Indirect Discrimination in Japanese Law: A European Perspective

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Abstract

In Japan, the equality principle is embodied in Art 14, para 1, of the Constitution, according to which all citizens are equal under the law and cannot be discriminated against on grounds of race, creed, sex, social status or family origin, in political, economic or social relations. As a corollary, Art 3 and Art 4 of the Labor Standards Act establish the principle of equal treatment. However, these principles are just a dead letter unless the State commits to implement them. Therefore, the aims of this paper are twofold: first, to clarify the content and application of anti-discrimination legislation in Japan, taking into consideration the criticism by external observers; second, to evaluate the effectiveness of the most recent reforms, including the one on indirect discrimination.

I. Introduction

In the multi-level legal system of the European Union (EU), the principle of equality has gradually reached a paramount importance under the influence of the constitutional traditions of its Member States. Moreover, constant efforts, not only by national judges, but also by supranational and international courts such as the Court of Justice of the European Union and the European Court of Human Rights have contributed to the progressive definition of a heterogeneous set of legal instruments serving the principle of equality – eg, the prohibition of both direct and indirect discrimination. Similarly, in Japan, a country that has historically based its own legal system on European models, the principle of formal equality is entrenched in the Constitution of 1946.[1] Pursuant to Art 14, para 1, all citizens are equal under the law and cannot be discriminated against on grounds of race, creed, sex, social status or family origin, in political, economic or social relations.[2] Applied to the field of labor law, the principle of equal

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[1] This document was formally an amendment to the Constitution of the Empire of Japan (also known as Meiji Constitution) of 1889 (entered into force in 1890), although the text was entirely rewritten. To date, the Shōwa Constitution has never been amended.

[2] All Japanese legislation was consulted in its original language and its most recent version on the portal of the Ministry of Internal Affairs and Communications of Japan, available at http://www.e-gov.go.jp. All the translations are by the author, but the unofficial English translations uploaded on the *Japanese Law Translation* website of the Ministry of Justice of

treatment can perhaps be considered the main expression of the more general principle of equality before the law. In Japan, the equal treatment in the workplace is embodied in the Act 7 April 1947 no 49, also known as Labor Standards Act (LSA). According to Art 3 of the LSA, the employer shall not engage in differential treatment in terms of wages, working hours, or other working conditions on grounds of nationality, creed, or social status of the worker. Furthermore, the Art 4 of the LSA prohibits discriminating against women with respect to wages.

However, the above-mentioned principles are likely to remain a dead letter if they lack a true commitment to implementation by the State and its institutions. This issue is common to many legal systems. To overcome such difficulties, for instance, the Art 3, para 2, of the Italian Constitution establishes a duty for the State to remove existing economic and social obstacles that prevent citizens from developing as human beings and becoming truly equal under the law as ideally envisaged by its drafters. This principle is known as substantive equality, and it exists in Japan in the framework of *seizonken* (the right to a certain standard of living). Pursuant to Art 25 of the Constitution of Japan, in fact, all citizens have the right to live a decent life and the State has to strive for the improvement and promotion of social welfare, social security, and public health in all aspects of life. In Italy, like in other European countries and in Japan, such constitutional principles were codified after the Second World War.[3] Later these were also transposed into ordinary laws. The Japanese LSA is a clear example of this. Despite this formal legal recognition, the resulting framework both in Italy and in Japan often suffers from a lack of coordination between the various sources of law, with the consequence that the legal remedies put in place are not always effective. One of the most productive and controversial developments of the equality principle in labor legislation has been in the area of equal opportunity laws, but there is still much room for improvement, as many observers have been stressing for years that competitive advantages would derive from more effective implementation.[4]

The aim of this paper is twofold: first, it seeks to clarify the content of Japanese anti-discrimination legislation stemming from the constitutional principle of equality. To limit the enquiry, I will chiefly focus on the laws against discrimination on grounds of sex together with the interpretation of such norms operated by Japanese judges. A more comprehensive view – eg on the so-called

Japan, available at http://www.japaneselawtranslation.go.jp, have been used as a reference whenever possible.

[3] The current Constitution of Italy, as well, was drafted and entered into force after the Second World War (in 1947 and 1948, respectively). The Kingdom of Italy had a different fundamental law called *Statuto Albertino* that entered into force in 1848 and included the principle of equality in Art 24, but see section IV below on the weakness of pre-war constitutions.

[4] International Monetary Fund, *IMF Country Report no 16/223* (Washington, DC: International Monetary Fund, 2016), 25-39; Id, *IMF Country Report no 16/268* (Washington, DC: International Monetary Fund, 2016), 7.

Japanese traditional employment system – will be adopted whenever necessary. The paper further compares the Japanese legislation on such issues with similar norms in Italy and the EU. Legally, Japan shares many similarities with some European countries, and, therefore, it is interesting and fruitful to compare the different approaches to implementing the equality principle and their results. The second aim of the paper is to evaluate the effectiveness of the above-mentioned anti-discrimination legislation in Japan in terms of achievement of a fully-fledged equality of opportunity. In particular, I will discuss some of the issues pointed out in the 2016 concluding observations on Japan by the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) of the United Nations.[5] Obviously, this paper cannot completely ignore the cultural peculiarities of Japan, but an approach that is more centered on the efficiency of the institutional framework rather than alleged cultural differences will be preferred.

II. Challenges in Approaching Japanese Law

For geographical and linguistic reasons, Japan is still perceived to be legally and culturally distant and inaccessible from Europe. Japanese scholars, however, beg to differ, since its legal system shares many similarities with those of some European countries, such as Germany, France, and Italy. One of the main difficulties that non-Japanese speaking scholars face in approaching Japanese law is that the majority of studies written in foreign languages are biased by a specific view, eg when the observer is wearing the glasses of the common law family, which includes the United States of America, the United Kingdom, Australia and others.[6] What happens is therefore that the criticism is directed to what is different, but not necessarily detrimental nor uncommon in other legal systems. Apart from the fact that the traditional differences between common law and civil law systems have been gradually challenged,[7] in recent years, a small group of European scholars, including some Japanologists, have started

[5] UN Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Japan* (New York: UN Committee on the Elimination of Discrimination against Women, 2016), 11-12.

[6] G.F. Colombo, 'Japan as a Victim of Comparative Law' 22 *Michigan State International Law Review*, 731-753 (2013).

[7] Many new taxonomies have been proposed over time, eg one that distinguishes legal systems on the basis of which pattern of law (professional law, political law, traditional law) prevails in a given country, see U. Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' 45 *The American Jounal of Comparative Law*, 5-44 (1997). On the bright side, there was a try to overcome Western-centrism. However, traditional views remained strong in the case of Japan, which is usually considered a system where cultural aspects prevail over the law, as seen in R. David and C. Jauffret-Spinosi, *Les grands systèmes de droit contemporains* (Paris: Dalloz, 2002), 433. Yet, in the end, no classification will ever come close to true objectivity unless it is based on criteria that can be measured exactly in the same way by any person.

to study Japan also from the point of view of the law, which is outside the traditional areas of Japanese studies – art, history, international relations, literature, and religion. The main goal of these approaches is to attempt to free Japanese law from the bias that for many years favoured culture and tradition over law.[8] The same approach will be adopted in this paper.

III. Terminology

Before moving on to the analysis of the existing legal framework, a few preliminary remarks on some terms used in this paper are necessary, in order to introduce the reader to a language that is, in fact, quite distant from European ones. Perhaps the most important issue to discuss here is whether the concept of equality existed in Japan, with a meaning that could be considered close to the current usage, before the Meiji Restoration of 1868 and the gradual introduction of European legal concepts. In the modern and contemporary European tradition, the principle of equality derives from the French Revolution and the Declaration of the Rights of Man and of the Citizen of 1789.[9] This is probably the most well-known legacy of the Enlightment in its attempt to step away from the inequalities of the Middle Ages, and its importance nowadays is widely recognized, especially from the point of view of human rights.[10,11] In the case of Japan, one may wonder if the word *byōdō* (equality) has the same meaning than in the Western world. This question is even more compelling in the light of the need expressed during the Meiji period[12] to redefine existing words[13] to adapt them to foreign concepts newly transplanted after the end of the *sakoku*[14] in the second half of the 19th century.

In the *Nippo Jisho* of 1603,[15] one of the most ancient dictionaries between

[8] D. Vanoverbeke et al, *The Changing Role of Law in Japan: Empirical Studies in Culture, Society and Policy Making* (Cheltenham and Northampton: Edward Elgar Publishing, 2014), 1-10.

[9] Especially Art 1 of the Declaration, according to which people are born and remain free and equal in their rights. Text in French consulted on the portal of the French Government, available at https://www.legifrance.gouv.fr.

[10] M.R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley, Los Angeles, London: University of California Press, 2008), 7-9.

[11] Although earlier notions of equality in terms of economic and social justice did exist. Ibid 35-40.

[12] Ibid 1868-1912.

[13] Perhaps the two most notorious examples in the legal field are *jiyū* (freedom) and *kenri* (right). See G. Ajani et al, 'Diritto dell'Asia orientale', in R. Sacco ed, *Trattato di diritto comparato* (Torino: Utet Giuridica, 2007), 24-43.

[14] Two centuries of almost complete isolation during which relations with foreign countries were limited.

[15] The anastatic copy published by Iwanami Shoten in 1960 was consulted, but the best version is probably the color edition by Bensei Publishing of 2013. A different Bensei edition is also on Google Books, available at https://tinyurl.com/y9nxkj4g (last visited 15 November 2018).

the Japanese and Portuguese languages, the term appears as *biŏdô* followed by the definition in Japanese *tairacani fitoxi* (equally alike).[16] This was translated into Portuguese as 'equality of things that are on the same level'.[17] In order to better understand this point, it is important to remember that the noun *byōdō* is of Chinese origin and it is written in both languages with two characters that mean 'flat' and 'similar'. This etymology, therefore, suggests the idea of a series of things having the same length. Curiously, the *kanji*[18] of *dō* in ancient China represented the bamboo tablets used in public offices, including courts, for writing. Even more interesting is the additional meaning of 'equality and justice',[19] which appears in the sentence *biŏdôni monouo vosamuru*,[20] translated as 'to govern with equality and justice'.[21] Therefore, the concept of equality not only already existed at least from the 16th century, but it seems that it already contained a reference at least to formal equality intended as a way of governing that was characterized as just because it treated all people in the same way. In the even more ancient *Dictionarium Latino Lusitanicum ac Iaponicum* of 1595[22] the term appears under *æquabilis* as *biŏdônaru coto* and under *æqualiter* as *biŏdôni*, so it seems that the Japanese term was associated to *æqualitas* (equality). The fact that a similar concept existed, however, does not mean that is was applied and interpreted as we would do today. Yet, it nevertheless represents a promising starting point for a more thorough understanding of the principle of equality, considering that the development of fundamental rights and human rights in Europe is often linked to earlier philosophical and religious ideas that where then refined by the Enlightenment movement.[23]

IV. Constitutional Principles

As previously explained in the introduction, this paper analyzes the principle of equality as conceived in Japan and its application from the Constitution to

[16] Which can be romanized according to modern rules (modified Hepburn system) as *tairaka ni hitoshii*.

[17] *Igualdade de cousas que estão prainas*. Rough translation.

[18] Sinograph (character of Chinese origin) as used in written Japanese.

[19] *Equdade & iustiça*. Rough translation.

[20] In modern Japanese, *byōdō ni mono wo osameru*.

[21] *Gouernar com igualdade, & iustiça*. Rough translation.

[22] Available at https://tinyurl.com/ycmgtt78 (last visited 15 November 2018).

[23] It is also worth remembering that *byōdō* is a Buddhist term (in Sanskrit, *sama*) that originally signified calmness of the heart. It also appears in the well-known Lotus Sūtra with the meaning of universally fair, with reference to Buddhist teachings, since they hold for all living things. In the 8th century the meaning was expanded to include the capacity to take on other people's sins and pain, closely resembling the Christian idea of 'suffering surrogate' (*daijuku*, in Japanese), as Jesus Christ who suffered in order to save humanity. See H. Nakamura et al, *Iwanami bukkyō jiten* (Iwanami Dictionary of Buddhism) (Tōkyō: Iwanami Shoten, 2nd ed, 2002), 851; S. Mochizuki, *Bukkyō daijiten* (Great Dictionary of Buddhism) (Tōkyō: Bukkyō Daijiten Hakkōjo, 1936), V, 4358-4359.

labor legislation. While the concept of equality was present in pre-Meiji Japanese culture, some scholars have suggested that the Japanese version of this principle had different connotations from its European counterpart.[24] The paper, therefore, analyzes this alleged distinction from the point of view of the equality principle – which in truth is designed in different ways even within the borders of the EU.[25] I will focus only on the developments that followed the Second World War, although a wider study on the concept of equality as found, for example, in Japanese philosophies and religions could offer deeper insights. In particular, I will limit my analysis to what happened after the Shōwa Constitution, which was promulgated on 3 November 1946, and entered into force on 3 May 1947. This legal text, in fact, represents a stepping-stone in an extremely complex operation aimed at moving away from the dark years of Japanese imperial fascism.

In the context of the post World War II Japanese Constitution, the principle of equality was given a prominent role. The idea that all citizens are equal under the law is in fact a necessary premise for the establishment a democratic state, and, surely, at the time of the promulgation of the Shōwa Constitution, it had the potential to renew the image of the country in the international arena. The previous Japanese Meiji Constitution of 1889 was a weak fundamental law that needed to be drastically revised. Altough formally containing a bill of rights granted to the subjects of the *Tennō*,[26] the Meiji Constitution was characterized by an extensive use of clauses that made it possible to limit such rights whenever the executive deemed it necessary. In the past, and sometimes even nowadays, the Shōwa Constitution has often been described as a mere imposition by the Supreme Commander for the Allied Powers (SCAP) Douglas MacArthur and his staff that controlled Japan right after the Second World War. It is, however, clear from the documentation of its birth[27] that the contributions by Japanese politicians were many. With regard to Art 14 (equality principle), the SCAP seemed to have a very specific interest in the abolition of the feudal system and everything that was connected to it, as stated in MacArthur's three points.[28] Therefore, the initial aim of the Constitution's founders was more to dismantle the previous balance of power, rather than guaranteeing equality among citizens.

[24] T. Suami, 'Rule of Law and Human Rights in the Context of the EU–Japan Relationship: Are Both the EU and Japan Really Sharing the Same Values?', in D. Vanoverbeke et al eds, *The Changing Role of Law in Japan: Empirical Studies in Culture, Society and Policy Making* (Cheltenham and Northampton: Edwar Elgar Publishing, 2014).

[25] European Commission, *A Comparative Analysis of Non-discrimination Law in Europe* (Luxembourg: Publications Office of the European Union, 2017).

[26] Usually translated as emperor, although the modern definition of empire usually includes the idea of a rule extending to overseas territories or a group of countries, which is not the case anymore for Japan (although the term might be justified from a historical perspective). Nowadays, it would probably be more appropriate to simply use the term king, since Japan is a constitutional monarchy.

[27] Available at https://tinyurl.com/4pfk7 (last visited 15 November 2018).

[28] Available at https://tinyurl.com/y6wq9jwv (last visited 15 November 2018).

For this reason, the principle of equality contained in the Constitution is still applied mostly to vertical relations between the State and citizens, and can be applied to horizontal or citizen-to-citizen relations only by means of interpretation. With respect to Art 25 (the right to a certain standard of living), the influence of Art 151 of the Weimar Constitution of 1919, the same found in other welfare states such as Italy and France, is undeniable. It seems that the Japanese politicians Morito Tatsuo and Suzuki Yoshio[29] particularly supported the Weimar model on the occasion of the constitutional amendment.[30] Therefore, it seems that, in this case, the Japanese view prevailed over the SCAP's.

In assessing the importance of Art 14 of the Shōwa Constitution in terms of equal opportunity law, a good starting point could well be the research done in the eighties by Frank K. Upham. Although much has changed since then, Upham tried to understand the connection between the law and social change. In particular, he identified a group of cases decided by Japanese courts that might have affected the Act 1 July 1972 no 113, also known as the Equal Employment Opportunity Act (EEOA). In this regard, it must be noted that, as highlighted by Upham himself,[31] many observers considered the EEOA the result of international pressure on Japan connected to the signature (1980) and ratification (1985) of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In reality, however, it could be described more as a process, albeit one involving an external stimulus, that took root in the fertile ground of an on-going jurisprudential reflection that will be summarized in the next section.

V. Historical Overview

Upham starts by reminding us that the contribution of women to the development of Japan up until the end of the Second World War had been fundamental, especially in agriculture and manufacturing. The situation changed after the war. Until the 1960s, women had to leave the labor market when getting married, usually around twenty-five years of age, and were not expected to return to work later in their lives. From the 1980s, however, women started re-entering the labor market, around thirty-five years of age, after their children gained some independence. The reasons for this were many: a higher level of education, a smaller number of children, longer life expectancy, and a decline in rural population. To these factors, one may add the economic crisis, which

[29] The given name follows the family name, in accordance with the Japanese use.

[30] H. Takahashi, 'Kenpō gikai ni okeru Weimar Model: seizonken kitei no sōnyū' (The Weimar model in the constitutional debate: the addition of a *menschenwürdiges Dasein* article) 37 *Shakai rōdō kenkyū* (Research on society and labor), 1-48 (1990).

[31] F.K. Upham, *Law and Social Change in Postwar Japan* (Cambridge and London: Harvard University Press, 1987), 151.

definitely compelled the need for more money since one salary was not enough anymore. However, women were relegated to low-level jobs, with lower salaries and less employment protection. In this context, women were almost exclusively part-timers and temporary workers, whereas full-time and undetermined-time jobs were reserved for men. Nowadays, inequality in employment persists in Japan as well as in many other countries,[32] and the sub-group of atypical workers is much larger because it includes around one third of the total number of workers – mostly women, young and older people, and non-Japanese.[33] As summarized by Upham, in the past, Japanese women were excluded from the labor market, and especially from managerial positions for three main reasons: the traditional idea of family;[34] the fear that their inclusion would increase the unemployment rate of men; and the belief that men would become less devoted to their jobs, without the support of their wives at home.

Currently, the above-mentioned justifications are considered old-fashioned, to say the least, and history has proved them wrong, since no correlation has been found between the rate of working women and the unemployment rate of men, or the devotion of men to their jobs. However, considerations like these used to be quite common also in Europe, and such inflexible thinking still lingers on in certain social groups, although they tend to be more hidden than in the past, since they are perceived to be somewhat backward. Everything changed in a very short span of time, and in Japan, a series of cases opened the door to the EEOA and the recognition of the discriminatory nature of various practices that had been widely accepted in companies up until the 1960s. A first group of judgements scrutinized blatant and direct discriminations in term of salaries, pensions and staff reduction, whereas a second group of decisions, starting from the 1970s, focused on more indirect discrimination. As explained above, the Constitution already contained a specific prohibition of discrimination, but involved an action of the State – apart from being subject to an evaluation of reasonableness – and therefore could not be applied *sic et simpliciter* to horizontal relations, ie cases of citizens discriminating against other citizens in the workplace.[35] Until the EEOA, the only protection in the latter situation was the already mentioned Art 4 of the LSA, which still prohibits differential treatment

[32] C. Olivetti and B. Petrongolo, 'Unequal Pay or Unequal Employment? A Cross-Country Analysis of Gender Gaps' 26 *Journal of Labour Economics*, 621-654 (2008).

[33] Unless otherwise specified, all statistical data is from the Statistics Bureau of the Ministry of Internal Affairs and Communications of Japan, available at http://www.stat.go.jp.

[34] As pointed out at the beginning of this section however, being forced to stay at home was actually not the norm or tradition in Japan before the war, since women used to work as much as men especially in agriculture and manufacturing.

[35] It must be noted that this approach is not peculiar to Japan. On the contrary, it seems to be perfectly in line with European tradition. As briefly outlined in section III, the equality principle was established to protect citizens from abuses by public authorities that were common practice under the *ancien régime*.

in very limited cases – on grounds of sex and with regard to wages –,[36] and Art 3, which covers discrimination on grounds of nationality, creed or social status. Therefore, judges had to refer to other principles, such as Art 24 of the Constitution on individual dignity and freedom of marriage, Arts 1 and 2 of the Japanese Civil Code against the abuse of rights and in favor of the equality of sexes respectively, and Art 90 of the Japanese Civil Code on the nullity of acts against public order and good morals.[37]

Single cases will not be analyzed here.[38] It is more useful, for the aims of this paper, to proceed directly towards evaluating the overall impact and outstanding issues that still remained in the 1980s. Regarding the impact, one of the points that Upham made is that litigation supported the creation of a political consensus[39] that functioned as a prelude to the EEOA and its amendments. It is undeniable that Japanese companies have gradually abandoned some common practices that Japanese judges have deemed in violation of the law, and the Ministry of Labor, nowadays Ministry of Health, Labor and Welfare (MHLW), has endorsed the case law produced by courts in this regard by amending the EEOA. At the same time, however, the Government did not challenge in an active and effective way the more ambiguous discriminatory practices that came about after the initial series of cases. Moreover, the lack of compelling legal remedies[40] and the fact that the prohibition of discrimination was not extended to all aspects of employment, including promotions and hiring, remained as outstanding issues. Obviously, differentiating workers according to categories is not wrong per se, since it might help preserve a company in time of crisis, during which temporary and part-time workers could be dismissed in a relatively easy way. However, if such a buffer becomes so common that approximately one third of the current workers are atypical, it might be a sign that there is something wrong with the system. Regarding this last point, from the employer's point of view, it might well be that the protection they have to ensure to full-time and undetermined-time positions is too much of an onerous burden. If we recall John Maynard Keynes, who wrote in the 1930s that he imagined a future of three hours of work per day for a total of fifteen hours per

[36] Other working conditions were excluded because in other situations discriminatory treatment was in fact allowed in order to favor women, at least according to the legislator.

[37] Notions of public order and good morals are often used, also in European legal systems, as flexibility clauses that can be updated over time according to the interpretations given by judges.

[38] For a more detailed overview of what is summarized in this section, see F.K. Upham, n 31 above, 129-144.

[39] ibid 156.

[40] In case of unlawful discrimination, the plaintiff could only hope for a limited monetary compensation for damages, but not for the nullification of the discriminatory act. In companies, it is quite common to calculate the costs of a possible lawsuit and compare them to how much money can be saved thanks to an unlawful practice. If the lawsuit costs less that the benefits derived from the unlawful practice, the management might prefer the latter. This kind of behaviour is known in Law & Economics as efficient breach.

week,[41] the solution perhaps will lie in a redefinition of what work is supposed to be, and on the importance of free time.

VI. Current Situation

In the previous section, the origins of the EEOA and the problems that emerged up to the 1980s were quickly summarized. The situation, however, has obviously changed in the years that followed. According to some scholars, what is happening nowadays can be described as a progressive switch from an employment policy approach to a human rights approach that is much more similar to the one adopted in Europe.[42] The EEOA, in its first significant amendment entered into force in 1986, collected the outcomes of the above-mentioned political consensus that had slowly crystallized over the years. Despite its many initial flaws, the law has been refined to protect men as well as women, and to cover other stages in the lives of workers, such as recruiting, promotions and training, at least in theory. Moreover, in case of unlawful discrimination, the worker can now be granted monetary damages as well as the annulment of the act in violation of the law.[43] From the 1990s, however, the CEDAW Committee expressed perplexities towards the so-called traditional employment system. In particular, according to the Committee, it seemed that Japanese women were subject to indirect discrimination resulting from the separate personnel management track system[44] widely adopted by private companies. Therefore, the Japanese Government was urged to include a prohibition of indirect discrimination in legislation.[45] It is undeniable that effectively prohibiting indirect discrimination could be a way to solve some of the above-mentioned issues affecting Japanese female workers, but it took a long time and a great deal of discussion before Japan finally introduced some sort of protection by amending the EEOA in 2006. Moreover, as highlighted by other scholars,[46] the provision

[41] J.M. Keynes, 'Economic Possibilities for our Grandchildren', in J.M. Keynes ed, *Essays in Persuasion* (London: Macmillan, 1931), 358-373.

[42] R. Sakuraba, 'Employment Discrimination Law in Japan: Human Rights or Employment Policy?', in R. Blanpain et al eds, *New Developments in Employment Discrimination Law* (Alphen aan den Rijn: Kluwer Law International, 2008), 181-200.

[43] Although a certain margin of discretion by employers remains, in accordance with their fundamental right to do business enshrined in Art 22 of the Constitution.

[44] According to this management practice, employees could be hired under two different career tracks: one for workers that were destined to menial jobs and another one for workers who could actually climb the career ladder until management positions. However, in order to access the latter, the worker had to accept a series of conditions, including transfers within Japan and abroad, which were sometimes difficult to meet for women who have additional family responsibilities.

[45] UN Committee on the Elimination of Discrimination against Women, *Consideration of the Reports Submitted by States Parties under Article 18 of the Convention* (New York: UN Committee on the Elimination of Discrimination against Women, 1994), para 598.

[46] M. Asakura, *Koyō sabetsu kinshi hōsei no tenbō* (A new prospect of anti-discrimination

failed to become a true instrument for social change because of the reasons that will be summarized in the next section.

VII. Indirect Discrimination

The concept of indirect discrimination, also known as disparate impact, firstly appeared in the United States Supreme Court decision *Griggs* v *Duke Power Co* of 1971,[47] where it was applied to discrimination on grounds of race. The Unites States Supreme Court described the issue with an unusual reference to the fable '*The fox and the stork*' by Aesop. According to the fable, a fox generously offered some milk to a stork, but it was on a plate that was actually too wide and shallow for the stork to be able to drink. In the actual case, the employer listed high school completion among the requirements, thus excluding the majority of non-white applicants, although it was not necessary for the job. However, as highlighted by the Court, 'tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork' and the 'vessel in which the milk is proffered' must be accessible to all. The relevant law[48] had therefore to be interpreted as prohibiting 'not only overt discrimination, but also practices that are fair in form, but discriminatory in operation'. Consequently, the idea of indirect discrimination focuses on the negative impact on a certain group of workers. In order to understand how the mechanism works, it might be useful to refer to the relevant legislation applied in the EU.

With relation to discrimination on grounds of sex, the relevant EU Directive[49] defines indirect discrimination as a situation

> 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'.

This kind of discrimination is prohibited in relation to access to employment and vocational training, working conditions including pay, and other matters mentioned in the Directive itself. Therefore, three elements must be present at the same time: (a) an apparently neutral rule; (b) a protected group that is affected by such apparently neutral rule in a more negative way; (c) a comparator, ie a

law in employment) (Tōkyō: Yūhikaku, 2016), 61.

[47] 401 US 424 (1971).

[48] Title VII of the Civil Rights Act of 1964.

[49] European Parliament and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

person of the other sex that can be used as term of comparison in order to assess the negative impact on the protected group by the apparently neutral rule.[50] Moreover, there is a possibility for lawful differential treatment in case of objective justification. As it will be clarified in the next paragraph, Japan adopted a similar approach, but decided to limit the prohibition of indirect discrimination to a very small number of cases.

Following the concluding observations of the CEDAW Committee of 1994 and, especially, of 2003,[51] a first non-binding definition of indirect discrimination was released in a policy research report by the MHLW in 2004.[52] According to this, indirect discrimination happens when an apparently neutral provision, criterion or practice is unfavourably affecting, to a considerable degree, the members of one sex in comparison to the other, and such provision is not reasonable or justifiable, for instance, because it has no connection with the job. Moreover, seven examples of indirect discrimination were selected by the MHLW research group. Two years later, the EEOA was amended to include indirect discrimination in Art 7, but the limitations were many. First of all, the prohibition was applicable only to situations mentioned in Art 5[53] and Art 6[54] of the EEOA. In addition, only three of the seven cases mentioned in the policy research report were listed:[55] (a) height, weight or physical strength requirements at the time of recruitment or employment; (b) worker's availability for relocation at the time of recruitment, employment, promotion or job change; (c) worker's experience of relocation at the time of promotion. It seems that the selection of the three measures was based on consensus among the representatives of labor and management, but not on political or legal considerations.[56] Finally, it is always possible for employers to prove that there is a 'reasonable justification'[57] that makes the differential treatment lawful.

To sum up, the prohibition of indirect discrimination was added to the EEOA in 2006, although the Japanese term for indirect discrimination[58] does

[50] European Union Agency for Fundamental Rights, *Handbook on European Non-discrimination Law* (Luxembourg: Publications Office of the European Union, 2011), 29-31.

[51] UN Committee on the Elimination of Discrimination against Women, *Consideration of the Reports Submitted by States Parties under Article 18 of the Convention* (New York: UN Committee on the Elimination of Discrimination against Women, 2003), para 358.

[52] Ministry of Health, Labor and Welfare, 'Danjo koyō kikai kintō seisaku kenkyūkai hōkokusho' (Report of the research group on policies for equal opportunity between men and women in employment), available at https://tinyurl.com/yap649y4 (last visited 15 November 2018).

[53] Recruitment and employment.

[54] Assignment, promotion, demotion, training, certain fringe benefits, change in job or employment type, retirement, dismissal, and renewal of the labor contract.

[55] Art 2 of Ordinance no 2 of 27 January 1986, as amended. See also the MHLW Public Notice no 614 of 2006 for the guidelines.

[56] M. Asakura, n 46 above, 72 (fn 12).

[57] In Japanese, *gōriteki na riyū*.

[58] In Japanese, *kansetsu sabetsu*.

not appear in the law itself, since the title of Art 7 is simply 'Measures on the basis of conditions other than sex'. However, its many limitations have reduced the potential of the provision in terms of raising awareness towards certain situations that are nowadays considered legitimate, but are de facto hindering the possibility of certain groups of workers, including women, but also young and older people, or non-Japanese, to have access to the best opportunities in the labor market. Of course, the MHLW can always update its list of unlawful practices in the future, and Japanese courts can work on developing a more general prohibition of indirect discrimination, which over time might be codified in national legislation. However, this process that has struggled over many years has been further slowed and, as mentioned above, the reform has missed the opportunity to really promote social change. On the bright side, it must be noted that a legislative step was taken and it raised some awareness by generating public discussion. Moreover, a certain degree of flexibility was ensured, since updating a ministerial ordinance requires less effort than a law, and reference to the concept of 'reasonableness' allows judges to balance decisions between business freedom and workers' rights. Once again, the role played by the judiciary will probably be fundamental.

VIII. Conclusions

In order to conclude this short overview on indirect discrimination in Japanese labor law, some final, but certainly not definitive, considerations will be drawn. A long time has passed since the entry into force of the Shōwa Constitution, of the LSA and of the EEOA. By recalling the initial aims of this paper, it is clear that many efforts were made in order to gradually clarify the content of such laws. In the end, Japan has somehow embraced the Euro-American views on indirect discrimination, but, for now, has adopted a very cautious approach, which might be justified by the future development of a broader political consensus on which further reforms could be based upon. As noted above, perhaps a bolder approach in the 2006 reform could have promoted a quicker response in society, but the mentality that the prohibition of indirect discrimination is challenging is quite entrenched in Japan. The timing for structural reforms is never easy to calculate, and it is not uncommon that they require many years in order to reach their full potential. Waiting for the response of the labor market, or resorting to more flexible legal sources before imposing top-down drastic reforms is therefore understandable.

From the point of view of the effectiveness of such reforms, despite the elements missing from a fully-fledged equality of opportunity that includes more ambiguous indirect discrimination cases, a fruitful osmosis has been established between the MHLW, the Japanese courts, and the National Diet, ie the executive, judiciary and legislative branches. With dialogue between the different institutions

of the State and representatives of the employers and the employees, a minimum level of compromise is possible. Such an arrangement, although it might not solve all the existing issues, is more likely to be implemented in an effective way in the future, since its content, at least in theory, was agreed upon by all the relevant actors. There are certainly differences between the EU and Japan, but with relation to the equality principle and its application to labor legislation, it seems that they share similar values that are gradually being reflected in the law. In Japan, legal reform has often been prompted by external pressure, but the same situation can be found in the Member States of the EU, and it can be said that it is in fact the capacity of a legal system to respond to crises through change that determines its ability to survive in the international arena.[59] States with institutions capable of cooperating in a productive manner offer a brighter future, if they can incorporate best practices from around the world.

[59] M. Riminucci, 'Resilient Japan: Legal Adaptability and Migration', in L. Ferrara et al eds, *Biopolitica dell'immigrazione* (Frankfurt am Main: Peter Lang, 2017).