Glass Ceiling or Iron Weight?: Challenges for Female Employees on Their Path to Becoming Managers and Executives in Japan

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It is a well-known fact that Japanese corporate executives and managers are predominantly male. The situation has improved somewhat since the enactment of the Equal Employment Opportunity Act (EEOA) of 1985. According to the Ministry of Health, Labor and Welfare, the proportion of females among section heads (*kacho*) or higher ranking employees of larger corporations (100 employees or more) increased from 1.4% in 1985 to 8.3% in 2014.[1] However, the figure is peculiarly low in comparison to developed European countries and the United States.[2] There is reason to suspect that sexual equality is being hampered in many workplaces in Japan.

Part of the problem is the EEOA. Although it grew from a weak measure of compromise to a more coherent equality statute through the amendments of 1997 and 2006,[3] the legal doctrines and procedures under the EEOA are still rather undeveloped and ineffective. However, a larger problem lies with the demanding lives of *seishain,*

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1. KŌSEI RŌDŌSHŌ [MINISTRY OF HEALTH, LABOUR AND WELFARE], CHINGIN KŌZŌ KIHON TŌKEI CHŌSA [BASIC SURVEY ON WAGE STRUCTURE] (2015) (Japan).

2. According to the ILO, the women's share of all managers in 2012 was 39.4% in France, 34.2% in U.K., 31.1% in Germany, respectively, while 11.1% in Japan, which is almost the same as South Korea (11.0%). The U.S. is listed by the older figure of 42.7% in 2008. INTERNATIONAL LABOUR ORGANIZATION, WOMEN IN BUSINESS AND MANAGEMENT: GAINING MOMENTUM 19 (2015).

3. *See* Hiroya Nakakubo, *"Phase III" of the Japanese Equal Employment Opportunity Act,* JAPAN LABOR REV., Summer 2007 at 9.

or the mainstream "regular" employees in Japan, which are associated with long hours of work and frequent transfers. Many female employees face difficulty in pursuing a professional career after marriage or childbirth due to family and societal conditions that burden women unfairly.

This article will explore these problems after reviewing the birth and development of the EEOA, and it will then touch on the recent statute enacted under the Abe administration to promote working females.

The EEOA of 1985, Then and Now

The EEOA marked an epoch in the history of Japanese gender-equality law, no matter how lukewarm it was at the outset. Before its adoption, Article 4 of the Labor Standards Act (LSA) of 1947, which prohibits sex discrimination regarding wages, and is the equivalent of the Equal Pay Act of 1963 in the U.S., was the only statutory provision addressing employment discrimination against women. Japanese courts struck down some non-wage discriminatory provisions, such as the "retirement on marriage" mandate for women[4] and the five-year difference in male and female retirement ages,[5] by utilizing a general provision (Article 90) of the Civil Code to represent the Constitution of Japan's spirit.[6] However, such case law was naturally vague, and dealt with a limited range of issues. It became generally accepted, especially in the wake of the U.N. Convention on the Elimination of All Forms of Discrimination against Women of 1979, that a legislative measure was necessary to ensure equality between men and women at all stages of employment. This culminated in the enactment of the EEOA in 1985.

This act was a product of compromise because the employers' side strenuously opposed strong legal intervention, especially as to their precious "freedom" of hiring,[7] which had allowed them to

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4. Tōkyō Chihō Saibansho [Tōkyō Dist. Ct.] Dec. 20, 1966, 17 SAIKŌ SAIBANSHO MINJI HANREISHU [RŌMINSHŪ] 6, 1407 (Japan) (Sumitomo Cement case).

5. Saikō Saibansho [Sup. Ct.] Mar. 24, 1981, 35 SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHŪ] 2, 300 (Japan) (Nissan Motors case).

6. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 14 (Japan) (prohibiting discrimination in political, economic or social relations based upon race, creed, sex, social status, or family origin).

7. Saikō Saibansho [Sup. Ct.] Dec. 12, 1973, 27 SAIKŌ SAIBANSHO MINJI HANREISHU

exclude women from career-track positions. Thus, the original EEOA only obligated employers to "endeavor" to treat men and women equally regarding recruitment, hiring, placement, and promotion. This culminated in the enactment of a square ban on discrimination in other matters such as termination of employment, training, and fringe benefits.[8] The EEOA also notably took the form of a chapter of a preexisting law to promote the welfare of working women. In harmony with the law's purpose to promote this welfare, the newly added equality provisions were interpreted as not prohibiting more favorable treatment of women than men, although there was considerable criticism that such an attitude would not be in women's interests in the long run.

For all of these, and other, weaknesses, the EEOA changed the practices of many Japanese employers. Females were allowed to apply for formerly male-only jobs, and some of them were successfully hired as core career-track employees of large corporations after graduating from university. The hope was that such pioneer women would increase and prosper under the EEOA. However, as the Japanese economy slumped badly in the 1990s, female graduates suffered a disproportionately heavy blow in the job market. This, coupled with the fact that the society had come to terms with the existence of the EEOA, supported the argument for strengthening the mandates of equality.

Accordingly, the EEOA was amended in 1997, and the "duty to endeavor" requirement regarding recruitment, hiring, placement, and promotion was replaced with a simple and flat prohibition of discrimination against women. A provision for positive (affirmative) action was also added based on the assumption that preferential treatment for women was discriminatory and illegal unless justified under the provision. Special "protections" for women in general, as opposed to just pregnant or postnatal women, regarding overtime and night work were completely abolished from the LSA to enable equal treatment; this abolishment reached beyond the partial deregulation

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[MINSHŪ] 11, 1536 (Japan) (Mitsubishi Jushi case stressing the importance of employer's discretion in hiring).

8. Wages were excluded from the coverage of the EEOA in deference to Article 4 of the LSA. *Compare* Kōyō no bunya ni okeru danjo no kintō na kikai oyobi taigū no kakuhotō joshi rōdōsha no fukushi no zōshin ni kansuru hōritsu [Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment] [hereinafter EEOA], Law No. 45 of 1985, art. 7-11 (corresponds to Law No. 82 of 2006, art. 5-6), *with* Rōdō kijunhō [Labor Standards Act], Act No. 49 of 1947, art. 4 (Japan).

in 1985, when the original EEOA was adopted.

The EEOA was amended again in 2006. This time, the act grew into a more universal antidiscrimination statute, prohibiting discrimination "because of sex" rather than "against women."[9] This meant men became protected from discrimination by the EEOA for the first time. In addition, a new provision was established to prohibit employers from treating women disadvantageously because of female-only issues like pregnancy, childbearing, and maternity leave.[10] It was thought to be essential for sexual equality in light of numerous cases of termination and forced resignation of female employees during pregnancy or childbirth. The Supreme Court highlighted this provision in a recent case, holding that demotion of a female employee who was assigned to a lighter job during her pregnancy was presumably illegal.[11] In addition, the 2006 amendment strengthened and expanded the employer's duty regarding prevention of sexual harassment, which was added to the EEOA in 1997.[12] Japan has placed this provision of sexual harassment side by side with sex discrimination per se, on the premise that they are related but theoretically distinct.

Problems of Proof and Enforcement

The EEOA has certainly made substantial progress since its enactment, though it tends to be criticized even today for its past weak provisions. However, the EEOA is still something short of an effective tool for combating sex discrimination. It seems there are two major problems.

First, legal doctrines for identifying discrimination, especially in subtle cases, have yet to be developed under the EEOA.[13] A number

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9. *See* Nakakubo, *supra* note 3, at 11.

10. Nakakubo, *supra* note 3, at 19. Unlike the Pregnancy Discrimination Act of 1978 of the U.S., this provision does not regard such an act as sex discrimination but separate illegal conduct. *Compare* EEOA, Law No. 82 of 2006, art. 9, para. 3 (Japan), *with* Pregnancy Discrimination Act of 19978, Pub. L. No. 95-555, § 955, 93 Stat. 2076 (1978).

11. *Compare* Saikō Saibansho [Sup. Ct.] Oct. 23, 2014, 68 SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHŪ] 8, 1270 (Japan) (Hiroshima Chuo Honen Seikyo case mandating Japanese employers to assign pregnant employees to lighter jobs upon request) *with Young v. United Parcel Service*, 575 U.S. (2015).

12. Nakakubo, *supra* note 3, at 21.

13. As for cases of systemic disparate treatment by reason of union membership or activity, Japanese labor relations commissions adopted a special method of inferring discrimination from comparison between relevant groups of employees. *See* Saikō Saibansho

of lower court decisions have found, and remedied, discrimination against women, but there is no established rule for finding discriminatory intent of the employer, as in the McDonnell Douglas framework[14] of the United States. Thus, results often depend on the attitude of the judge(s) in each case.

An illustrative example lies in a recent case, where a female employee of an electric power company claimed she was sexually discriminated against regarding a promotion; her claim was rejected.[15] The Hiroshima High Court affirmed the district court's decision that her moderate performance, rather than discrimination, was the reason why she lagged behind her male colleagues.[16] The court acknowledged that a far greater number of men occupied the higher positions than women in the company.[17] However, it quickly denied the existence of discrimination, stating there was no prescription that women be treated differently, that her evaluation was conducted in an objective manner, some men were kept in lower positions based on their performance, and that women tended to shun promotion or quit mid-career.[18] I am not in a position to judge whether the plaintiff was truly a victim of discrimination, but I cannot help but feel these explanations are perfunctory and not very convincing.

Second, the EEOA is quite weak regarding enforcement of its provisions. When a victim of discrimination files a complaint with the Prefectural Labor Bureau, the EEOA only gives "assistance" to the parties of the dispute in the form of advice, guidance, and recommendations. The chief of the Bureau may refer the issue to a formal mediation procedure headed by a three-member panel in appropriate cases, but the employer is in no way obligated to accept the proposed solution. It is true that the Bureau often succeeds in persuading the violating employer to abide by the law. However, if unsuccessful, the EEOA does not provide for civil fines or criminal penalties.[19] The Minister of Health, Labor and Welfare is authorized

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[Sup. Ct.] Jan. 24, 1986, 467 RŌDŌ HANREI [RŌHAN] 6 (Japan) (Beniya Shoji case approving such method of inferring discrimination from comparison between relevant groups of employees).

14. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

15. Hiroshima Kōtō Saibansho [High Ct.] July 18, 2013, 1804 RŌDŌ HORITSU JUMPO 76 (Japan) (Chugoku Electric Power case), *appeal denied* (Sup. Ct. Mar. 11, 2015).

16. *Id.*

17. *Id.*

18. *Id.*

19. The Labor Standards Act provided criminal sanctions for sex discrimination in

by the EEOA to publicize the employer's name in egregious cases, but for one reason or another this authority was not utilized until September 2015.

Thus, in many cases, the victim must resort to a civil action to challenge illegal sexual discrimination. However, as mentioned above, it is not an easy task for a plaintiff to convince a court that there was, in fact, discrimination. Access to proof is difficult because Japanese Civil Procedure does not have as strong rules of discovery as the United States. The amount of damages tends to be low in the absence of a jury trial and punitive damages. And even in large-scale or otherwise deplorable cases, no administrative agency, such as the Equal Employment Opportunity Commission of the United States, will sue the employer on behalf of victims.

Each country has its own way of realizing legal norms in society, but the EEOA seems to leave much to be desired in this respect, even by the Japanese standard.

Context of Japanese Employment Practices

Of course, the EEOA is not solely responsible for the current uninspiring conditions of female participation and advancement in Japanese workplaces. Japanese employment practices pose particularly difficult problems to women in their pursuit of professional careers. Foreign-affiliated companies have been popular among females as prospective employers because they tend to be more equal and friendly to employees.

Much has been said about Japanese employment practices.[20] Its most important feature is so-called "life-time employment," or long-term continued employment till the retirement age—most universally today, age 60—for the core workforce. It has been coupled with the seniority wage system and enterprise-based unionism, forming the three major characteristics of Japanese employment. However, wages have been modified substantially to reflect the employee's ability and/or performance in recent decades. These "regular"

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wages, but those measures were not historically enforced. *Compare* Rōdō kijunhō [Labor Standards Act], Act No. 49 of 1947, arts. 4 & 119 (Japan), *with* EEOA, Law No. 82 of 2006 (Japan).

20. *See* SANFORD M. JACOBY, THE EMBEDDED CORPORATION: CORPORATE GOVERNANCE AND EMPLOYMENT RELATIONS IN JAPAN AND THE UNITED STATES (2005). *See also* MASAMI NOMURA, NIHONTEKI KOYO KANKO: ZENTAIZO KOCHIKU NO KOKOROMI (2007).

employees are usually hired fresh from school each year en masse; they typically begin working on April 1 after graduation in March. Most of them are hired not for specific job skills, but for their potential for later development. They are trained as they work in the following years, accumulating experience and knowledge, and they are gradually promoted to higher positions. Periodical transfer is part and parcel of Japanese employment at large companies, where the employer reshuffles the personnel each year. The employees are usually supposed to have experienced a variety of positions and places before being promoted to the managerial level. Thus, these regular employees constitute the internal labor market from which the employer usually selects its managers and executives. Mid-career hiring from the outside has become more common, but it is generally thought that "promotion from within" is still the main way to fill the manager posts. Likewise, many corporate board members are promoted from such long-term, regular employees.

The story has been quite different for women. In the old days, they were excluded from such a course. They could be hired as regular employees (as opposed to part-time or fixed-term employees) after graduating high school or junior college, but they engaged in manufacturing, retail, or clerical duties at relatively low pay and without prospects for promotion. Many quit at the time of marriage or childbirth and become housewives, though they often sought non-regular, part-time jobs to supplement the income of their households after several years. The EEOA changed this picture. Career-track employment was opened to both sexes, and a number of women have been hired for that purpose after graduating college. Now they enjoy, along with men, higher salaries, stable employment, and prospects for advancement. However, women have to work very hard, and they put in many hours, including overtime. Women have to abide by orders of transfer, which may include relocation, from time to time, in their careers. They have to show not only skills and ability, but also loyalty and dedication to the employer in the arduous competition among peers for promotion.

It is a demanding life, and a substantial number of women are intimidated and stray away from this track. Even when a woman is successfully employed as such an employee, it is not easy for her to remain so. According to a survey,[21] females are scarce among career

21. KŌSEI RŌDŌSHŌ [MINISTRY OF HEALTH, LABOUR AND WELFARE], HEISEI

track employees even from the beginning, comprising less than ten percent at the hiring stage. Ten years after initial employment, about 59% are gone. Of course, this is not unique to career-track employees. More than 60% of female employees, including non-regular workers, leave their job when their first child is born. Some do so willingly, while others reluctantly, fearing that their working life would be too tough; there are even others who are terminated or pressured by the employer to leave. However, discontinuance of employment is particularly damaging to a career-track employee because it is difficult for her to be rehired afterwards for managerial positions. Japanese companies still favor long-term employees who have served them from the beginning and without hiatus.

Excessive Burden on Female Employees

As indicated above, the conditions of Japanese regular employees are not amiable to females when they are aspiring to follow a career path. In fact, the Japanese employment system was based on a male, breadwinner model in which the husband worked to sustain the household[22] while his wife took care of the children and chores at home. Societal conditions, although changing, still tend to reflect this traditional model. Naturally, many women find themselves unfairly burdened in the course of their professional careers. I will elaborate on three major problems, among others.

First is the issue of long working hours, including customary overtime. The basic rule of the LSA is 40 hours a week and 8 hours a day, but there is almost always an agreement between the employer and the majority representative of the workplace that allows legal overtime rather generously. The Supreme Court held that employees cannot refuse employers' orders of overtime if the necessary arrangements for mandatory overtime have been made.[23] However, the problem is more about the perception of the employer and the colleagues than the law. Long hours are often regarded as a sign of

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NIJŪROKUNICHI NENDO KŌSU BETSU KOYŌ KANRI SEIDO NO JISSHI SHIDŌ JŌKYŌ "SOKUHŌ-BAN" O KŌHYŌ SHIMASU [2014 EQUAL EMPLOYMENT OPPORTUNITY SURVEY] (2014) (Japan).

22. The seniority wage system matched employees' wages with their increasing financial needs upon marriage and having children. Japanese employers commonly pay family allowances to the employees according to the number of dependents.

23. Saikō Saibansho [Sup. Ct.] Nov. 28, 1991, 45 SAIKŌ SAIBANSHO MINJI HANREISHU [MINSHŪ] 8, 1270 (Japan) (Hitachi case).

devotedness, and employers consider those hours when determining whether employees should be promoted. Colleagues also like a loyal employee who engages in overtime willingly when others are doing so. However, many female career-track employees face serious difficulties when they get married and have children. It is a shame that Japanese husbands are generally unhelpful, and female employees are doing much of the domestic chores.[24]

Second is the shortage of childcare facilities. This is especially serious in Tokyo and other urban areas. There are many reports of long waiting lists for childcare centers. National and local governments have taken measures to alleviate the situation, including the deregulation of standards for childcare centers and referrals to individual caregivers. Still, it is not easy for many working parents to find proper childcare. It is true that the Child-care and Family-care Leave Act, which has developed considerably since its original enactment in 1991 as the Child-care Leave Act, guarantees a right to take childcare leave until the baby becomes one year old (or one year and a half in certain cases).[25] In fact, a great number of female employees are actually taking this leave.[26] However, some of them are giving up returning to work due to lack of childcare.[27]

It goes without saying that the problem does not end when a spot is secured at a childcare center. A child may become sick and need to be picked up early to see a doctor, or to stay home all day. Working couples have to deal with such special cases in addition to their daily chores, and mothers are often pressured to compromise their job duties for the sake of family. The myth that a child should stay home with mother till age three for sound psychological growth dies hard.

Third is the issue of transfers, especially those necessitating

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24. Ministry of Health, Labour and Welfare, *supra*, note 18. This applies to other nations as well. ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME (2012).

25. The employee is not paid wages during the leave but receives 50 to 67% of the amount of their former wage from the unemployment insurance fund.

26. Although the right is guaranteed to a caring employee regardless of sex, there are few men who exercise this right.

27. *See* Ayako Mie, *Maternity Leave, Day Care Still Elude Many Working Mothers*, JAPAN TIMES (June 18, 2013), http://www.japantimes.co.jp/news/2013/06/18/national/social-issues/maternity-leave-day-care-still-elude/. *See also* Tomohiro Osaki, *Angry Blog Post Sparks Movement for Improved Day Care*, JAPAN TIMES (June 18, 2013), http://www.japantimes.co.jp/news/2016/03/07/national/angry-blog-post-sparks-movement-for-improved-day-care/.

relocation to a distant place. Regular Japanese employees are usually hired without contractual restriction as to the nature or place of work, and it is understood that the employer has a right to transfer them according to business necessity. This right is not without limit, but the Supreme Court has upheld the employer's order of transfer repeatedly,[28] rejecting the employee's contention in each case that family life would be damaged seriously by the relocation. In any event, most employees are being transferred without fuss or litigation. However, female employees are sometimes compelled to leave their jobs and accompany their husbands when their husbands are transferred to other places. Issues also arise when wives are transferred by their employers. While there are many men who live away from the family to comply with transfer orders (*tanshin-funin*), it is much more difficult for women to do the same, given the prevalent notions and conditions of family and society. Thus, transfers are particularly problematic for career track females.[29]

It is no wonder that only a small number of women survive in the company to become candidates for promotion to managerial positions. They are often unmarried, childless, or fortunate enough to have parents nearby to take care of their children. Or perhaps they are super women.[30] Japanese companies often complain that there are few female candidates for promotion, but it seems their own practices have much to do with the situation. The scarcity of female managers is reflected by the board of directors, too,[31] although the condition has improved slightly as the number of external board members increased in recent years.

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28. Saikō Saibansho [Sup. Ct.] July 14, 1986, 477 RŌDŌ HANREI [RŌHAN] 6 (Japan) (Toa Paint case). *See also* Saikō Saibansho [Sup. Ct.] Jan. 28, 2000, 774 RŌDŌ HANREI [RŌHAN] 7 (Japan) (Kenwood case).

29. In fact, the government, recognizing that transfers impose a disproportionately heavy burden on women, enlisted two requirements about transfers as a suspect for indirect (or disparate impact) discrimination under the EEOA. *See* Nakakubo, *supra* note 3, at 15–16.

30. *See* Jonathan Soble, *To Rescue Economy, Japan Turns to Supermom*, N.Y. TIMES (Jan. 1, 2015), http://www.nytimes.com/2015/01/02/business/international/in-economic-revival-effort-japan-turns-to-its-women.html.

31. *See* Katia Dmitieva, *Japan Worst, Norway Best for Women on Corporate Boards*, BLOOMBERG BUSINESS (Jan. 13, 2015), http://www.bloomberg.com/news/articles/2015-01-13/japan-worst-norway- best-for-women-on-corporate-boards. *See also* Kathleen Chu and Komaki Ito, *No Women on 90% of Japan Boards Belies Abe Equality Push*, BLOOMBERG BUSINESS (Mar. 11, 2015), http://www.bloomberg.com/news/articles/2015-03-10/no-women-at-90-of-japanese-boards-belies-abe-push-for-equality.

Beginning of a New Era?

Now, it seems the government has decided to make Japanese employers change. The Abe administration declared that women should "shine" in society and vowed to help women prosper in workplaces as well. This is a surprisingly progressive move of Mr. Abe, who is conservative or rather reactionary in other aspects, if it is based on considerations of the economy rather than fairness and social justice. A bill was drafted based on the deliberation at a tripartite council of the Ministry of Welfare, Labor and Health, but this was made possible by strong political support from the prime minister. As a result, a new statute called, "Act to Promote Women's Participation and Advancement in the Workplace" was adopted by the Diet in August 2015. It was to come into force on April 1, 2015.

The central feature of this act is to mandate larger employers (300 employees or more) to take certain actions, while obligating smaller employers to "endeavor" to do the same. First, the employers must study and analyze the situation of their female employees, including (a) the rate of females among the newly hired, (b) the differences in the length of service by sex, (c) the conditions of working hours, and (d) the rate of females among supervisors and managers. Second, employers must make an action plan to improve the current situation and submit it to the governmental office. The action plan must include the goal, the measures to be taken, and the time frame. Notably, the goal has to be decided in a "numerical" manner as for the four elements mentioned above, although each employer may choose any number in accordance with the practical conditions of its own. Third, the employers must publicize relevant information regarding the conditions of female employees. There is also a system for certification of excellent employers as encouragement and incentive.

As a whole, this act is a form of mandating mild positive (affirmative) actions to the employers, which was long overdue. The EEOA provided for permissibility of such actions in 1997, but it was up to each employer whether to act or not. There are certainly exemplary employers in Japan, which have achieved significant progress regarding female employees. Now that all of the employers are required to do something, hopefully there will be far more equal workplaces in the future.

Conclusion

Law is important, but it cannot change everything. This is especially true of sexual equality in employment because so much depends on societal conditions and systems, as well as culture and education. However, after the 30 years since the EEOA was enacted, a new act arrived to make the employers step forward. Regardless of Mr. Abe's true intentions, the political leadership is behind it. It is easy to be pessimistic, given the need for structural changes, but I think we should give this act and other equality measures a chance.