

The United Nations’ International Year of Women in 1975 helped convince Japanese lawmakers that gender discrimination is a serious violation of human rights. Consequently, many Japanese politicians and bureaucrats began to promote laws and policies against gender discrimination.\textsuperscript{33} In 1980, the Japanese government signed on to the United Nations’ Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).\textsuperscript{34} Japan ratified CEDAW in 1985, and enacted the first version of the Equal Employment Opportunity Law,\textsuperscript{35} (“Old EEOL”) in an attempt to adjust internal law to comply with the U.N. treaty.\textsuperscript{36} The Old EEOL formed part of an amendment to thirteen labor laws, including the Working Women’s Welfare Law\textsuperscript{37} and the Labor Standards Law.\textsuperscript{38}

The Old EEOL attempted to discourage gender discrimination in the workplace by updating the Labor Standards Law’s sparse provisions on

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item See Foote, \textit{supra} note 22, at 672-73.
\item The official title at the time was the “Law to Promote the Welfare of Female Workers by Providing for Equality of Opportunity and Treatment in Employment for Women” [Kōyō no bunyō ni okeru danjo no kintō na kakai oyobi taigū no kakuhotō joshi rōdōsha no fukushi no zōshin ni kansuru hōritsu], Law No. 45 of 1985 (passed as an amendment to the Working Women’s Welfare Law [Kinrō fujin fukushinhō], Law No. 113 of 1972) [hereinafter Old EEOL]. See also Loraine Parkinson, \textit{Japan’s Equal Employment Opportunity Law: An Alternative Approach to Social Change}, 89 \textit{COLUM. L. REV.} 604, 605-06 (1989).
\item Kinrō fujin fukushinhō [Working Women’s Welfare Law], Law No. 113 of 1972, \textit{noted in} Parkinson, \textit{supra} note 35, at 605-06.
\item Parkinson, \textit{supra} note 35, at 605-06. The EEOL does not replace the Labor Standards Law, but only amends it.
\end{enumerate}
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gender-based wage discrimination. The Old EEOL articulated five employment stages where discrimination was to be discouraged: (1) recruitment and hiring; (2) job assignment and promotion; (3) education and training; (4) employee benefits; and (5) mandatory retirement age, retirement, and dismissal. Employers had a “duty to endeavor” to give women opportunities equal to men in “recruitment, hiring, assignments, and promotion.”

That is, employers were not prohibited from discriminating, but were required to make a good-faith effort to achieve equal opportunity in employment. Enforcement was left to administrative guidance by the then-Ministry of Labor and there was no punishment for non-compliance.

Shortly after its passage, the Old EEOL’s limitations became baldly apparent. The Old EEOL added no prohibitions beyond those already established by the courts. It only mandated that firms “endeavor” to stop discrimination in hiring, placement, and promotion. The law was essentially toothless. It did not provide for enforcement by means of a private cause of action. Instead the law provided three ineffective enforcement mechanisms: (1) voluntary resolution through internal employer methods; (2) assistance from the Directors of the Ministry of Labor Offices of Women’s and Young Workers’ Affairs when employer and employee could not resolve matters internally; and (3) non-binding mediation by an Equal Opportunity Mediation Commission, but only if both parties agreed to the mediation.

The business world circumvented the Old EEOL through the two-track hiring system, which satisfied the requirements of the EEOL but maintained the male-dominated company. Jobs were divided into two tracks: the general, or clerical, track and the management track. The management track consisted of predominantly male
employees. The clerical track consisted largely of female employees, and
duties included photocopying, serving tea, and performing basic office
work. Management-track employees were eligible for better pay and
benefits, and had better access to promotions than clerical-track employees.
The difference between the two was more than one of economic status; it
involved different job duties and different commitments from employers to
provide secure employment and the potential for advancement.

Employers were able to maintain their discriminatory practices under
the Old EEOL by setting requirements for the managerial track that kept
men and women divided. These requirements included: a degree from a
prestigious university, fluency in a foreign language, and additional
competitive examinations for female applicants. Further, management-
track employees were required to work long hours and transfer to locations
throughout the country. This often meant that women, who bore the
primary responsibility of rearing children, could not realistically comply
with management track requirements, indirectly weeding them out. By
setting requirements such as these, employers were able to comply with the
letter of the Old EEOL and maintain the discriminatory dual-track system,
rendering the Old EEOL ineffective in eliminating gender discrimination in
employment.

C. The 1997 Revisions to the EEOL Addressed Gender Discrimination in
the Japanese Workplace with Limited Success

Recognizing the defects in the Old EEOL, the Diet revised the EEOL
in 1997 (“1997 Revision”). While this first revision was a step forward for
gender discrimination law in Japan, it left many problems unresolved. The
Diet acted in large part because of social pressures requesting change.
However, while the 1997 Revision slightly strengthened the law’s

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49 The Ministry of Health Labor and Welfare’s (“MHLW”) Equal Opportunity Committee released a
report that observed that very few women are promoted to the managerial level in companies using dual-
¶ 15, available at http://japanfocus.org/products/details/2012 (citing a MHLW report posted August 3,
2005).
50 Shimoda, supra note 2, at 224.
51 Id.
52 Id. at 225 (citing Kamio Knapp, Still Office Flowers: Japanese Women Betrayed by the Equal
Opportunity Employment Law, 18 HARV. WOMEN’S L.J. 83, 122 (1995) (finding that these requirements
make it difficult for women to enter the managerial track)).
53 Boling, supra note 7, at 181.
54 Id.
55 Kōyō no bunya ni okeru danjyo kinto ni kikai oyobi taigū no kakuho ni kansuru hōristu, [Law
on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment], Law
No. 92 of 1997 [hereinafter 1997 Revision].
enforcement mechanism, it failed to address the law’s one-sidedness and left the issue of indirect discrimination unresolved.

Fears of a declining birthrate and weakening workforce helped spur the 1997 Revision to the Old EEOL. In 1990, there was an unexpected decline in the birthrate (the “1.57 shock”). The low birthrate presented the potentially serious problem of a decline in the Japanese labor force. Many worried that this decline would create a downturn in economic productivity, and shrink the base to support the pension system for a very large elderly population. In an attempt to address these concerns, the government created the Office of Gender Equality in 1994, which consisted of feminist activists, academics, and national bureaucrats who studied gender issues. The Office of Gender Equality issued several reports and suggested changes to the Old EEOL to resolve the birthrate problem. This work laid the social and legal framework for revisions to the Old EEOL.

After much criticism and heated debate, the Diet revised the Old EEOL in June 1997. This revision took effect in April 1999. The 1997 Revision strengthened the Old EEOL in several significant ways. It changed the provision requiring employers to “endeavor” not to discriminate in recruitment and hiring, and job assignment and promotion. Under the 1997 Revision, employers were prohibited from discriminating against women in hiring and recruiting and job assignment and promotion. The 1997 Revision also recognized sexual harassment for the first time as a form of gender discrimination, and placed an affirmative duty on employers to prevent sexual harassment in the workplace.

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56 The birthrate in Japan hit a post-war low in 1989 when the Ministry of Health Labor and Welfare reported that the average number of children a woman would bear in her lifetime was 1.57. The Japanese media reported widely on this statistic, and dubbed it the “1.57 shock.” This statistic and its corresponding media attention re-sparked the gender equality debate, and spurred the Diet to enact the Childcare Leave Act of 1991. See Boling, supra note 43, at 75.

57 See Boling, supra note 7, at 175.

58 Weathers, supra note 43, at 75.

59 Id.

60 Id.


62 Shimoda, supra note 2 at 232.

63 Id.

64 1997 Revision, arts. 5, 6.

65 Id. art. 21. See also Shimoda, supra note 2, at 237. The EEOL does not explicitly give individuals a private cause of action. The affirmative duty on employers to prevent sexual harassment in the workplace was a compliance measure with no penalty attached for non-compliance. This affirmative duty can support a cause of action under tort principles set forth in the Civil Code, but individuals may not sue to enforce any rights under the EEOL itself.
Importantly, the 1997 Revision changed the enforcement provision by granting the employee the right to force her employer into mediation. The Diet charged the Ministry of Health Labor and Welfare (“MHLW”) with providing mediation services.\(^{66}\) The 1997 Revision allowed an aggrieved employee to request mediation with the Equal Opportunity Mediation Commission (“EEOMC”) without the consent of the employer.\(^{67}\) If the employer failed to comply with the mediation, the MHLW was given authority to release to the media the names of the companies who failed to follow the agency’s advice, guidance, and recommendations regarding discriminatory practices.\(^{68}\)

Though the 1997 Revision contained a punitive aspect for non-compliance with EEOMC guidelines, it still did not provide for effective enforcement. Some argued that provision for publication of the names of non-complying employers was punitive enough given the Japanese cultural preference for group harmony.\(^{69}\) This argument, however, over-emphasizes the cultural argument often made by the business lobby, and ignores the strong influence of that lobby on the passage of labor legislation.\(^{70}\) Even in Japan, where it is probable that employers value their good reputations, this measure remains too employer-friendly and is not punitive enough to effectuate a change in discriminatory practices.

Despite its developments, the 1997 Revision left several critical areas in need of further revision. First, the law was written to protect only women and did not apply to men. Second, it did not address the growing problem of indirect discrimination. Indirect discrimination involves employer practices or requirements that are facially neutral, but result in disadvantageous treatment that affects a group of people disproportionately.\(^{71}\) Third, the enforcement provisions remained weak, providing only for administrative guidance and the release of a non-complying employer’s identity to the media. These shortfalls prompted the Diet to pass new revisions in 2006.

\(^{66}\) Articles 14-19 provide for the establishment of EEOMCs at each Prefectural Labor Office and the appointment of commissioners at each local office to hear arguments from both sides in an employment dispute, and to “prepare a proposal for mediation and recommend acceptance to the parties concerned.” 1997 Revision, arts. 14-19.

\(^{67}\) Shimoda, supra note 2, at 233.

\(^{68}\) Id. at 232. This differed significantly from the Old EEOL, which provided that the parties could enter mediation proceedings only if both sides consented. Furthermore, under the Old EEOL, the MHLW had no recourse if an employer failed to comply with the mediation or failed to follow the agency’s advice.

\(^{69}\) Id. at 236.

\(^{70}\) See Carl Weathers, supra note 19, at 426.

\(^{71}\) The prevalence of indirect discrimination is apparent when one looks at the percentages of female managers in Japan (about 9%), compared to 30% in the UK, and 45% in the US. See Weathers, supra note 49, at ¶ 17.
III. **THE 2006 REVISION MAKES SEVERAL SYMBOLIC CORRECTIONS TO THE EEOL, BUT STILL FALLS SHORT IN SEVERAL AREAS**

In 2006, Japan’s Diet made further revisions to the EEOL. The Diet reacted to the rise of gender-discrimination litigation and pressure from the United Nations.\(^{72}\) It also made the revisions out of a steady concern for the declining birth rate and its effect on the workforce.\(^{73}\) These broad concerns prompted the MHLW to convene a new policy deliberation committee [審議会] in 2005. In March of 2006, the Diet approved the MHLW’s suggested revisions to the EEOL (“2006 Revision”). The bill was enacted in the 164th Session of the Diet on June 15, 2006.\(^{74}\)

The 2006 Revision makes several significant changes to the EEOL. Most notably the revisions address indirect discrimination, adverse treatment for taking childcare leave, and provide new enforcement measures for sexual harassment. This section will discuss how the 2006 Revision addresses some problems left unanswered in the older versions, and how the 2006 Revision continues to fall short of the ultimate policy goal espoused in the law’s purpose statement.

A. **The 2006 Revision Expands the Applicability of the EEOL**

The 2006 Revision broadens the applicability of the EEOL. It changes the one-sided language of the previous version by making the EEOL applicable to female and male employees. It also adds new forms of prohibited employment discrimination, extending the EEOL’s protections. These additions are a positive step toward the expansion of the EEOL’s applicability and the development of anti-discrimination law in Japan.

The 2006 Revision represents a symbolic shift in employment discrimination law because it changes the one-sided, female-only language of the previous version. The policy deliberation committee’s first recommendation for revision was to change the language of the entire EEOL so that it would apply to both men and women.\(^{75}\) As such, the 2006 Revision now reads, “[t]he basic principle of this law is that workers


\(^{73}\) Weathers, supra note 43, at 69.

\(^{74}\) 2006 Revision, Law No. 82 of 2006. See also Diet Enacts Law to Stem Sex Discrimination at Work, JAPAN ECON. NEWSWIRE, June 15, 2006, at 1, available at File No. 04:30:20.

\(^{75}\) Atsuko Ishii, Kaisei danjo koyō kikai kintō hō no kaisetsu [Commentary on the Revised Equal Opportunity Employment Law], NBL, Jul. 15, 2006, at 22, 23.
[労働者] be enabled to engage in a full working life without discrimination based on sex, with due respect for the maternity of female workers.”

By changing the word “women workers” to “workers,” policymakers were able to broaden the scope of the EEOL to cover all forms of gender discrimination. This is a very positive development in Japanese gender discrimination law because it changes the concept of the law from one of protectionism to one of equality.

The Diet further expanded the law’s scope by prohibiting additional forms of employment discrimination. The EEOL bars discrimination in a limited set of employment areas. The 1997 version prohibited discrimination in the areas of recruitment, hiring, job assignment, and promotion. The 2006 Revision added provisions addressing the employer actions of demotion, alteration in employment status, and coercion to make an employee to retire or quit. The revision further expands the definition of the term “job assignment” to include the distribution of tasks and the grant of authority. When the law goes into effect, employers will be prohibited from making decisions on these phases of employment on the basis of gender. This change comes in response to numerous complaints that companies were demoting a disproportionate number of regular women workers and relegating them to part-time work.

B. The 2006 Revision Recognizes Specific Forms of Indirect Discrimination

With the 2006 Revision, the EEOL recognizes indirect discrimination, but only to a limited extent. The 2006 Revision narrowly addresses this problem by prohibiting three forms of indirect discrimination. Indirect discrimination involves practices that are facially neutral but which in reality are “disproportionately disadvantageous” to a certain group. It targets, for

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76 2006 Revision, art. 2. The 1997 version read, “The basic principle of this law is that women workers be enabled to engage in a full working life, with due respect for maternity but without discrimination based on sex.” (emphasis mine). 1997 Revision, art. 2.
77 See 2006 Revision, art. 6.
78 For example, the EEOL prohibits discrimination based on gender in recruitment, hiring, job assignment and promotion. It lists specific areas of employment where discrimination is prohibited, rather than prohibiting it more generally to protect all aspects of the employment relationship.
79 1997 Revision, arts. 5, 6.
80 Id.
81 Id.
82 See 2006 Revision, art. 6, para. 1-3.
83 Ishii, supra note 75, at 26.
84 Id. at 25.
85 Weathers, supra note 49, at ¶ 8.
example, employer requirements for managerial track positions that are nominally gender-neutral, but effectively exclude most women. The statute attempts to stop employers who discriminate on the basis of sex, but justify their actions using legitimate, but false pretenses. The Revision gives the MHLW authority to adopt ministerial ordinances \[\text{省令}\] that, “take appropriately targeted measures,” to shed light on this problem.\[\text{87}\]

The MHLW’s proposed ordinances\[\text{88}\] articulate three forms of prohibited indirect discrimination: (1) using height and weight requirements in recruitment and hiring; (2) requiring a managerial track applicant to accept a transfer to anywhere in Japan; and (3) requiring candidates for promotion to have been previously transferred to other places in their jobs.\[\text{89}\] If the employer cannot prove that these requirements are related to the nature of the work or give some other rational reason\[\text{90}\] for them, then they are in violation of the statute and the practice is prohibited.\[\text{91}\]

This provision is a step forward because it gives official recognition to a long-standing problem, but lawmakers have only begun to scratch the surface. The EEOL will prohibit certain forms of indirect discrimination, and therefore some employees affected by indirectly discriminatory policies will have recourse both in the MHLW and in the courts under Article 90 of the Civil Code. However if employee recourse is limited to those situations recognized in the ministerial ordinances, the law’s scope is too narrow.

\[\text{86}\] 2006 Revision, art. 7.
\[\text{87}\] \text{Id.}
\[\text{88}\] Ministerial orders are directives dealing with matters under an agency’s jurisdiction. They provide technical interpretations of the law and are authoritative sources. However, legislation passed by the Diet has greater legal authority. See T.J. Pempel, The Bureaucratization of Policymaking in Postwar Japan, 18 AM. J. POL. SCI. 647, 654 (1974).
\[\text{90}\] “Rational reason” \[\text{総合合な合理}\] is not defined in the statute. Proposed MHLW guidelines state that the reason must be concrete \[\text{具体的}\] and judged based on all the circumstances \[\text{総合に判断が行われるものである}\]. MHLW policy implementation documents give examples of irrational reasons, such as the inability to carry heavy loads due to lack of physical strength. See, e.g., Ministry of Health, Labor and Welfare, Rōdōsha ni taisuru seibetsu o riyū to suru sabetsu no kinshitō ni kansuru kōki ni sadameru jikō ni kanshi jigyōnushi ga tekitetsu ni taisho suru tame no shishin \[\text{Guidelines for employers to appropriately deal with the prohibitions on gender discrimination}\], available at \text{http://www.mhlw.go.jp/general/seido/koyou/kaiseidanjo/dl/04a.pdf}. Also, in previous discrimination cases, courts have struck down employer explanations such as efficiency in hiring, differences in length of service between male and female employees, and that female employees require too many legal protections as “unreasonable” \[\text{非合理的}\]. See Sasaki v. Iron and Steel Federation, 156 Zeimu sosō shiryō 2202 (Tokyo D. Ct., Dec. 12, 1986) \text{translated in Curtis J. Milhaupt et al., THE JAPANESE LEGAL SYSTEM: CASES, CODES AND COMMENTARY} 587 (2006).
\[\text{91}\] 2006 Revision, art. 7.
C. The 2006 Revision Prohibits Adverse Employment Treatment for Taking Childcare Leave

Article 9 of the 2006 Revision provides greater protection for women who take maternity or childcare leave. Although women are entitled to take maternity and childcare leave under the Labor Standards Law, many women were encouraged to quit their jobs when they became pregnant, or were told their jobs had disappeared when they returned to the workplace. The 1997 Revision prohibited employers from terminating employment for getting married, becoming pregnant, giving birth, or for taking maternity leave. This proved insufficient to stop the terminations. Accordingly, the 2006 Revision expands the law’s scope by prohibiting employers from “treating employees disadvantageously.” Specifically, termination during a pregnancy or within a year after giving birth, or termination for taking childcare leave will be nullified. Termination will only stand where the employer can prove that the decision was made for a valid reason other than pregnancy or taking childcare leave.

The MHLW’s proposed ministerial ordinances address the meaning of “disadvantageous treatment,” and set out three prohibited reasons for termination or disadvantageous treatment. These prohibitions are similar to the ordinances on indirect discrimination. Under the proposed ordinances, an employee cannot be terminated for using or requesting the protection of the maternal health provisions of the EEOL or for using or requesting maternity leave under the Labor Standards Law. Moreover, an employer cannot terminate an employee under the pretense of inefficiency or inability to do manual labor after a female employee has conceived or given birth.

92 Since the 1997 Revision, the MHLW has heard various complaints from women experiencing these problems. Harumi Ozawa, Japan Tightens Laws Against Sex Discrimination, AGENCE FRANCE-PRESSE, June 15, 2006.
93 Ishii, supra note 75, at 26.
94 Id.
95 [不利的取扱をしない] 2006 Revision, art. 9, para. 3.
96 Id., art. 9, para. 4.
97 Id.
98 This is an anti-retaliation provision. Employers may not retaliate by terminating an employee who initiates proceedings against her employer for dismissal or disadvantageous treatment because of marriage, pregnancy or childbirth. Id., art. 9.
99 Article 65 of the Labor Standards Law requires employers to provide leave to women expected to give birth within six weeks and who request it. It further provides that women may take an additional six to eight weeks of leave after the birth, if the woman requests it. Rōdō kijun hō [Labor Standards Law], Law No. 49 of 1947, art. 65.
The proposed ordinances end with the word “nado” (et cetera), indicating this is not an exhaustive list. Although the ordinances list only three prohibited reasons for termination or disadvantageous treatment, the inclusion of the word nado may indicate that the MHLW will draft further instruction. Barring the addition of new prohibitions, the word nado may support a broader application of the law’s basic concept that employers are prohibited from terminating employees who bear children or take parental leave.

The 2006 Revision makes positive inroads to ending indirect, disadvantageous treatment towards female employees who take childcare leave. It is hoped that this will encourage employers to take greater steps towards retaining expectant parents. Importantly, this improves upon the 1997 Revisions because it recognizes that expectant parents face termination for their private life choices. Unfortunately, ambiguity still remains as to whether these orders will be strictly interpreted or applied to situations that fall outside the three enumerated circumstances listed.

IV. THE 2006 REVISION FAILS TO FURTHER JAPAN’S CONSTITUTIONAL REQUIREMENTS AND THE EEOL’S PURPOSES

Despite the Diet’s efforts, the 2006 Revision satisfies neither the constitutional principle of equality under the law, nor the stated purpose of the EEOL. The Constitution states 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.” The EEOL’s purpose is similarly broad: “The purposes of this Law are to promote equal opportunity and treatment between men and women in employment in accordance with the principle contained in the Constitution of Japan of ensuring equality under the law.” Although the 2006 Revision represents a more serious attempt to further gender equality in the Japanese workplace, it raises several important issues that illustrate a need for further revision.

\(^{101}\) Id.


A. The Provisions on Indirect Discrimination Are Too Narrowly Drafted

The most prominent problem with the 2006 Revision is that it does not define indirect discrimination. The concept of indirect discrimination is introduced in the form of three specifically prohibited discriminatory measures that are not contained in the body of the statute itself. The legislature essentially passed the buck to the MHLW to draft ordinances clarifying the concept. Drafted by the MHLW, the ordinances prohibit: (1) providing for weight and height requirements in hiring and recruitment; (2) requiring applicants for promotions to accept transfer to any place in the country; and (3) requiring candidates for promotion to have experienced transfer to other places.104 This short list is simply insufficient.

The three recognized forms of indirect discrimination in the ordinances are too narrowly drafted. Although the recognition of these three forms will likely “promote equal opportunity and treatment between men and women in the workplace,”105 there are certainly countless manifestations of indirect discrimination that are not covered by the ordinances. In fact, four other forms of indirect discrimination were discussed in the MHLW Labor Policy Council, but not included in the MHLW’s proposals.106 Those included (1) requiring a particular academic background or certain degrees when it is not necessary for the job; (2) requiring recipients of welfare and family benefits to be the registered head of the household; (3) giving preferential treatment to regular employees even when there are no differences in the work performed by regular and non-regular employees;107 and (4) excluding non-regular workers from welfare and family benefits when there are no differences in work performed.108 The Labor Policy Council discussed these particular forms because the MHLW had documented these forms of indirect discrimination.109 The inclusion of these recognized forms of indirect discrimination in the ordinances on indirect discrimination would have made the law more broadly applicable, and thus better aligned it with its stated purpose than the enacted version.

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105 Id.
107 This places women at a disadvantage because a large percentage of non-regular workers are women. See Weathers, supra note 19, at 425.
109 Id. at ¶ 5.
Because only three forms of indirect discrimination have been officially recognized, other equally offensive and unequal practices fall outside the law’s remedial scope. For example, some employers who use the dual track system require managerial track employees to graduate from prestigious universities. This policy indirectly eliminates many women from consideration for the managerial track because most graduates from prestigious universities are male. This real instance of indirect discrimination is not covered by the ordinances. In response to criticism, the drafters were careful to include a caveat that the courts may find other forms of indirect discrimination than those listed in the statute.

Japanese case law on discrimination indicates that the courts see the EEOL as merely a statement of policy that illustrates the current social trends. Although the courts in Japan have actively developed the public order doctrine to invalidate some discriminatory employer practices, they have been reluctant to apply this doctrine to the realm of hiring and recruitment, where indirect discrimination most likely occurs. For example, in the recently-decided Sumitomo Metal case, the Osaka District court found Sumitomo Metal guilty of indirect discrimination in the area of wages and promotions. The court cited the 1997 version of the EEOL in support of its invalidation of Sumitomo’s disproportionate promotion of men to the managerial track based on internal personnel rules that were not made clear to the employees. The court found indirect discrimination in this case mostly because Sumitomo’s internal policies were clearly documented and discriminatory in the area of promotion, but courts have been unwilling to find it in cases where documentation is not as clear, or where the discriminatory treatment occurs in hiring or recruitment.

Without a more thorough approach from the legislative branch on indirect discrimination, courts are likely to continue to apply the doctrine sparingly, especially with regard to hiring and recruitment decisions. This

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110 Shimoda, supra note 2, at 224.
113 See Foote, supra note 22, at 672.
115 Id.
116 Foote, supra note 22, at 672.
will result in little progress in the promotion of “equal opportunity and treatment between men and women in employment”117 in accordance with the Constitutional principle that “there shall be no discrimination in political economic or social relations because of race, creed, sex, social status or family origin.”118

B. The Childcare Leave Provisions Do Not Fully Address the Spectrum of Disadvantageous Treatment

The 2006 Revision stops short of achieving its lofty policy goals by failing to address the range of workplace hostility faced by those who take childcare leave. The MHLW has stated that one of the most important purposes of the 2006 Revision is to “create an environment in which women [can] work and raise children in order to raise the birthrate.”119 The childcare leave provisions included in the 2006 Revision fail to fully advance this purpose because they contain only negative statements, and place no affirmative duty on employers to provide accommodations to women who choose to work and raise children.

Working mothers in Japan often face difficult employment conditions. Although statistics show that most eligible women take childcare leave, nearly two thirds of women workers quit work when they become pregnant (and therefore are not eligible to take their leave).120 Many women often quit rather than take childcare leave, because “they are reluctant to force extra work on their coworkers during their leave,” and those women who do take leave often face resentment among their coworkers who must cover in their absence.121 The Nihon Keizai Shinbun122 reports that employers tend to parse out the extra work to the other female employees rather than males, resulting in still more problems with inequality in the workplace.123 Working mothers report that this creates strained human relations [人間関係] including subtle snubs, put-downs and other hostile actions.124

120 Weathers, supra note 49, ¶19.
121 Id.
122 This is a prominent economic newspaper in Japan.
123 Weathers, supra note 49, ¶19 (citing Nihon Keizai Shinbun, May 9, 2005).
124 Boling, supra note 7, at 185.
This stigma prevents many from taking their parental leave. Preventing this type of harassment is critical for achieving equality in the workplace.

The 2006 Revision makes an attempt to curb adverse treatment by employers, but falls short of addressing adverse treatment by other employees. The 2006 Revision does not place an affirmative duty on employers to accommodate childcare leave recipients. The language of the 2006 Revision limits the law’s applicability to three types of prohibited employer conduct. The Revision does not remedy the behavior of employers who fail to balance the workload more effectively in the event of an absent employee. Nor does it provide guidance for more flexible work arrangements to accommodate the changing demands on the parent-employee and the remaining employees. A clearly-stated measure addressing this problem would help to further the law’s basic principle and allow all workers to engage in a “full working life.”

The 2006 Revision does not provide the courts with effective tools to stop workplace hostility. The courts will not likely be willing to apply the public order doctrine to such a subtle form of discrimination, because they have only done so when discrimination was a documented and obviously unreasonable employer policy. Courts that have addressed discrimination issues related to maternity leave, marriage, and employment have done so in the context of mandatory retirement policies within companies, which required female employees to agree to retire upon marriage or the attainment of a certain age (around thirty). The courts reasoned that the preservation of the freedom of marriage is part of the public order, and a retirement plan that unreasonably restricts the freedom to marry is void as against the public

125 Id.
126 Those are: termination for using or requesting the protection of the maternal health provisions of the EEOL, requesting maternal health protection under the Labor Standards Law, and termination under the pretense of inefficiency or inability of a female employee to do manual labor after a female employee has conceived or given birth. See supra Part III.C, n. 98-99.
129 See e.g. Upham, supra note 23, at 133 (citing Tokyō Kikan Kögyō, 20 Rōshū 715 (Tokyo D. Ct. Jul. 1, 1969) (invalidating employer’s mandatory retirement policy for women who reached age 30)).
order principle of Article 90 of the Civil Code. 130 Whereas the retirement plan was obviously discriminatory, the more subtle instances of discriminatory practices involving unaccommodating work environments or coworker resentment will be harder for a court to manage. Hostile work environment is difficult to prove and it would force a court to go out on a limb to apply the public order doctrine in such a case. Thus, it is unlikely that the courts will make up for the narrow scope of legislation.

C. The Enforcement Mechanisms in the 2006 Revision Are Still Too Weak

The EEOL’s enforcement mechanisms remain effectively toothless, too weak to align the law with its stated purpose. The drafters of the 2006 Revision did little to alter the existing remedies for employees. Every stage of the EEOL’s drafting and revision has been met with criticism of this aspect. Many Western scholars criticize the EEOL, because it gives no incentive to companies to follow the law. 131 Some have suggested more punitive measures, including heavy fines or criminal sanctions for companies that demonstrate patterns of sex discrimination. 132

The EEOL differs significantly from its American counterpart in Title VII 133 in this manner, and perhaps more punitive enforcement measures would increase its effectiveness. 134 However, punitive sanctions may not fit Japan’s cultural and legal climate.

Japanese scholars reject America’s litigious approach to gender discrimination, arguing that it contradicts Japan’s cultural environment that encourages harmony and consensus. 135 They stress that American jurisprudence teaches legal principles though deterrence, punishment, and exorbitant damage awards, while the Japanese approach encourages personal contact and negotiation. 136 The cultural argument for harmony and consensus, however, has long been questioned by scholars, such as John Haley, who argue that the low incidence of litigation in Japan results from other factors such as institutional incapacity and scarcity of lawyers and

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130 Id. at 133-134 (citing Matsuro v. Mitsui Shipbuilding Corp., 22 Rōshū 1163 (Osaka D. Ct., December 10, 1971) (invalidating employer mandatory retirement policy for women upon marriage or upon the birth of the first child)).
132 Id.
134 Fan, supra note 131, at 137.
135 See Shimoda, supra note 2, at 247.
136 Id.
judges. As more scholars recognize other structural factors that contribute to the low rate of litigation in Japan, the cultural argument becomes less persuasive.

Accepting that Japan is not suited to full litigation of workplace discrimination, mediation by the MHLW’s Equal Employment Opportunity Mediation Commission (“EEOMC”) is equally insufficient to deter discriminatory behavior or comply with constitutional principles. Although the administrative procedure likely resolves some disputes in an efficient and cost-effective manner, the EEOMC’s role is that of a mediator, meaning its officials assist the parties in reaching a settlement. The EEOMC’s effectiveness depends largely on voluntary compliance. EEOMC officials do not make judgments, and the proceedings are not binding on the parties. Failure to comply, however, may result in a public announcement to the media that the employer has violated the EEOL. This may encourage some employers to comply, although there is no measurable loss for failure to do so. The EEOMC’s reliance on voluntary compliance and the relatively weak punishment employers receive for non-compliance does not deter discriminatory behavior.

The threat of a lawsuit is not necessarily a serious concern for an employer. Though it is possible that an employer’s failure to attend and comply with EEOMC proceedings will prompt the employee to file a lawsuit in the courts, discrimination is difficult to prove in the courts and the trial process is often very lengthy and costly. These factors may discourage potential litigants, removing the threat to employers of potential lawsuits. The low probability of discrimination lawsuits also undermines attempts to deter discriminatory behavior.

Several statistics further illustrate that that the EEOL’s enforcement provisions are not effectively enforcing the principles the law sets forth. Gender stratification continues to worsen in the employment sector. As of 2005, the female-male wage differential in Japan was around 66%, and only

138 EEOMCs are located in each Prefectural Labor Office. They are staffed with commissioners “of learning and experience” appointed by the Minister of Health Labor and Welfare. Aggrieved employees may seek informal advice from local offices or file formal complaints. The EEOMC may initiate mediation proceedings without the consent of the employer, and commissioners will “give any necessary advice or guidance or make any necessary recommendation to the parties concerned.” See 2006 Revision, arts. 14-19.
139 Hanami, supra note 42, at ¶ 36.
140 See 2006 Revision, arts. 14-19.
141 Many lawsuits in Japan take over ten years to complete. See Weathers, supra note 43, at 80.
142 Id.
8.9% of managers were female.\textsuperscript{143} Although most large firms have adopted the MHLW’s guidelines on discrimination and sexual harassment to protect their images,\textsuperscript{144} the above statistics continue to reflect that the role of this law in influencing employment practices is negligible. Gender discrimination continues to be a pervasive problem twenty years after the first passage of the EEOL and its enforcement mechanism is still insufficient, even after this latest revision.

V. REVISION IS NECESSARY TO PROMOTE THE PRINCIPLES OF EQUALITY ESPoused IN THE EEOL’S PURPOSE AND THE CONSTITUTION

To align the 2006 version of the EEOL with its stated purpose and the Constitution, the Diet should enact further revisions. First, the law should include a broader definition of indirect discrimination. Second, the law should place an affirmative duty on employers to provide better childcare leave accommodations. Finally, drafters should aim to strengthen the EEOL’s enforcement mechanism through either a grant of binding authority for administrative mediation proceedings, or through a cause of action for private litigants.

A. Lawmakers Must Draft a General Legal Definition of Indirect Discrimination to Cover a Broader Range of Discrimination

The 2006 Revisions fail to provide adequate remedial coverage of indirect discrimination. Indirect discrimination remains difficult to solve because members of the Labor Policy Council claim they are unsure how exactly to define it.\textsuperscript{145} This issue is complex, because it involves deeply rooted practices of dividing labor along gender boundaries. While the Diet’s recognition of this issue reflects a step towards the development of this new doctrine, the EEOL’s limited and gradual approach does not fully address the possible instances of indirect discrimination.

Lawmakers should draft a general legal definition of indirect discrimination that the courts and administrative bodies can apply. The Diet should make this general legal definition part of the statute itself to send a clear, authoritative message to the courts that the concept is to be applied more broadly. This would merely require drafters to revisit the definition of the term used in the discussions of the Labor Policy Council’s Subcommittee

\textsuperscript{143} This statistic seems quite low when compared to the U.S., where 45.1% of managers are female. \textit{Id.} at 69.
\textsuperscript{144} \textit{Id.} at 79 (citing SHŪKAN RÔDÔ NYŪSU (May, 1999), JAPAN LABOUR BULLETIN, August 1999).
\textsuperscript{145} Ishii, \textit{supra} note 75, at 25.
The Subcommittee defined indirect discrimination as “when rules, standards[,] and customs appear facially to be gender neutral but one sex is receiving substantially disadvantageous treatment, and that treatment has no relationship to job duties and no legal or rational basis.”

Although this definition would need refinement for placement in the statute, it is evidence that the term is definable and that the lawmakers have defined the term for purposes of their debates.

U.S. anti-discrimination laws can also serve as an example, though not a substitute. The U.S. Congress codified indirect discrimination in Title VII of the Civil Rights Act of 1991. The United States takes a broader and more litigious approach than the EEOL. However, Title VII places a difficult burden of proof on the complainant and does not open the doors widely to successful litigation. The disparate impact provision states:

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

The U.S. model demonstrates that indirect discrimination can in fact be statutorily defined in a broad manner. The U.S. Supreme Court has applied this statute in cases where plaintiff-employees claim that requirements or conditions of employment disqualify a certain group at a substantially higher rate than others. This portion of Title VII places the initial burden on the complainant to prove that the employer’s practice causes a disparate impact on the basis of race, color, religion, sex, or national origin. If the plaintiff...
can satisfy this burden, then the burden of proof shifts to the defendant to show that the practice is “job related for the position in question and consistent with business necessity.” If the defendant satisfies this burden, then the burden shifts back to the plaintiff to prove that “an alternative employment practice” exists with a smaller disparate impact.

Because of the incongruity of the Japanese and American legal systems, the U.S. statutory model would not likely translate easily into Japanese law. Moreover, the U.S. model is not ideal because it is a formula for private litigation, and places a very difficult burden on plaintiffs to actually prove that a particular employment practice causes a disparate impact. The U.S. model is, however, a useful starting point in defining indirect discrimination by statute to include a broad range of circumstances.

An effective definition for the EEOL might require a more holistic view of indirect discrimination. The EEOL should establish that indirect discrimination exists where the net effect of the employer’s requirements (and not one requirement in particular) is that a disproportionately small amount of female (or minority) employees are hired for certain positions compared to their counterparts in the wider labor market. It is difficult to avoid statistic-based analyses in indirect discrimination cases because proof of an employer’s intent to discriminate is often lacking. However, the statistical approach is particularly compatible with the Japanese preference for enforcement by administrative agencies. A revised EEOL could allow the MHLW to collect and analyze such statistical data if it suspects discriminatory practices. The burden of proof in this proposed revision is also substantially lower than the U.S. version, because the claimant would only be required to show the net effect of the employer’s practices, and not base the argument on one specific practice.

In short, the 2006 Revision’s statutory scheme for indirect discrimination is too narrowly drafted. While Japanese lawmakers argue that the concept is difficult to define in a broad manner, the United States

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156 The U.S. Supreme Court has held that the plaintiff meets his or her burden of proof by establishing a disparity between the proportion of minority employees in a certain job and the proportion of those minority workers in the same type of position in the wider labor market. See *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 654 (1989) (This case was later overruled by Congress in the Civil Rights Act of 1991; however, its analysis on the plaintiff’s initial burden of proof still remains valid law). This involves a complex comparison of statistical evidence, and only passes muster if the disparity is large enough to be significant.
157 Adapted from 29 C.F.R. § 1607.4C (2000).
158 Of course, the proposed revision would also include a clause giving the employer the opportunity to provide a rational or business-related reason for the requirements.
provides an example of a broader definition of the concept. Several changes to the U.S. definition, including a relaxed burden of proof and the collection and analysis of statistical data by the MHLW make this approach more compatible with the Japanese legal framework, and significantly broaden the provisions enacted in the 2006 Revision.

**B. The MHLW Should Adopt Regulations That Place an Affirmative Duty on Employers to Act and Assist Employers in Providing Better Accommodations for Parents Who Take Childcare Leave**

The MHLW should supplement the childcare leave provisions by placing an affirmative duty on employers to provide accommodation for all employees. Although the 2006 Revision recognizes new forms of prohibited employer conduct, it does little to address the problem that women often choose to quit when they become pregnant.159 Official government policy states that the EEOL’s goal is to encourage more women to stay in the workforce, and combat the M-curve phenomenon.160 Accepting this policy, the government needs to place an affirmative duty on employers to create systems that encourage women to remain in the workforce when they become pregnant, and retain women even after they have children.

Supplementary regulation should state that employers have an affirmative duty to accommodate employees who take childcare leave. Accommodations should include distributing the absent employee’s work evenly among remaining employees, making telecommuting options available, hiring temporary replacements to take the burden off of remaining employees, and allowing leave recipients more flexible work schedules. Further, if an expectant parent does decide to quit entirely, employers should be encouraged to rehire him or her and provide continuing education to better integrate the parent back into the regular work force.

**C. The EEOL Needs a Stronger Enforcement Mechanism**

The administrative guidance model of the EEOL has been ineffective at curbing widespread gender discrimination and is virtually toothless.
Because Japanese scholars and policymakers are wary of encouraging litigiousness, government policies tend to remove disputes from the courts and place them into the “government-controlled mediation machinery.” 161 Legislation, especially in the economic realm, tends to be general and leaves broad discretion with bureaucrats to interpret and apply the law. 162 Government officials offer administrative guidance, and compliance is theoretically voluntary.163

As an effective enforcement measure, the EEOMC should become an arbitration body, which renders binding decisions. In the context of the Japanese legal system, it may not be feasible to implement civil rights legislation identical to that of the United States, as the two countries have entirely different approaches to litigation and the enforcement of laws. The arbitration approach need not change the conciliatory focus that the Japanese administrative and judicial branches often take. The arbitrator may still encourage conciliation and settlement, but proceedings must be mandatory and settlements must be binding. Non-compliance with the guidelines and the decisions of the EEOMC should be more strictly enforced in the form of substantial administrative fines or other punitive measures.

In light of recent legal reforms in Japan, it is increasingly acceptable for the government to provide private litigants with a cause of action to enforce the EEOL. Indeed, the Diet has recognized private causes of action for investors in securities with the Financial Services Law.164 Hence, there is some evidence of the shifting conceptions of enforcement through private litigation and of the role of law in society.

Despite these recent developments, a provision that gives individuals a private cause of action to enforce the EEOL would likely encounter many obstacles. First, Japanese lawmakers tend to prefer the administrative guidance mechanisms of the bureaucracy to settle disputes. Second, the lawmakers would likely never ratify such a provision. Labor policy-making decisions are made by the Labor Policy Council. Business, agricultural, and other private interest groups are well represented in the Labor Policy Council and maintain a controlling influence. Although unions and women’s groups are also represented, their influence is limited.165 Because a private

161 Upham, supra note 23, at 163.
163 Id.
165 Weathers, supra note 43, at 72.
cause of action for individual litigants would represent a major, pro-employee change to the EEOL, the Labor Policy Council would not greet it positively. This kind of change could only really come about from pressure outside the Labor Policy Council, perhaps from more lawsuits by women’s activist groups on behalf of victims of discrimination.\textsuperscript{166} Similarly, it could happen if courts further invalidate discriminatory employer practices through the public order doctrine.

In light of these concerns, the most feasible approach to strengthening the enforcement mechanisms of the EEOL would be to transform the EEOMC into an arbitration body whose authority is binding. This measure maintains the Japanese conciliatory approach and the role of administrative guidance while strengthening the power of the executive branch to enforce anti-discrimination law.

VI. CONCLUSION

In order for Japanese lawmakers to more effectively align the EEOL with its purpose and Japan’s constitutional principles, they must continue to develop anti-discrimination law and take a more aggressive approach to its application and enforcement. Women make up roughly 48% of the workforce in Japan\textsuperscript{167} and their equal participation in the workplace is as much an issue of human rights as it is of economic productivity. Yet, given the narrowness of the 2006 Revisions, it remains to be seen whether employers in Japan will be more receptive to hiring and retaining female employees. It appears quite likely that employers will still be able to sidestep the law and develop new discriminatory practices that the current revisions do not address.

Frank Upham argued in 1987 that the force of the women’s movement in Japan might disappear with laws like the EEOL, since the EEOL effectively took the anti-discrimination movement out of the courts and channeled disputes into the administrative bureaucracy. After 20 years, including several important court cases and two revisions, it is clear that the campaign for gender equality has not disappeared. Due in part to the declining birth rate, the issue has become central to Japan’s economic and public policy. While the current Revision attempts to remedy gender-based discrimination, it falls short of its goal. Accordingly, lawmakers should no

\textsuperscript{166} For example, The Working Women’s International Network is an Osaka-based interest group that advocates for gender equality. It assists workers in filing sex-discrimination lawsuits against employers and proposes amendments to laws related to gender.

longer take the path of least resistance. They should follow up on their promise to better promote equal opportunity and treatment between men and women in accordance with constitutional principles. They can do so by drafting a general definition of indirect discrimination, regulations strengthening childcare leave provisions, and a more punitive enforcement mechanism into the EEOL. These revisions would certainly prove useful to victims of discrimination like Ms. Honma. They would give more substance and stronger teeth to what is currently no more than a paper tiger.168

168 Fan, supra note 131, at 104.