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Kristina T. Geraghty†

Introduction

Yukako Kurose began working at a department store's corporate office in 1986, one year after the passage of Japan's first Equal Employment Opportunity Law (EEOL).[1] Although her career initially seemed promising, it quickly went downhill after the birth of her daughter.[2] According to

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1. Martin Fackler, *Career Women in Japan Find a Blocked Path, Despite Equal Opportunity Law*, N.Y. TIMES, Aug. 6, 2007, at A1.

2. *Id.*

Ms. Kurose, her company passed her over for promotions because she frequently left work before 6:30 in the evening to pick up her child.[3] Eventually, the company forced Ms. Kurose into a dead-end clerical job and she quit.[4] Ms. Kurose's struggle to balance both a successful career and a family is not unique. Japanese women who try to prove that they can succeed at both work and family face constant discrimination throughout their careers.[5] Takako Ariishi, the president of a manufacturing company that supplies gauges to Nissan, is the only woman in a group of approximately 160 Nissan suppliers.[6] Although Ms. Ariishi comes right back to work after leaving at 7:00 each evening to put her son to bed, she still feels as though she has "to prove all the time that a woman can be president."[7] For example, the first time she went to a meeting of Nissan suppliers the men asked her to wait in another room with the secretaries.[8]

Twenty-two years after the Diet enacted the EEOL, Japanese women still face wage discrimination, limited career opportunities, a lack of upward mobility, pervasive sexual harassment, and an inability to have both a successful career and a family.[9] In 2003, the average monthly salary of a female Japanese worker was 66.8% of the average male worker's earnings, one of the largest wage differentials of all developed nations.[10] Moreover, according to the International Labor Organization, in 1985 women held only 6.6% of all management jobs in both Japanese corporations and government.[11] By 2005, the number of female managerial employees had risen only to 10.1%.[12] Additionally, the United Nation's 2006 "Gender Empowerment Measure" (GEM), which indexes women's participation in politics and the economy, ranked Japan forty-second out of seventy-five countries—much lower than other developed nations, such as the twelfth-ranked United States.[13]

Japan has recently taken notice of its gender inequality problem—a problem that has had a massive effect on their economy as a whole. Japanese women have begun delaying marriage and some refuse to marry at all.[14] This reluctance to marry has caused the Japanese population to shrink, leading many to fear that soon there will not be enough workers to

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3. *Id.*
4. *Id.*
5. *See id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *See generally* Charles Weathers, *Equal Opportunity for Japanese Women: What Progress?*, THE JAPANESE ECON., Winter 2005-06, at 16 (discussing the EEOL's progress and future after the 2006 amendments).
10. *See* GENDER EQUAL. BUREAU, CABINET OFFICE, GOV'T OF JAPAN, WHITE PAPER ON GENDER EQUALITY 2007, at 12 (2007), *available at* http://www.gender.go.jp/whitepaper/ewp2007.pdf [hereinafter WHITE PAPER].
11. *See* Fackler, *supra* note 1.
12. *Id.*
13. *See* GENDER EQUAL. BUREAU, CABINET OFFICE, GOV'T OF JAPAN, GENDER EQUALITY IN JAPAN 2007, at 7 (2007).
14. *See* Darlene Budd, *Japan's Silent Revolution: Saying No to Marriage and the System?*, 5 J. INST. JUST. INT'L STUD. 43, 52 (2005).

sustain Japan's economy.[15] As of 2005, the Japanese birthrate was at a low of 1.26%.[16] Analysts estimate that if this downward trend continues, by 2050, the population will decrease to 101 million and that by 2100, it will fall to 64 million—half of the 2005 population.[17]

In 2006, the Japanese government implemented reforms to the EEOL in an effort to stave off this grim picture.[18] The question remains, however, are these reforms enough to produce gender equality in the workplace? This Note argues that a comparison between Japan and Norway reveals that to remedy Japan's problem of gender equality in the workforce, Japan must take a more aggressive legislative approach in its gender equality laws. This aggressive approach includes using positive or affirmative action, a more aggressive penalty and reward program for complying and non-complying corporations, refining the child-leave laws, reform of the tax laws, and a set definition of what constitutes indirect discrimination.

Part I of this Note discusses the history of gender equality in Japan and the pre-2006 gender equality laws, including the Labor Standards Law (LSL), the original EEOL, the 1997 EEOL, and the Child Care and Family Care Law (CCFCL). Part II examines the Japanese gender equality laws as they stand now, the problems with the current laws, the current status of Japanese women, and what the Japanese government plans to do to further women's equality. Part III evaluates the situation of women in Norway and Norwegian law, particularly focusing on the Norwegian Act Relating to Gender Equality and the quota system. Part IV focuses on how to integrate the approach of Norway into Japanese law and society to further gender equality.

I. History of Japanese Gender Equality and Gender Equality Laws

A. Traditional Role of Japanese Women and the Labor Standards Law of 1947

Traditional Japanese society stresses the idea of *ryousai kenbo*, or "good-wife, wise mother."[19] This idea became extremely popular during the reform period of the late nineteenth century as a way to repress the popularity of the "working-girl" movement by focusing women's priorities on the home and family.[20] Since the nineteenth century, *ryousai kenbo* has permeated the structure of Japanese society and has helped to limit the

15. *See* MICHAEL ZIELENZIGER, SHUTTING OUT THE SUN: HOW JAPAN CREATED ITS OWN LOST GENERATION 161-62 (2006).

16. GENDER EQUAL. BUREAU, *supra* note 13, at 12.

17. Budd, *supra* note 14, at 52.

18. *See* Megan L. Starich, Comment, *The 2006 Revisions to Japan's Equal Opportunity Employment Law: A Narrow Approach to a Pervasive Problem*, 16 PAC. RIM L. & POL'Y J. 551, 552 (2007).

19. Kelly Barrett, *Women in the Workplace: Sexual Discrimination in Japan*, HUM. RTS. BRIEF, Winter 2004, at 5.

20. *Id.*

ability of women to be anything but homemakers.[21]

Although early twentieth century Japanese society mainly relegated women to the house, Japanese women were not entirely without protection. The Japanese Constitution contains an equal rights amendment, Article 14, that outlaws discrimination based on sex: "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."[22] Article 14's protection, however, is weak.[23] Judges have interpreted the provision "to apply only to 'unreasonable' discrimination by State action."[24] The reasonableness determination entails a highly fact-specific inquiry into each case, as well as a consideration of the political and social conditions of the time.[25] Therefore, the definition of "reasonable action" can frequently change. Finally, Article 14 also has extremely limited utility as it only protects against public sector discrimination.[26]

During the post-World War II American occupation, however, the Labour Standards Law (LSL) brought about further protections.[27] This law delineates rules and standards governing working conditions and contracts for both men and women,[28] but the LSL only mandates equal treatment of men and women with regard to wages.[29] Although an employer cannot discriminatorily pay a worker "by reason of the worker being a woman,"[30] if the employer can provide a non-gender based justification, then disparate pay is permissible.[31] This ability to discriminate, however, has limits. For example, employers cannot fire a female worker during her maternity leave, before and after childbirth, or within thirty days of the leave expiring.[32] This provision allows pregnant mothers to take maternity leave without fear of losing their jobs.[33]

The main effect the LSL had on women came from its protectionist provisions.[34] The LSL restricted women from performing harmful or

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21. *See* M. Christina Luera, Comment, *No More Waiting for Revolution: Japan Should Take Positive Action to Implement the Convention on the Elimination of All Forms of Discrimination Against Women*, 13 PAC. RIM L. & POL'Y J. 611, 612 (2004).

22. KENPÔ, art. 14 (Japan), *translated in* CURTIS J. MILHAUPT ET AL., THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY 738 (2006).

23. *See* Jennifer S. Fan, *From Office Ladies to Women Warriors?: The Effect of the EEOL on Japanese Women*, 10 UCLA WOMEN'S L.J. 103, 111 (1999).

24. *Id.* (citation omitted).

25. *See id.*

26. *Id.*

27. Michiko Aizawa, *An International Perspective: A Proposal to Combine Disparate Approaches to the Maternal Wall*, 7 EMP. RTS. & EMP. POL'Y J. 495, 503 (2003).

28. *See* Rodo Kijyun-Ho [Labour Standards Law], Law No. 49 of 1947, arts. 1-13 (Japan), *available at* http://www.jil.go.jp/english/laborinfo/library/documents/llj_law1.pdf.

29. *See id.* art. 4 ("An employer shall not engage in discriminatory treatment of a woman as compared with a man with respect to wages").

30. *Id.*

31. Starich, *supra* note 18, at 554.

32. *See* Rodo Kijyun-Ho [Labour Standards Law], art. 19(1).

33. Aizawa, *supra* note 27, at 504.

34. *See id.* at 503-04 (detailing the various protectionist provisions of the LSL).

strenuous work, such as heavy lifting, during pregnancy and one year after giving birth.[35] Additionally, these women could request a transfer to "light duties"[36] and exemption from overtime[37] and night work.[38] Finally, women had the right to up to fourteen weeks of maternity leave—six weeks prior to the birth and eight weeks after the birth.[39] Only six of the weeks following the birth, however, were mandatory.[40] Once the woman returned to work, a woman with a child under one year of age could take two unpaid thirty-minute breaks per day.[41] "The rationale [for these protections] was that women are physically weaker than men" and require more time for their familial and household duties.[42] Although some of these protections, including the mandatory maternity leave and the ability for a woman to be exempt from overtime if she so requests, are beneficial to working mothers, the LSL fell short in many ways. By limiting its equal employment protections only to wages, the LSL left employers free to discriminate in other areas such as hiring, training, promotion, firing, and job assignment—to name but a few.[43]

The inadequacies of the LSL soon became obvious, and during the 1960s, the courts stepped in to help remedy some of the problems by creating a legal standard called the "public order doctrine."[44] The courts developed the "public order doctrine" from Article 90 of the Civil Code, which states that "[a] juristic act which has for its object such matters as are contrary to public policy or good morals is null and void."[45] From the 1960s to the 1980s, the courts repeatedly applied this doctrine in cases in which employers forced women to retire upon the birth of a child, pregnancy, or marriage.[46] A woman's "retirement" was important in the life of a corporation because it permitted her post to be filled by a younger woman—a potential new wife for one of the corporation's managers.[47] In *Matsuro v. Mitsui Shipbuilding Corporation*,[48] the employer required all female employees to retire upon marriage.[49] The woman could apply for a service extension (*kinmu enchô*) or an employment extension (*koyô enchô*) but the

35. *See* Rodo Kijyun-Ho [Labour Standards Law], art. 64-3(1).
36. *See id.* art 65(3).
37. *See id.* art 66(1).
38. *See id.* art. 66(3).
39. *See id.* art. 65(1), (2).
40. *See id.* art. 65(2).
41. *See id.* art. 67(1).
42. *See* Aizawa, *supra* note 27, at 505.
43. *See* Starich, *supra* note 18, at 554.
44. *Id.* at 555.
45. *See* MINPÔ, art. 90 (Japan), *translated in* CURTIS J. MILHAUPT ET AL., *supra* note 22, at 738; *see also* Starich, *supra* note 18, at 555.
46. FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 133 (1987); *see also* Tokyu Kikan Kogyo, 20 ROSHU 715 (Tokyo D. Ct., Jul. 1, 1969) (invalidating employer's mandatory retirement policy for women who reached thirty years of age), *cited in* Starich, *supra* note 18, at 555 n.25.
47. Budd, *supra* note 14, at 49.
48. 2 Rôminshû 1163 (Osaka D. Ct., Dec. 10, 1971) (Japan), *translated in* CURTIS J. MILHAUPT ET AL., *supra* note 22, at 572.
49. *See id.*

woman had to stop working upon the birth of her first child.[50] The Osaka District Court found that "[p]ublic order prohibits unreasonable sex-based discrimination and restriction on the freedom of marriage"[51] and that the mandatory retirement system constituted discrimination.[52] Additionally, the court noted that although a female employee who takes maternity leave can create some inconvenience for the employer, the employer must bear this inconvenience and not try to avoid it by firing the employee.[53]

Although this decision marked a major milestone in the struggle for gender equality in employment, much of the court's language demonstrates the still pervasive idea of *ryousai kenbo*. For example, the court states, "[O]f course . . . it is a tenet common to all countries that, as a rule, once a man and woman have entered into marriage, the wife will manage household affairs."[54] Moreover, the court discusses the "essential differences of the sexes" and the ability for employers to use "rational sex-based discrimination."[55] The use of this language helped to maintain the employer's ability to discriminate based on gender and shows that courts in the pre-EEOL era were reluctant to go too far in support of gender equality.[56] Use of the courts to further gender equality in employment has also been ineffective due to Japan's civil law jurisdiction that stresses statutes over judicial decisions.[57] Because judicial decisions are not binding on later cases, litigation can be uncertain and risky.[58] Additionally, litigation is very expensive and long, taking at least five years to move through the district court.[59]

Because Japan's early gender equality measures had proven largely ineffective, a change was on the horizon by the end of the 1960s. The 1970s brought increased worldwide gender consciousness, and the 1975 UN-designated "International Women's Year" and "Decade for Women" helped to spur further reform in Japan.[60]

B. CEDAW: The Impetus for Change

Japan enacted the Equal Employment Opportunity Law in 1985 mainly to appease the United Nations and mollify international opinion.[61] In fact, the Director of the Ministry of Labor's (MOL) Women's Bureau asserted that Japan would not have enacted the EEOL by 1985 if not for the

50. *Id.*
51. *Id.* at 580.
52. *Id.* at 573.
53. *Id.* at 578.
54. *Id.* at 577.
55. *Id.* at 574.
56. *See* Starich, *supra* note 18, at 555 (discussing how courts have been reluctant to utilize the public order doctrine to invalidate discriminatory promotion and hiring practices).
57. *See* Barrett, *supra* note 19, at 6-7.
58. *See id.* at 7.
59. *Id.* (the District Court is the second-level trial court in Japan and is subject to review by the Japanese Supreme Court).
60. *See* Fan, *supra* note 23, at 114.
61. Weathers, *supra* note 9, at 18.

UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[62] CEDAW has two main functions.[63] First, it defines discrimination against women and provides parties to the treaty with the ideal vision of gender equality.[64] Second, CEDAW provides parties with the legal framework for creating a gender-equal society.[65]

CEDAW defines "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political economic, social, cultural, civil or any other field."[66] The treaty also has a special provision that calls for equal employment rights for men and women.[67] This provision emphasizes women's right to have the same employment opportunities based on the same criteria as men, as well as their right to receive the same pay and benefits as men for equal work.[68] CEDAW does not allow a party's culture to hinder a woman's exercise of her fundamental rights.[69] To ratify the treaty, a country must take "all appropriate measures, including legislation, to ensure the full development and advancement of women,"[70] including abolishing laws, practices, or customs that constitute discrimination against women.[71] In addition to regular legislation, CEDAW allows parties to adopt "temporary measures" aimed at accelerating de facto equality between men and women without that measure constituting discrimination.[72]

Japan committed itself to signing and ratifying CEDAW by 1985.[73] This deadline helped to move the treaty through the Diet in the face of opposition from business leaders and labor unions.[74] Business leaders feared that equal employment opportunities would end the post-World War II economic growth and that women could not fill the "corporate warrior" role and tradition of lifetime employment due to their other societal duties of child-rearing and caring for elderly parents.[75] Additionally, labor unions called for maintaining the special protections in the labor law because they feared that weakening those protections would allow busi-

62. Fan, *supra* note 23, at 115.
63. *See* Luera, *supra* note 21, at 615.
64. *See* Convention on the Elimination of All Forms of Discrimination Against Women art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13.
65. *See id.* art. 2.
66. *See id.* art. 1.
67. *See id.* art. 11.
68. *See id.*
69. *See id.* art. 5(a) (requiring states "[t]o modify the social and cultural patterns of conduct of men and women, with a view to [eliminating] prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women").
70. *Id.* art. 3.
71. *Id.* art. 2(f).
72. *See id.* art. 4.
73. Fan, *supra* note 23, at 114.
74. *See* UPHAM, *supra* note 46, at 149-50 (further discussing the ongoing debate between business leaders and labor unions); Fan, *supra* note 23, at 114-16.
75. Fan, *supra* note 23, at 116.

nesses to underpay women and subject them to poor working conditions.[76] The resulting EEOL legislation was a "compromise between the pressure to comply with [CEDAW] and the unwillingness of the business community to concede anything which might affect industrial productivity and profit."[77]

C. The EEOL and Its Immediate Effects

The Equal Employment Opportunity Law updated the Labour Standards Law by discouraging gender discrimination in five areas: recruitment and hiring, job assignment and promotion, vocational training, employee benefits, and retirement and dismissal.[78] Under the EEOL, employers have two types of duties: *kinshi* (prohibited) and *doryoku* (best efforts).[79] The *kinshi* duties are stricter, prohibiting employers from discriminating with regard to retirement age, discharge, and voluntary resignation.[80] The *doryoku* duties require the employer only to *endeavor* not to discriminate in advertisements, hiring, job placement, and promotions.[81] Therefore, the original EEOL did not prohibit employers from discriminating; rather, the employer simply had to make a "good faith effort" to achieve equal opportunity in the workplace.[82]

In addition to creating the *doryoku* and *kinshi* duties, the EEOL significantly amended the LSL's special protections.[83] After the passage of the EEOL, women could work more than six hours of overtime a week and past 10 p.m.[84] In addition, pregnant women could "work until six weeks before their due dates and [could] return to work six weeks after giving birth [as long as they] work at a job which a doctor certifies will not be harmful to them."[85]

Problematically, the EEOL did not create penalties for violations of the *kinshi* or *doryoku* duties.[86] Employees did not have a private right of action under the EEOL and the EEOL did not mandate any form of civil or crimi-

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76. Charles Weathers, *In Search of Strategic Partners: Japan's Campaign for Equal Opportunity*, 8 SOC. SCI. JAPAN J. 69, 74 (2005); *see also* UPHAM, *supra* note 46, at 150 (noting that business leaders wanted to eliminate the special protections claiming that women could never be truly equal with the protections in place).

77. Fan, *supra* note 23, at 117.

78. *See* Koyo no Bun'yo ni Okeru Danjo no Pinto na Kikai oyobi Taigu no Kakuho to Joshi-Rodosha no Fukushi no Zoshin ni Kansuru Horitsu [Act on Securing, Etc. of Equal Opportunity and Treatment Between Men and Women in Employment of 1972], Act No. 113, arts. 7-11, *amended by* Act No. 45 of 1985, arts. 7-11 (Japan), *cited in* NAT'L INST. OF EMPLOYMENT AND VOCATIONAL RESEARCH, JAPAN, WOMEN WORKERS IN JAPAN 96-97 (1988) [hereinafter 1985 EEOL].

79. Fan, *supra* note 23, at 118.

80. *Id.*; *see also* 1985 EEOL, *supra* note 78, art. 11 ("With regard to the compulsory retirement age and dismissal of workers, employers *shall not* discriminate against a woman worker as compared with a man . . . .") (emphasis added).

81. Fan, *supra* note 23, at 118; *see also* 1985 EEOL, *supra* note 78, arts. 7-10.

82. Starich, *supra* note 18, at 557.

83. *See* Fan, *supra* note 23, at 119-20.

84. *See id.* at 120 & n.101 (citing 1985 EEOL, *supra* note 78, arts. 61, 64-2, 64-3).

85. *Id.*

86. *See id.* at 118.

nal sanctions.[87] Moreover, although the EEOL provided for three employee-employer dispute resolution mechanisms,[88] these mechanisms proved largely ineffective.[89] First, parties could come before an in-house employer/employee grievance resolution committee to discuss the problem.[90] Second, the MOL's Women and Young Workers' office could give guidance or recommendations to the parties.[91] Finally, if both parties agreed, the Equal Opportunity Mediation Commission (EOMC) could provide mediation.[92] Under the original EEOL, both parties had to agree to mediation,[93] and if they did, three MOL-appointed individuals of "learning and experience" proposed a non-binding settlement.[94]

Tadashi Hanami, the Director General for Research of the Japan Institute of Labour has stated that the "EEOL was born as an ugly duckling and has never metamorphosed into a swan."[95] The original EEOL had many problems that helped to turn the law into a paper tiger.[96] Because the lax enforcement and dispute resolution mechanisms left women with little recourse if they experienced discrimination, few took advantage of the law's provisions. Between 1985 and 1998, only 106 employees applied for mediation with the EOMC and the Commission mediated only *one* of these cases.[97]

Moreover, the EEOL's mere exhortation that employers "endeavor" not to discriminate allowed employers to easily circumvent the law.[98] In an effort to avoid equal opportunity, companies developed a "two-track system" of employment.[99] The management, or "career," track consisted largely of males, while the general, or "clerical," track was composed mainly of females.[100] Employees on the two tracks had different duties, wages, and qualifications.[101] Management track employees focused on corporate development, planning, and negotiations.[102] Additionally, management track employees had better benefits and wages[103] and were able to be promoted to higher levels in the company than clerical track employees.[104] In contrast, clerical track employees had less significant duties,

87. *Id.*
88. *See* 1985 EEOL, *supra* note 78, arts. 13-15, 18-20.
89. *See* Starich, *supra* note 18, at 557.
90. 1985 EEOL, *supra* note 78, art. 13.
91. *Id.* art. 14.
92. *Id.* arts. 18-20.
93. *Id.* art. 15.
94. *Id.* art. 17(2).
95. Junko Kumamoto-Healey, *Women in the Japanese Labour Market 1947-2003: A Brief Survey*, 144 INT'L LAB. REV. 451, 463 (2005).
96. *See* Starich, *supra* note 18, at 557.
97. Fan, *supra* note 23, at 122.
98. *See* Starich, *supra* note 18, at 557.
99. KAZUO SUGENO, JAPANESE EMPLOYMENT AND LABOR LAW 132 (Leo Kanowitz trans., 2d ed. Univ. of Washington Press 1992) (1985).
100. *See* Starich, *supra* note 18, at 557-58.
101. *See id.* at 558.
102. SUGENO, *supra* note 99.
103. Starich, *supra* note 18, at 558.
104. SUGENO, *supra* note 99.

such as serving tea and mundane office work.[105] Women in the general track, therefore, served relatively the same purpose as the ornamental "office flowers" or "office ladies" of the 1960s and 1970s.[106]

The qualifications for entering the management track furthered the discriminatory purpose of keeping the genders separated.[107] Many employers required the ability to speak a foreign language fluently, graduation from a prestigious university,[108] an obligation to work long hours, and the ability to travel frequently or relocate easily—criteria that although facially gender neutral more often than not could only be fulfilled by males.[109] For example, the requirement that management track employees work upwards of 3,000 hours per year is extremely difficult for women with children to fulfill.[110] Kuniko Inoguchi, the former cabinet minister in charge of gender equality, stressed that "[i]f expected to work 15 hours a day, then most women will give up."[111] In addition to facially neutral but nonetheless discriminatory criteria such as long hours, some employers required additional qualifications from female candidates not required for males, including written examinations, interviews, or recommendations.[112]

D. The Aftermath of the EEOL in the Early 1990s

During the 1990s, gender equality in Japan remained stagnant and disappointing. The interest in promoting women's rights and keeping up with the rest of the world faded because the issue of equal opportunity was no longer the primary goal on the global agenda.[113] The marriage of Japan's Crown Prince Naruhito to Harvard- and Oxford-educated Masako Owada offers a prime example of the continuation of *ryousai kenbo* during the 1990s.[114] Owada was an intelligent woman who worked for the Japanese Foreign Ministry as a trade representative responsible for negotiations with the United States and other industrialized nations.[115] During her tenure at the Ministry, the Crown Prince proposed to her.[116] Owada rejected

105. Starich, *supra* note 18, at 558.

106. *See* Fan, *supra* note 23, at 105. It is important to note that women in the management track often also needed to fulfill the traditional roles of "office ladies." *See id.* at 125. For example, a bank employer required a female on the bank's management track to arrive at work early and "clean ashtrays, wipe off desks, and boil water for tea before the rest of the staff arrived." *Id.*

107. *See* Nakano Mami, *Ten Years Under the Equal Employment Opportunity Law*, *in* VOICES FROM THE JAPANESE WOMEN'S MOVEMENT 72 (AMPO - Japan Asia Quarterly Review ed., 1996).

108. *See* Starich, *supra* note 18, at 558.

109. *See id.*; SUGENO, *supra* note 99.

110. *See* Fan, *supra* note 23, at 124-25.

111. Fackler, *supra* note 1.

112. Fan, *supra* note 23, at 124.

113. *Id.* at 115.

114. *See* Budd, *supra* note 14, at 48.

115. *Id.*

116. *Id.*

the Crown Prince's first two proposals but eventually accepted.[117] On the day of her engagement, Owada spoke eight seconds longer than her future husband and received scathing criticism from the press.[118] From that moment on, the palace began to control her public appearances.[119] The palace consigned this once powerful representative to photo opportunities, ceremonies, and walking three steps behind her husband.[120]

On the employment front, employers still discriminated against women during the hiring process. Interviewers frequently asked women questions that had nothing to do with job performance or scholastic aptitude.[121] For example, during the late 1990s, interviewers often asked female interviewees about their "*suree saizu*" or "three sizes": waist, hips, and bust.[122] Other discriminatory questions focused on the woman's marriage plans.[123] Employers also limited their employment search to women with desirable physical and personal attributes.[124] In the arena of physical attributes, employers considered "ugly women," "short women—those less than 140 centimeters," or "women with spectacles" to be "undesirable" female employees.[125] With regard to personal attributes, Kinokuniya Shoten, a Japanese bookstore chain, characterized undesirable female applicants as "divorcees, women who belong to political or religious groups, women who respect passionate artists such as Vincent Van Gogh, . . . women living in rented rooms and daughters of professors or wives of teachers."[126] Discrimination, however, did not simply occur in the hiring process.[127] Surveys indicate that during the economic slowdown of 1991, the hiring cutbacks affected women the most.[128]

Many government policies during the 1980s and 1990s also helped to limit equal opportunity for women in the employment sector. The govern-

117. *Id.* Many people say that Owada finally accepted the marriage proposal because after the second refusal, Owada's father, a prominent foreign ministry diplomat, was told that if his daughter did not accept the Prince's proposal, his job in the ministry would be at risk. *Id.*

118. *Id.*

119. *Id.*

120. *See id.*

121. *See* Barrett, *supra* note 19, at 8; *see also* Mami, *supra* note 107, at 70.

122. Weathers, *supra* note 9, at 19.

123. *See* Barrett, *supra* note 19, at 8.

124. *See* Mami, *supra* note 107, at 70 (discussing how interviewers often "intentionally and persistently [took] up the subject of looks and physical appearance"). Moreover, many women received training from their employers to achieve the "ideal" standard of etiquette. *See* Fan, *supra* note 23, at 109. "For example, female workers at Normura Securities are 'drilled by former Japan Air Lines stewardesses in bowing, walking, smiling, telephone etiquette, tea service, and sitting.'" *Id.* at 109-10 (citation omitted).

125. *Id.* at 109.

126. *Id.*

127. *See* Mami, *supra* note 107, at 67-68, 70-72 (providing examples of gender discriminatory practices, such as the female-male wage differential, the low numbers of female managers, and the large percentage of women who are "non-regular," or part-time workers).

128. Weathers, *supra* note 76, at 74; *see also* Mami, *supra* note 107, at 69 (noting that new female graduates faced greater obstacles than their male peers in the employment search during the recession).

ment enacted tax breaks for couples in which one spouse earns 1.03 million yen per year or less,[129] approximately $10,000 U.S. dollars.[130] Women who make more than the stipulated maximum risk having to work more hours to counterbalance the tax penalty that they receive, making it even more difficult for these women to raise a family.[131] Additionally, if a woman makes more than 1.4 million yen per year, the woman is no longer entitled to be included in her husband's pension plan.[132] Finally, during the 1980s, the government decreased the amount of funding directed toward child care centers, even though women's work participation was on the rise.[133] These policies had the combined effect of encouraging women to remain home as caregivers or to work only part-time.[134] Due in large part to these policies, women's participation in the work force continued to mirror an "M-shaped curve" with decreased female employment during the ages of 25-29 and a low point during the peak child-rearing ages of thirty to thirty-four.[135]

Not all government policies from the 1980s through the mid-1990s stalled gender equality. In response to an unexpected decrease in the birthrate,[136] the Diet passed the Child Care Leave Law (CCLL) in 1991.[137] The CCLL allowed workers who were raising their own child, adopted or biological, in their own homes to request that the employer grant them child care leave until the child reached the age of one.[138] An employer could not refuse to grant leave unless the requesting employee had worked for the company for less than one year or had a spouse who could "ordinarily take care of the child."[139] A person's spouse could "ordinarily take care of the child" if the spouse was either not employed or was taking child care or another form of leave.[140] This restriction meant that under the CCLL, a father and mother could not take leave together.[141] Because of the ideals of *ryousai kenbo* that still permeated Japanese society, it was unlikely that a man would take leave to care for his child in order to allow his wife to pursue her career. In addition to child care leave, the CCLL provided that employers should permit some accommodations, such as reduction in working hours, a flexible work arrangement, or installing a child care facility, to make it easier for women with children younger than

129. Weathers, *supra* note 76, at 74-75.
130. ZIELENZIGER, *supra* note 15, at 170.
131. *See* Budd, *supra* note 14, at 47.
132. ZIELENZIGER, *supra* note 15, at 170.
133. Weathers, *supra* note 76, at 75.
134. *See id.*
135. *See* GENDER EQUAL. BUREAU, *supra* note 13, at 10.
136. Aizawa, *supra* note 27, at 508-11; Starich, *supra* note 18, at 559.
137. Ikuji-Kyugyo-tou ni kansuru Horitsu [Child Care Leave Law of 1991], Law No. 76 of 1991 (Japan), *cited in* Aizawa, *supra* note 27, at 509 n.73.
138. Aizawa, *supra* note 27, at 509.
139. *Id.* (noting that there are several exceptions to the coverage, including employment on a day-to-day basis, employment for a fixed term, or union agreements).
140. *Id.* at 510.
141. *Id.*

one year of age to work.[142]

In 1995, the Diet revised the CCLL and renamed it the Child Care and Family Care Leave Law (CCFCLL).[143] The CCFCLL not only granted employees leave to care for children but also to care for a family member. As in the CCLL, the employer could not refuse to grant leave unless the employee met the above-stated conditions.[144] Neither the CCLL nor the 1995 CCFCLL required an employer to pay an employee who took leave.[145] The Employment Insurance Law, however, required the employment insurance fund to pay 25% of the employee's wages during the worker's child care leave.[146] Unfortunately, this benefit did not apply when the worker took leave to care for a family member.[147]

E. 1997 Revisions

By the mid-1990s, the pitfalls and failures of the 1985 EEOL became obvious. Japan still faced an ever-decreasing birthrate, a dwindling workforce, and increased litigation challenging gender discrimination in employment.[148] These pervasive problems helped to spur the 1997 revisions to the EEOL.[149] In addition, a July 1996 report from the Office for Gender Equality (OGE),[150] as well as the United Nation's Fourth World Conference on Women in 1995, may have helped to rekindle the feeling of gender consciousness in Japan.[151]

The 1997 revision sought to strengthen the old EEOL in a number of ways. First, the revision changed the duty to "'endeavor' not to discriminate" into an outright *prohibition* against discrimination in recruiting and hiring,[152] as well as prohibiting discrimination in the areas of promotions, training, and job assignments.[153] This prohibition against discriminatory

142. *Id.* at 510-11 (noting that an employer only has the duty to *endeavor* to make these accommodations available for a woman once her child reaches one year of age).

143. Ikuji-Kyugyo, Kaigo-kyugyo-tou Ikuji mataha Kazoku Kaigo wo Okonau Rodosha no Fukushi ni kansuru Horitsu [Child Care and Family-Care Leave Law], Law No. 107 of 1995 (Japan), *cited in* Aizawa, *supra* note 27, at 511 n.87; *see* Kumamoto-Healey, *supra* note 95, at 464.

144. Kumamoto-Healey, *supra* note 95, at 465.

145. *See id.*

146. *See id.*

147. *See id.*

148. *See* Aizawa, *supra* note 27, at 511-12; Starich, *supra* note 18, at 559.

149. *See* Starich, *supra* note 18, at 559. It is important to note that although Japan enacted the revisions in 1997, they did not take effect until April 1999. *Id.* As such, these revisions are sometimes referred to as the "1999 Revision."

150. The Japanese government created the OGE in July 1994. *See* Weathers, *supra* note 76, at 75. The OGE consists of feminist leaders, academics, and national bureaucrats who examined the old EEOL and suggested revisions to solve the birthrate issue. *See* Starich, *supra* note 18, at 559.

151. *See* Weathers, *supra* note 76, at 75.

152. *See* Koyo no Bun'yo ni Okeru Danjo no Pinto na Kikai oyobi Taigu no Kakuho to Joshi-Rodosha no Fukushi no Zoshin ni Kansuru Horitsu [Act on Securing, Etc. of Equal Opportunity and Treatment Between Men and Women in Employment of 1972], Act No. 113, art. 5, *amended by* Act No. 92 of 1997, art. 5 (Japan) (emphasis added), *translated in* MILHAUPT ET AL., *supra* note 22, at 738 [hereinafter 1997 EEOL].

153. *See id.* art. 6.

recruitment included banning the utilization of gender- specific ads asking for "females only" or using gender-specific job titles such as "waitress."[154] Second, the revision granted the employee the right to unilaterally force an employer into mediation with the Ministry of Health Labor and Welfare (MHLW).[155] Importantly to employees, Article 13 of the Revised EEOL prohibited an employer from taking retaliatory actions, including discharge, against an employee who requests mediation.[156] If the employer did not comply with mediation, the MHLW could make a "public announcement" to the media regarding the non-complying company.[157] These changes in the EEOL also caused the Diet to amend the LSL, abolishing the protective provisions that restricted women from overtime and late-night work.[158]

One of the most important effects of the 1997 revision, however, was that it recognized sexual harassment as a type of gender discrimination.[159] The inclusion of sexual harassment, or *seku hara*, in the 1997 EEOL was especially noteworthy because *seku hara* was not even a part of the Japanese language until 1989.[160] Although Japanese courts previously had held that employers could be found liable for an employee's sexually harassing conduct,[161] the 1997 Amendments required employers to affirmatively prevent employees from engaging in sexually harassing behavior in the workplace.[162] Article 21 of the 1997 Amendments provides that "[e]mployers shall give necessary consideration . . . so that [the] women workers they employ do not suffer any disadvantage in their working conditions by reason of said women workers' responses to sexual speech and behavior in the workplace and [that] their working environments do not suffer any harm."[163] The 1997 revision also requires the Ministry of Labor to release guidelines to classify and define the two types of sexual harassment, quid pro quo and hostile work environment, and to inform employers of their obligations under the EEOL.[164] Under these guidelines, employers must explain their sexual harassment policies and make them known to all of their employees.[165] Employers must also implement a

154. Fan, *supra* note 23, at 134.
155. *See* 1997 EEOL, *supra* note 152, art. 14.
156. *See id.* art. 13(2).
157. *See id.* art 26.
158. Fan, *supra* note 23, at 134.
159. *See* 1997 EEOL, *supra* note 152, art. 21.
160. Fan, *supra* note 23, at 126.
161. *See* KAZUO SUGENO, JAPANESE EMPLOYMENT AND LABOR LAW 176-77 (Leo Kanowitz trans., 5th ed. Carolina Academic Press 2002) (1985) (discussing various sexual harassment cases including many in which the courts held employers liable for an employee's misconduct).
162. *See* 1997 EEOL, *supra* note 152, art. 21(1).
163. *Id.*
164. *See id.* art. 21(2); SUGENO, *supra* note 161, at 175-76. Some of the guidelines that one government agency issued give such specific examples as: "[d]on't force a woman to sing karaoke with you," "[d]on't coerce her into dancing," and "[d]on't peep into her locker room." Mark Magnier, *Equality Evolving in Japan*, L.A. TIMES, Aug. 30, 1999, at A12.
165. Fan, *supra* note 23, at 136.

scheme for dealing with sexual harassment complaints and for counseling sexual harassment victims.[166] Finally, employers faced with sexual harassment claims must immediately gauge the extent of the sexual harassment and successfully deal with the problem.[167]

The new sexual harassment provision had an immediate effect. Sexual harassment complaints skyrocketed from roughly four a year in the early 1990s to 2,534 in fiscal year 1997 and 7,019 in fiscal year 1998.[168] In the late 1990s, a female Cabinet member accused Japan's "Minister of Gender Equality," Hiromu Nonaka, of sexual harassment for suggesting to her that she should marry—implying that she should become pregnant and set an example for other women to reverse Japan's low birthrate.[169] Women began to file complaints against other prominent individuals as well.[170] For example, a well-known television producer was arrested and charged with molesting a nineteen-year-old woman on the subway, conduct that Japanese society used to tolerate.[171] The producer spent two days in jail and then quit his job in disgrace.[172]

The 1997 revision, however, was not completely successful. Most notably, the system for enforcing the 1997 EEOL, publication, was incredibly weak.[173] Although one might think that in the consensus culture of Japan, publishing the names of violators would provide sufficient deterrence, the companies simply have no incentive to follow the law.[174] Moreover, the "sting" of publication was basically an empty threat. As of August 2007, the MHLW had *never* published the names of any EEOL violators.[175] Additionally, the 1997 EEOL did not address the serious problem of indirect discrimination—employer requirements or actions that are neutral on their face but result in disproportionate, detrimental treatment of one sex.[176] Moreover, the revision only protected women and did not include protections for men.[177] Lastly, recovery on sexual harassment claims was also problematic under the 1997 revision.[178] The amounts that the courts rewarded in sexual harassment suits were not large, and female complainants often lost their jobs.[179] Additionally, sexual harassment cases are subject to very stringent standards of proof, and the weak Japanese discov-

166. *Id.*
167. *Id.*
168. Weathers, *supra* note 76, at 79.
169. Magnier, *supra* note 164, at A1.
170. *See id.* at A12.
171. *Id.*
172. *Id.*
173. *See* Fan, *supra* note 23, at 137.
174. *See* Starich, *supra* note 18, at 560.
175. *See* Fackler, *supra* note 1, at A6.
176. SUGENO, *supra* note 161, at 171.
177. *See generally* 1997 EOL, *supra* note 152, arts. 5-9 (discussing the importance of providing female workers with gender equality but not delineating similar equality requirements for men).
178. *See* Weathers, *supra* note 76, at 79-80.
179. *Id.* at 79.

ery laws do not aid lawyers who attempt to try these cases.[180] Thus, the trials simply take too long and the awards are too meager to make the effort to sue worthwhile.[181]

It is also worth noting that in 1999, the Diet passed the Basic Law for a Gender-Equal Society.[182] This law articulated five main principles: (1) respect for the human rights of women and men, (2) social systems and practices should have as neutral an impact as possible on social activities, (3) women and men should have the opportunity to participate together as equal partners in planning and deciding policies of the government and private bodies, (4) the activities of family life should be compatible with other activities, and (5) Japan should strive for international cooperation to help achieve its goals.[183] The goal of this basic law was to provide government agencies and private organizations with the ideal tenets of gender equality to which they should strive.[184]

II. Status of Japanese Women and Japanese Gender Equality Law Today

A. Why Another Reform?

Increasing gender equality litigation, the still decreasing birthrate, and demands from the international community, particularly the United Nations, all led the Diet to reform the EEOL in 2006.[185] In 2003, the CEDAW Committee gave an "unusually stinging criticism" of Japan's limited compliance with the goals of CEDAW.[186] The Committee focused on a variety of areas, including Japan's failure to define and eliminate the problem of indirect discrimination,[187] the persistence of gender stereotypes,[188] and the lack of female representatives in the political sphere.[189] The two-track employment system also remained an ever-pervasive problem. In 2000, 91.3% of companies "had a general track to be followed by . . . newly-hired female employees"—up 3% from 1998.[190] Additionally, 85.7% of businesses reported that less than 10% of female employees held management track positions.[191]

180. *Id.* at 80, 82.
181. *See id.* at 80.
182. *See* GENDER EQUAL. BUREAU, *supra* note 13, at 18.
183. *Id.*; *see also* Danjo kyôdô sankaku shakai kihonhô [Basic Law for Equal Social Participation by Men and Women], Law No. 78 of 1999, arts. 3-7 (Japan).
184. *See* Weathers, *supra* note 76, at 78.
185. *See* Starich, *supra* note 18, at 561.
186. Weathers, *supra* note 9, at 21; *see generally* Comm. on the Elimination of Discrimination Against Women, *Consideration of Reports of States Parties: Japan, Fourth and Fifth Periodic Reports*, ¶¶ 21-42, U.N. Doc. CEDAW/C/2003/II/CRP.3/Add.1/Rev.1 (July 18, 2003) (*prepared by* Christine Kapalata).
187. See Comm. on the Elimination of Discrimination Against Women, *supra* note 186, ¶ 22.
188. *See id.* ¶ 23.
189. *See id.* ¶ 32.
190. *See* Kumamoto-Healey, *supra* note 95, at 453-54.
191. *Id.* at 454.

In 2002, the Tokyo District Court, however, dealt the two-track system a blow by declaring that it was illegal for Nomura Securities Company to operate a management scheme that differentiated between hiring men and women.[192] Lawyer Mami Nakano called the ruling "a warning to companies that violate the constitution by using the two-track system as a cover for discrimination against women."[193] Nevertheless, the court limited the verdict only to damages accruing after April 1999, the date of the enactment of the 1997 revisions to the EEOL.[194] This limitation means that Nomura will not have to compensate the twelve female plaintiffs for much of the difference in salaries with their male colleagues.[195] Furthermore, the court focused only on two-track systems that companies apply discriminatorily and as a cover for discrimination, not on two-track employment systems in general. Although the majority of two-track systems are clearly discriminatory, the fact that trials center on subjective standards of discrimination and last for many years may give employers the incentive to continue using this system.[196]

Although use of the two-track system has been on the decline, Japanese businesses have continued to discriminate against women. Since 1998, the utilization of part-time, or non-regular, workers has become the main obstacle to achieving gender equality.[197] Between 1997 and 2004, "the number of regular positions [in Japan] decreased by 4.32 million and the number of non-regular positions increased by 3.97 million."[198] These non-regular workers are not given regular wages, have few or no social security or fringe benefits, and earn about 40% of what regular workers do.[199] Problematically for women, employers have started to use non-regular workers in the same way as they had used clerical-track employees.[200] As of 2005, 52.4% of part-time workers were women who earned 8% less than their part-time male counterparts.[201]

By 2005, the female-male wage differential was approximately 67% and only 10.1% of managers in the workforce were females.[202] Moreover,

192. *Id.* at 451; *see also* Barrett, *supra* note 19, at 7 (discussing the 2000 Shiba Shinkin Bank decision, which took thirteen years to decide, in which the court ruled that the bank's requirement of passing a test or allowing personnel evaluations as a substitute to qualify for a promotion, with the discriminatory result that most men were promoted and most women not, was illegal).

193. *Companies Are Being Forced to Confront Sexual Discrimination After a Landmark Ruling Against Nomura, Says Bayan Rahman*, FT.COM, Apr. 17, 2002, at 2 [hereinafter *Landmark Ruling*].

194. *See* Weathers, *supra* note 76, at 81.

195. *Landmark Ruling*, *supra* note 193, at 3.

196. *See* Weathers, *supra* note 9, at 22-23.

197. *Id.* at 28.

198. *Id.* at 17.

199. *Id.* at 24.

200. *See id.* at 28; *see also* Mami, *supra* note 107, at 67 (noting that the trend toward part-time work for women started even earlier than 1998 and citing statistics that between 1985 and 1993 2.9 million of the 4.6 million women who entered the workforce worked part-time).

201. GENDER EQUAL. BUREAU, *supra* note 13, at 11.

202. *Id.* at 9, 11.

a 2005 survey reported that 63% of Japanese firms were not planning to recruit women.[203] Most importantly, by 2005, the birthrate had hit a new low of 1.26%.[204] As a result, the Council for Gender Equality commissioned an international comparison to study the effect of gender equality and birthrate.[205] The study found that by 2000 there was a positive correlation between women's labor participation and a higher birthrate, but in 1970, the correlation was negative.[206] The study concluded that the relationship between the two variables was not fixed but rather that the social environment caused the different results.[207] Looking at the social environments of countries with increasing birthrates, such as the United States and Norway, the study concluded that these countries have diverse policies and systems for child care that make different lifestyle choices possible.[208] The study found that to increase its birthrate, Japan should try to improve in areas, such as flexibility and equal employment opportunities.[209] With these ideals in mind, the Diet enacted the 2006 Amendments to the EEOL.[210]

B. 2006 EEOL Reform and Other Recently Adopted Laws

The 2006 revision made many changes to the EEOL. The new language of the EEOL makes it broadly applicable to both men and women.[211] For example, the revision states: "[T]he basic principle of this Act is that workers be enabled to engage in full working lives, with respect for maternity in the case of women workers but *without discrimination based on sex for all workers*."[212] This change in language is of far more than structural importance because it changes the crux of the law from protectionism to equality.[213]

Secondly, the 2006 revision prohibits indirect discrimination but balks before defining the concept, instead delegating the task to the MHLW by giving it the authority to promulgate ministerial ordinances that help define prohibited forms of indirect discrimination.[214] Currently, the

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203. Abdullah Al Madani, *Gender Equality Gains Support in Male-Dominated Japan*, GULF NEWS (Dubai, U.A.E.), Feb. 26, 2006.

204. GENDER EQUAL. BUREAU, *supra* note 13, at 12.

205. *See generally* COUNCIL FOR GENDER EQUAL., SPECIALIST COMM. ON THE DECLINING BIRTHRATE AND GENDER-EQUAL PARTICIPATION, GOV'T OF JAPAN, INTERNATIONAL COMPARISON OF THE SOCIAL ENVIRONMENT REGARDING THE DECLINING BIRTHRATES AND GENDER-EQUALITY SUMMARY REPORT (2006).

206. *See id.* at 1.

207. *See id.*

208. *See id.* at 2.

209. *Id.*

210. *See* Starich, *supra* note 18, at 561.

211. *See generally* Koyo no Bun'yo ni Okeru Danjo no Pinto na Kikai oyobi Taigu no Kakuho to Joshi-Rodosha no Fukushi no Zoshin ni Kansuru Horitsu [Act on Securing, Etc. of Equal Opportunity and Treatment Between Men and Women in Employment of 1972], Act No. 113, arts. 1-7, *amended by* Act No. 82 of 2006, arts. 1-7 (Japan) (emphasis added) [hereinafter 2006 EEOL].

212. *Id.* art. 2 (emphasis added).

213. *See* Starich, *supra* note 18, at 562.

214. *See* 2006 EEOL, *supra* note 211, arts. 7, 10.

MHLW ordinances prohibit three forms of indirect discrimination: (1) establishing height and weight requirements in hiring and recruitment, (2) requiring management-track employees to accept transfers to any location in Japan, and (3) mandating that promotion candidates have previously been transferred to other locations.[215] To pass muster under the EEOL, an employer who utilizes the above criteria must either show that these requirements are rationally related to the type of work in question or that some other rational reason justifies having these criteria.[216] If the employer cannot do so, then any of the above criteria constitute indirect discrimination and violate the statute.[217]

Thirdly, the law expands the prohibition of discrimination based on sex to the areas of demotion,[218] "change in job type or employment status,"[219] and "encouragement of retirement, mandatory retirement age, dismissal, and renewal of the labor contract."[220] These prohibitions are extremely important, particularly when coupled with the increased protection of Article 9 for women taking maternity or child care leave.[221] Article 9 of the revised law prohibits employers from dismissing a woman or treating her disadvantageously because of marriage, pregnancy, or childbirth, or because she requested leave due to pregnancy or childbirth.[222] Additionally, an employer may not fire a female worker during her pregnancy, within one year of giving birth, or for requesting child care leave unless the employer can prove a valid reason other than pregnancy or leave for child care.[223]

In addition to revisions to the EEOL, the Diet has also enacted recent revisions to the CCFCLL.[224] For example, if continued leave is "particularly necessary for continued employment" of the worker, maternity leave can be extended to one-and-a-half years.[225] The employer, as in the past, is not obligated to pay the employee, but employment insurance can pay up to 40% of the employee's previous earnings.[226] Finally, if the worker has a child younger than elementary school age, the employee has the right to

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215. Starich, *supra* note 18, at 563.

216. *Id.*

217. *See id.*

218. 2006 EEOL, *supra* note 211, art. 6(i).

219. *Id.* art 6(iii).

220. *Id.* art. 6(iv).

221. *See* Starich, *supra* note 18, at 564.

222. 2006 EEOL, *supra* note 211, art. 9(1)-(3).

223. *See id.* art. 9(3)-(4).

224. *See* Michiyo Morozumi, *Special Protection, Equality and Beyond: Working Life and Parenthood Under Japanese Law*, 27 COMP. LAB. L. & POL'Y J. 513, 521 (2006).

225. Ikuji-Kyugyo, Kaigo-kyugyo-tou Ikuji mataha Kazoku Kaigo wo Okonau Rodosha no Fukushi ni kansuru Horitsu [Child Care and Family Care Leave Law], Law No. 76 of 1991, *amended by* Law No. 50 of 2004, art. 5 ¶ 3 (Japan), *available at* http://www.mhlw.go.jp/general/seido/koyou/ryouritu/english/e1.html (emphasis added) [hereinafter CCFCLL 2004].

226. Koyo-Hoken-Ho [Employment Insurance Law], Law No. 116 of 1974, art. 61-7(4), *available at* http://www.jil.go.jp/english/laborinfo/library/documents/llj_law11.pdf.

five unpaid leave days to take care of the sick or injured child,[227] and the employee can request a limit on overtime work[228] and an exemption from night work.[229] Additionally, the employer "shall take measures" to facilitate shorter working hours for employees with children below the age of three.[230] Although these protections are in place, when the "special period" from pregnancy to one-and-a-half years of age elapses, working parents with small children are expected to balance their needs with that of the employer and many of the above protections can be rejected if approval "would impede normal business operations."[231] Moreover, once the child reaches elementary school age, approximately six years old, the parents no longer have any kind of statutory protection under this Act.[232]

C. Problems with the Law

Although the EEOL and CCFCLL have greatly expanded in scope, problems remain. First, the definition of indirect discrimination is still too narrow, vague, and difficult to apply.[233] The discussions of the Labor Policy Council's Subcommittee on Equal Employment 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."[234] Although this definition would need to be polished before the EEOL can utilize it, the subcommittee definition proves that "indirect discrimination" can be defined and that lawmakers have defined it in the past.[235] Without a working definition of indirect discrimination, it is very difficult for courts to know exactly what could constitute a violation of the EEOL. Additionally, the MHLW ordinances currently give only three examples of what could constitute indirect discrimination. "Countless manifestations" are not covered, such as necessitating that welfare and family benefits be registered to the head of the household, giving regular employees preferential treatment and better benefits than non-regular employees even when non-regular workers perform the same work, and requiring certain academic backgrounds.[236] Although the MHLW included the caveat that the list of the three examples of indirect discrimination is not exclusive and that courts could find other forms of indirect discrimination,[237] the difficulty and longevity of the court process in

227. Ikuji-Kyugyo, Kaigo-kyugyo-tou Ikuji mataha Kazoku Kaigo wo Okonau Rodosha no Fukushi ni kansuru Horitsu [Child Care and Family Care Leave Law], art. 16-2.
228. *Id.* art. 17.
229. *Id.* art. 19.
230. *Id.* art. 23(1).
231. *See id.* art. 17 (discussing how the limitation on overtime for working mothers needs to be restricted if granting the woman's request would impede the normal operations of business).
232. Morozumi, *supra* note 224, at 526.
233. *See* Weathers, *supra* note 9, at 22.
234. Starich, *supra* note 18, at 573.
235. *Id.*
236. *Id.* at 566.
237. *Id.* at 567.

Japan means that litigating other possible situations of indirect discrimination will be tedious and complicated.

Second, the 2006 revision does not impose an affirmative duty on employers to provide accommodations to working women with children. The revised law only speaks in negative terms about prohibitions rather than in positive terms creating duties.[238] Although the 2006 EEOL does *permit* employers to take steps to help the situation of working mothers,[239] the 2006 EEOL neither provides guidance as to what these steps should be nor does it mandate any form of positive action. The revised CCFCLL gives some guidance regarding shortening work hours and exemptions from overtime, but these provisions do not do enough. After a child reaches one-and-a-half years of age, the mother is essentially at the whim of an employer-performed balancing test as to whether her request for decreased hours interferes with the employer's business operations. In Japanese society, where workers work an average 3,000 hours per year, the balance will more often than not be struck in favor of the employer. Additionally, after her child reaches the age of six, the woman is left with no aid—no statute requires the employer to honor any requests for exemption from overtime, shortened work hours, or even exemption from night work.

Finally, and most importantly, the EEOL is still lacking an effective enforcement mechanism. Although litigation is always an option, Japanese culture is not fond of the litigious approach to dealing with problems[240] and litigation is incredibly long and costly. Moreover, mediation is often an insufficient alternative because its effectiveness depends on voluntary compliance and the proceedings are non-binding.[241] Publishing the names of offenders is still available, but it has never been used and is not likely to be effective at dissuading companies from becoming repeat offenders. In addition to there not being any "sticks" to make the employers follow the law, there are also no "carrots" or incentives for employers who follow the law or even go beyond what the law requires. Tax breaks, additional funding, or government-sponsored advertising for firms who take proactive steps toward gender equality could increase the number of Japanese companies that make gender equality a priority and goal.

D. Current Situation of Japanese Women

As the above-cited statistics demonstrate, the situation of women in Japan has not changed greatly since the passage of the original EEOL over twenty years ago. In 2000, only 3.5% of women had jobs that held the potential for promotion,[242] and today, approximately two-thirds of Japanese women quit work after becoming pregnant.[243] Dropping out of the workforce has important consequences for working mothers because leav-

238. *See* 2006 EEOL, *supra* note 211, art. 9.
239. *See id.* art. 8.
240. Starich, *supra* note 18, at 570.
241. *Id.* at 571.
242. Budd, *supra* note 14, at 49.
243. Starich, *supra* note 18, at 568.

ing the workforce erases an individual's past employment history and can therefore adversely affect a woman's ability to receive a promotion.[244] Nevertheless, because many women who take leave face resentment from coworkers who have to cover for the woman in her absence, many women are reluctant to take maternity leave and quit instead.[245] Employers feed off of this resentment by doling out the extra work created by the employee's absence to other women, creating an environment where the worker feels snubbed and put down by the hostile actions of her peers.[246] Men may also take childcare leave, but they only do so at a rate of 0.56%.[247] For men, the fear of losing their job and the stigma associated with pawning off their heavy workload is even greater.[248]

Although the situation for many women has not changed, women themselves are beginning to change the way that they interact with society. Many women today refuse to marry and have children, instead choosing to live with their parents.[249] These women, referred to as "parasite singles,"[250] are ardent consumers, frequently travel to foreign countries on extravagant vacations, and prefer to "live for the moment."[251] Approximately 90% of Japanese women in their late twenties and 60% of Japanese women in their late thirties are *parasito*.[252] According to "Kiyoko," a twenty-eight year old marketing executive for Toyota, "the Japanese system is not fully prepared for both men and women to work while having children . . . . Like other women, I would have to choose between my career or my baby, and the reality is most women now are choosing careers."[253]

Up until the 1970s, women often had to marry a man simply to survive.[254] Schooling and work focused only on acquiring the skills necessary to attract and please a mate (i.e., cooking and house management).[255] The utmost goal for many Japanese women was to join a man's household and solidify her place in the Japanese hierarchy.[256] In fact, a woman who did not get married by age twenty-five was commonly called "Christmas Cake"—no one wanted to purchase her on the twenty-sixth.[257] New jobs in the emerging service economy, however, gave women incentives to pursue advanced degrees and careers rather than marriage.[258] Today, only 11% of women believe that marriage will prove financially beneficial due to the feudal attitudes governing marriage and the crippling economic costs of

244. *See* Budd, *supra* note 14, at 49.
245. Starich, *supra* note 18, at 568.
246. *See id.*
247. Weathers, *supra* note 9, at 30.
248. *See id.*
249. *See* ZIELENZIGER, *supra* note 15, at 161.
250. *Id.* Sociologist Masahiro Yamada coined this term in 1999. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 161-62.
254. *See id.* at 164.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 165.

child-rearing.[259]

Ironically, in Japan, an increase in a woman's salary means a decreased likelihood that the woman will marry.[260] This statistic shows that the "womb strike" is about more than simply fiscal concerns. Educated women want a "liberated" husband who will share the work of child-rearing and allow the woman to work outside of the home.[261] These women look at the traditional Japanese "salaryman" as *dasai* (uncool) or *nasakenai* (clueless).[262] The problem is the overriding Japanese sentiment that "obviously no man would ever think of withdrawing from work because of child-rearing."[263] The intransigence of Japanese men extends to areas other than child-rearing. For example, Japanese men spend an average of only twenty-five minutes per day on housekeeping and childcare, while working Japanese women still spend an average of four hours and twelve minutes per day on those activities.[264]

Nevertheless, traditional Japanese ideals have been changing. Today, only 49.7% of Japanese men and 41.2% of Japanese women agree with the statement: "A husband should be the breadwinner and the wife should stay at home."[265] These figures are down significantly from the 1979 poll that asked the same question, with which 70% of respondents agreed.[266] Additionally, in 2000, 92.3% of respondents agreed that "[w]e should envision a society in which individual ability can assert itself regardless of sex."[267]

Moreover, some Japanese firms are taking active steps to promote women to positions of power. Sanyo and Daiei are two of a handful of firms that have elevated women to the position of CEO,[268] and many other firms have ambitious plans for increasing the number of female managers within their ranks.[269] Other firms have responded to the Japanese birth crisis by adopting policies that are more sympathetic to the inability of women with young children to relocate freely.[270] Asahi Mutual Life now allows women on their management track to be exempt from job relocation

259. *Id.* at 165, 168.

260. *Id.* at 173-74. The trend is the reverse in the United States. *Id.*

261. *Id.* at 174.

262. Budd, *supra* note 14, at 52.

263. Dr. Sumiko Iwao, Professor of Soc. Psychology at Musashi Inst. of Tech. & Member of the Council for Gender Equal., Keynote Speech Policy Dialogue on Gender Equality: The Challenges and Strategies for Gender Equality in Japan (Nov. 20, 2001), *available at* www.gender.go.jp/grobal/gb01-k1.pdf.

264. *See* GENDER EQUAL. BUREAU, *supra* note 13, at 6. Compare these numbers with 3.7 hours for men in Sweden and 2.6 hours for men in the United States. *Id.*

265. *Id.* at 4.

266. *Id.* at 5.

267. Weathers, *supra* note 9, at 39.

268. *See id.* at 17.

269. *See Firms More Committed to Female Workers*, NIKKEI WEEKLY, May 1, 2007, at 1 (stating that "[m]ajor Japanese companies are revising their personnel systems so as to retain women longer[, and some are] set[ting] goals for promoting more women to managerial positions").

270. *See id.* (explaining that some companies "intend to introduce measures to allow [women] to avoid relocation").

while the woman has children under three years of age.[271] Additionally, Kirin Brewery is in the process of adopting a system where management-track employees may refuse to relocate for up to ten years.[272] Finally, Mitsubishi has implemented a system that allows women to return to the company after being forced to quit due to a spouse's relocation.[273] Although these steps are not alone sufficient to remedy the problem of gender inequality, they show that some companies are willing to make changes to accommodate female workers—an important step toward achieving a gender equal society.

E. Current Plans of the Japanese Government

The Japanese government has made it a priority to achieve gender equality and solve the current birth crisis. The government knows that merely amending its equal employment opportunity laws will not be enough and thus has made plans to tackle inequality on various other fronts.[274] On December 27, 2005, the Cabinet approved the Second Basic Plan for Gender Equality—the second national plan based on the Basic Law for a Gender-Equal Society.[275] This Basic Plan has twelve priority fields on which to focus with regard to improving the status of women both inside and outside of the workplace:

1) Expanding women's participation in policy decision-making processes,
2) Reviewing social systems and raising awareness from a gender-equal perspective,
3) Securing equal employment opportunities and treatment for men and women,
4) Establishing gender equality in rural areas,
5) Supporting the efforts of men and women to harmonize work with family and community life,
6) Developing conditions that allow the elderly to live with peace of mind,
7) Eliminating violence against women,
8) Supporting lifelong health for women,
9) Promoting gender equality in the media,
10) Promoting gender equality and diversity of choice in education,
11) Contributing to the "Equality, Development and Peace" of the global community, and
12) Promoting gender equality in fields requiring new initiatives.[276]

In addition to laying out these priority fields, the government has set numerical targets that it hopes to achieve in each area.[277] For example, the

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271. *Id.* at 2.
272. *Id.*
273. *Id.* (The Mitsubishi system allows "female employees that were forced to quit for family-related reasons [to] return to their jobs within a certain period of time . . . . [E]mployees with more than three years of service who are forced to quit because their husbands have been transferred overseas will be given a three-year window in which to come back . . . .").
274. *See generally* GENDER EQUAL. BUREAU, *supra* note 13, at 19.
275. *Id.* at 19.
276. *Id.*
277. *See id.* at 20-21.

Gender Equality Bureau expects to see the proportion of women occupying leadership positions increase to at least 30% by 2020.[278] To reach this goal, the government plans to actively employ women and to encourage private companies to set targets for female employment.[279] National universities "will be required to make efforts" toward increasing the number of female professors they hire.[280] Moreover, since 2001, each Ministry in the government has enacted its own plan to enlarge the recruitment and promotion of female national public officers.[281] Still, the percentage of women in managerial government positions remains low.[282] In 2005, the percentage of women occupying senior positions among public employees was a low 1.7%.[283]

Finally, the government hopes to promote a zero-waitlist policy for child care facilities by intensifying its efforts to increase the number of children admitted to kindergartens.[284] Additionally, because children of all ages need adequate childcare, the government is enacting its "After-School Plan for Children" to ensure that children have safe places and activities to attend after school and on weekends.[285]

These goals are extremely worthwhile, but Japan's plan of attack is lacking. The government's plan still lacks any real incentives for companies to take action in recruiting and hiring more women. Additionally, although the government can hire and promote women within its various ministries, such efforts have only been minimally successful. Without effective incentives to include more women in the corporate and public worlds, Japanese employers will not promote women to positions of power. Similarly, without adequate alternatives for long hours and an inability to procure child care, it is unlikely that Japanese women with children will be able to fill the managerial positions that may be open to them. Moreover, the government again weakens the force of its proclamations by stating that national universities only need to *make efforts* to hire more women faculty. Like the "duty to endeavor" in the original EEOL, this request, rather than requirement, likely will cause the government to fall short of its goal.

Similar to the Second Basic Plan for Gender Equality, the Committee for Deliberation of Supportive Measures for Women's Renewed Challenges formulated the Plan of Support for Women's Renewed Challenges on December 26, 2005.[286] Amended in December of 2006, this plan is directed at the problems women face in returning to work after having a child.[287] As a result, efforts are underway to establish women's centers

278. *Id.* at 20.
279. *See id.*
280. *Id.*
281. *Id.* at 26.
282. *Id.* at 17, 26.
283. *Id.* at 17.
284. *Id.* at 20.
285. WHITE PAPER, *supra* note 10, at 41.
286. GENDER EQUAL. BUREAU, *supra* note 13, at 27.
287. *Id.* at 28.

that will provide comprehensive information to help women set life goals.[288] These centers will serve as support networks where women can receive job information, skill development, and other services.[289] The goal is that these centers will make consultation services more accessible to women with children and will encourage businesses to open their doors to working mothers.[290]

Nevertheless, the Japanese government has done more than simply plan to implement gender equality. It has taken active steps toward achieving that goal. For example, since 2001, Japan has celebrated Gender Equality week, a week filled with various events geared toward deepening public understanding of the goals and philosophy of the EEOL.[291] The week entails poster distribution, public service announcements, and a conference, as well as the presentation of awards for companies that have taken positive action to encourage female workers to utilize their talents.[292] Additionally, the government has created the Women's Information Network (Winet),[293] a portal website that links users to over 800 sites and home pages with information to help women improve their status and work toward a gender-equal society.[294] Finally, since October 2006, the government has established a system that gives prefectural governments the ability to create facilities to provide preschool and child care services in the hopes of easing the child care obligation on Japanese women.[295]

III. The Situation in Norway

At a 2006 meeting of the U.N. Economic and Social Council, Norwegian Prime Minister Jens Stoltenberg asserted "that the greatest gains countries can achieve, economically as well [as] politically, come with empowering women, ensuring equal opportunity . . . and increasing the ratio of women's active participation in working life."[296] This type of national sentiment led the United Nations to rank Norway number one in its Gender Empowerment Measure (GEM) and number two on its Gender Gap Index (GGI).[297] As a developed nation with high rankings for gender

288. *Id.* Some of these centers, named "Mothers' Hello Work," opened in 2006. WHITE PAPER, *supra* note 10, at 37.

289. GENDER EQUAL. BUREAU, *supra* note 13, at 28.

290. *See id.*

291. *Id.* at 34.

292. *Id.*

293. *Id.* at 37. The website may be found at http://winet.nwec.jp/. *Id.*

294. *Id.*

295. *See* WHITE PAPER, *supra* note 10, at 38.

296. NOR. MINISTRY OF FOREIGN AFFAIRS, ACTION PLAN FOR WOMEN'S RIGHTS AND GENDER EQUALITY IN DEVELOPMENT COOPERATION 2007-2009, at 12 (2007), *available at* http://www.regjeringen.no/upload/UD/Vedlegg/Utvikling/ActionPlanwomensRights.pdf.

297. *See* GENDER EQUAL. BUREAU, *supra* note 13, at 7. The GEM measures the extent of women's participation in decision-making and economic and political life. *Id.* The GGI measures whether disparities exist between men and women in the areas of the economy, politics, education, and healthcare. *Id.* It is important to note that Japan ranks forty-second on the GEM and seventy-ninth on the GGI. *Id.*

equality, along with a relatively high fertility rate, 1.75% in 2002.[298] Norway serves as an ideal comparison with the Japanese system.

A. History of Gender Equality in Norway

Although today Norway stands as a bastion of gender equality, this was not always the case. For example, in 1960, only 23% of Norwegian women worked.[299] Indeed, in Norway, the traditional image of women as caregivers remained stronger during the 1970s and 1980s than in any of its Scandinavian neighbors.[300] As a rule, married women had most of the responsibility for family care and housework.[301]

During the labor shortage of the 1970s, however, women joined the job market in increasing numbers, some of them filling jobs traditionally held only by men.[302] In fact, from 1972 to 1980, the number of employed women increased by 184,800,[303] with growth particularly in areas such as the public sector, healthcare, teaching, and office work.[304] Nevertheless, employers doled out jobs that were typically reserved only for men to a small number of specially chosen women.[305] As in Japan, the hiring criteria for women included factors such as age, marriage, and number of small children.[306] Unlike Japan, however, the Norwegian employers focused on these factors for reasons unrelated to the woman's desirability as a wife. An employer considered a woman to be a better candidate if she was a *married* woman without small children.[307] The goal for Norwegian employers seemed to be to have steady and reliable employees, not young brides for top executives. Additionally, although the ideal age for an employee was twenty-five to forty-five years old, this age was ideal because it was associated with decreased sick leave,[308] not because this was the range in which women were considered most attractive.

While women joined the workforce in increasing numbers during the 1970s, many of them faced difficulties balancing work and family life. Work, particularly "male" jobs, often started as early as 7:00 a.m., but kin-

298. *See* Arni Hole, Dir. Gen., Nor. Ministry of Children & Family Affairs, Childbearing and Parenting in Low Fertility Countries: Enabling Choices (Jan. 12-14, 2004), *available at* www.unece.org/pau/epf/present/ts2/hole.doc.

299. Gunvor Strømsheim, *Working Hours and Segmentation in the Norwegian Labour Market*, *in* WORK AND WOMANHOOD NORWEGIAN STUDIES 49 (Arnlaug Leira ed., 1983).

300. Karoliina Ahtela, *Promoting Equality in the Workplace: Legislative Intent and Reality*, *in* NORDIC EQUALITY AT A CROSSROADS: FEMINIST LEGAL STUDIES COPING WITH DIFFERENCE 70 (Eva-Maria Svensson et al. eds., 2004).

301. Strømsheim, *supra* note 299, at 53.

302. *See* Synnøva Aga, *Women's Attempts to Break Down Sex Barriers in the Labour Market*, *in* WORK AND WOMANHOOD NORWEGIAN STUDIES, *supra* note 299, at 88.

303. *See* Strømsheim, *supra* note 299, at 49-50.

304. Aga, *supra* note 302, at 91.

305. *Id.* at 93. "Male jobs" were those that were carried out by men alone or those in which less than 15% of women participated. *Id.* at 122 n.3. For example, cleaning, heavy packing, and bicycle production were all considered "male jobs" during the 1970s and 1980s. *Id.* In 1980, only about 2,500 women had "male jobs." *Id.* at 116.

306. *See id.* at 93.

307. *Id.*

308. *Id.* at 96.

dergartens and day care centers usually did not open until 8:00 a.m., making it difficult for women to start their day as both mother and employee.[309] Additionally, employers often denied requests for part-time work or flexible working hours due, in part, to the belief that if women wanted to work, they would have to do so under the same conditions as men.[310] As the government had not yet developed public child care schemes for small children, 60% of families had to make private child care arrangements.[311] Because of these difficulties in achieving work-life balance, many women worked only part-time.[312] Still, by 1978, 71% of women with children under ten years of age and 42% of women with children under two years of age were members of the workforce in some capacity.[313]

Women had problems with discrimination and harassment in their new working environments. Employers felt that it was important not to annoy their male workers by giving too many jobs to women or by giving the "good jobs" to women.[314] Therefore, most employers gave women only the jobs that men no longer wanted or that there were not enough men to fill.[315] Additionally, male workers were distrustful of their new female counterparts and therefore often hostile.[316] Men felt that working women were "militant feminists" who were challenging their position as breadwinner and wanted to take over their jobs.[317] Due in large part to the insecurity of the male workers, women often experienced sexual harassment as a form of "initiation" into the workplace.[318]

Although the majority of the women in the Norwegian workforce were not "militant feminists," many of the economic and political reforms that occurred during the 1970s and beyond were thanks to the efforts of the Norwegian feminist movement.[319] The idea of equality is not entrenched in the Norwegian Constitution as it is in the constitutions of other countries.[320] The Norwegian Constitution does not contain a general "bill of rights" or an exhaustive list of social, economic, or cultural rights to which each person is entitled.[321] Additionally, though courts recognize the importance of women's rights, gender equality litigation in Norway was,

309. *See id.* at 106.
310. *See id.*
311. *See* Strømsheim, *supra* note 299, at 60.
312. *See id.* at 48.
313. Anne Maire Berg, *Love and Power: The Division of Household Labour*, *in* WORK AND WOMANHOOD NORWEGIAN STUDIES, *supra* note 299, at 217.
314. Aga, *supra* note 302, at 94.
315. *Id.*
316. *See id.* at 104.
317. *See id.* at 101, 104.
318. *See id.* at 98.
319. *See* Ahtela, *supra* note 300.
320. *See* Meg Russell & Colm O'Cinneide, *Positive Action to Promote Women in Politics: Some European Comparisons*, 52 INT'L & COMP. L.Q. 587, 596 (2003).
321. Cecilie Ostensen Noss, Eur. Commission for Democracy Through Law, *Gender Equality in Norway*, at 2, CDL-JU (2006)-028 (June 12, 2006). In 1994, however, the Norwegian government amended the Norwegian Constitution to state, "It is the responsibility of the authorities of the State to respect and ensure human rights." *Id.*

and still is, incredibly sparse.[322] Because of the lack of statutory, constitutional, and case-law support for gender equality, feminist leaders had to work hard to achieve gender equality legislation in Norway.[323] Their work, coupled with the recognition of business and the government that women were a vital part of the labor force, led to the creation of the 1978 Act Relating to Gender Equality.[324]

B. Norwegian Equality Laws: The Act Relating to Gender Equality, Maternity Benefits, and the Use of Quotas

The purpose of the Act Relating to Gender Equality (the Act) is to promote gender equality and improve the position of women.[325] The Act imposes a duty on public authorities and employers to make active efforts to promote gender equality within their enterprises.[326] These efforts can include positive, or affirmative, action in favor of one of the sexes, as long as the affirmative action is in conformance with the purpose of the Act.[327] The Act also prohibits direct and indirect differential treatment of both men and women.[328] The Act defines indirect differential treatment as "any apparently gender-neutral action that in fact has the effect of placing one of the sexes in a worse position than the other."[329] Additionally, job advertisements may not be based on an applicant's sex unless there is an "obvious reason for doing so," and women and men must receive equal pay for the "same work or work of equal value."[330] Moreover, there can be no difference between men and women concerning promotions, dismissals, hiring, and layoffs.[331] Finally, the Act ensures that men and women have an equal right to education and prohibits gender-based and sexual

322. *See id.* at 4. For example, in a 1975 case before the Norwegian Supreme Court, a man claimed that because he built a home for himself and his wife using his own money and his own labor, the house belonged solely to him. *Id.* The Supreme Court, however, ruled that the work of the housewife and her efforts in caring for the children were necessary for the building of the house and, therefore, the house was joint property. *Id.*

323. *See* Ahtela, *supra* note 300.

324. *See id.*

325. Lov om likestilling mellom kjønnene [The Act Relating to Gender Equality], § 1 (2005) (Nor.).

326. *See id.* § 1a.

327. *See id.* § 3a.

328. *See id.* § 3. The Act defines direct differential treatment as "actions that[:] 1. discriminate between women and men because they are of different sexes[;] 2. place a woman in a worse position . . . because of pregnancy or childbirth, or place a woman or man in worse position . . . because of her or his exercise of rights to take leave of absence that are reserved for one of the sexes." *Id.*

329. *Id.* Indirect differential treatment, however, "is permitted if the action has an objective purpose that is independent of gender, and the means that is chosen is suitable, necessary and is not a disproportionate intervention in relation to the said purpose." *See id.*

330. *Id.* §§ 4, 5. "Whether the work is of equal value shall be determined after an overall assessment in which importance is attached to the expertise that is necessary to perform the work and other relevant factors such as effort, responsibility, and working conditions." *Id.* § 5.

331. *Id.* § 4.

harassment.[332]

The Anti-Discrimination Ombud Act (ADOA) of 2005 gives the Equality and Anti-Discrimination Ombud the authority to enforce the Act by monitoring compliance with the Act, deciding discrimination cases, or bringing cases before the Equality and Anti-Discrimination Tribunal.[333] If the Ombud believes that an employer has violated the Act, the ADOA gives the Ombud the discretion to impose coercive fines on the employer.[334] Importantly, if an individual or the Ombud brings a case of discrimination before the Tribunal or a court, the person *responsible* for the alleged discrimination has the burden of proving "on a balance of probabilities" that the discriminatory treatment in question did not take place.[335] This assumption of differential treatment demonstrates how seriously Norway considers claims of gender discrimination.

Norway's gender equality laws also include a panoply of regulations regarding maternity and paternity benefits. In Norway, parents are entitled to very generous maternity and paternity leave.[336] Mothers can receive their full salary and take leave for nearly one year, or they can extend that year by accepting reduced benefits.[337] Additionally, under the Working Environment Act (WEA), each parent is entitled to a year off from work without pay.[338] To qualify for these forms of leave, both the mother and father must have earned income for six of the last ten months prior to the benefit period, meaning that the parents could have become employed after the woman became pregnant and yet still receive the benefit.[339] The parents, however, do *not* have to be married in order to qualify for leave.[340]

Although mothers and fathers have similar rights, there are some important differences.[341] For example, only women can receive leave benefits before birth.[342] Additionally, for the first six weeks after the birth, the WEA prohibits mothers from returning to work to give them time to breastfeed and recover without pressure from their employer.[343] Approximately one month of the maternity benefit period, however, is reserved for

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332. *Id.* §§ 6, 8a.

333. Lov om Likestillings- og diskrimineringsombudet og Likestillings- og diskrimineringsnemnda [The Anti-Discrimination Ombud Act], §§ 1, 3 (2005) (Nor.).

334. *See id.* § 8.

335. Lov om likestilling mellom kjønnene [The Act Relating to Gender Equality], § 16.

336. *See* Hege Brækhus, *Care and Social Rights in Norway*, *in* NORDIC EQUALITY AT A CROSSROADS: FEMINIST LEGAL STUDIES COPING WITH DIFFERENCE 91, 97 (Eva-Maria Svensson et al. eds., 2004).

337. *Id.*

338. *See* Arbeidslivets lover [Working Environment Act], § 12-5(1) (2007) (Nor.).

339. Brækhus, *supra* note 336, at 97; *see also* Arbeidslivets lover [Working Environment Act], § 12 (outlining the leave of absence to which parents are entitled).

340. Brækhus, *supra* note 336, at 98.

341. *Id.* at 97.

342. *Id.*

343. *See* Arbeidslivets lover [Working Environment Act], § 12-4; Brækhus, *supra* note 336, at 97. The WEA also gives parents the right to take paid leave to care for sick children and the option to request shorter working hours to facilitate child care. *See* Arbeidslivets lover [Working Environment Act], §§ 12-9, 10-2(3).

fathers.[344] If the father does not use this time, then the time is lost and the maternity leave is one month shorter.[345] This "father's month," introduced in 1993, has been tremendously successful in increasing the number of fathers who take parental leave.[346] In 1990, only 1.5% of fathers took parental leave as compared to 78% in 1993.[347] Today, 90% of fathers take advantage of the paternity leave,[348] and the success of "father's month" has caused the Norwegian government to extend the parental leave to six weeks.[349] Nevertheless, the parents can allocate their respective leave any way they want.[350] The mother receives the benefit even if the father stays at home, but the father receives the benefit only if the mother returns to work or attends school.[351]

Norwegian parents also are entitled to various governmental allowances to help with child care. All parents with children under the legal age of majority receive a child benefit allowance of approximately 11,664 crowns per child.[352] The aim of the allowance, which is low and could not itself cover the living costs for the child, is to improve the general situations of families with children.[353] Additionally, parents with children under the age of three who do not attend a daycare funded by government subsidies[354] or who only go to daycare part-time receive the Norwegian Home Care Allowance (HCA).[355] The purpose of this allowance of approximately 3,657 crowns per month, or less if the child is in daycare part-time, is to improve the opportunities for parents to spend more time caring for their children and less time working because of financial concerns.[356] Still, the allowance, which is approximately 43,884 crowns per year, is far lower than the average Norwegian annual salary of 230,000 crowns.[357] Couple this discrepancy with the problem that a recipient is not required to stay home and care for a child to receive the funds, and the result is questionable as to whether many parents use this money for its intended purpose.[358]

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344. Brækhus, *supra* note 336, at 97.
345. *Id.*
346. *Id.*
347. *Id.*
348. WHITE PAPER, *supra* note 10, at 16.
349. *See* THE EQUALITY AND ANTI-DISCRIMINATION OMBUD, NORWEGIAN NATIONAL STRATEGY FOR THE 2007 EUROPEAN YEAR OF EQUAL OPPORTUNITIES FOR ALL 3 (2007).
350. Brækhus, *supra* note 336, at 97-98.
351. *Id.*
352. *Id.* at 98. Parents receive this allowance whether they are single parents or married, regardless of their income. *Id.* The government, however, pays the money to the mother unless other arrangements are made. *Id.* at 99. This arrangement recognizes the mother's child-rearing work. *Id.*
353. *See id.* at 98-99.
354. In Norway, 44% of childcare centers are run by local governments. WHITE PAPER, *supra* note 10, at 16.
355. Kristine Helen Korsnes, *The Norwegian Home Care Allowance*, *in* NORDIC EQUALITY AT A CROSSROADS: FEMINIST LEGAL STUDIES COPING WITH DIFFERENCE, *supra* note 336, at 107, 110.
356. *Id.* at 108, 111.
357. *See id.* at 111.
358. *See id.* at 108.

The final gender-equalizing tool that Norway utilizes is gender quotas. Quota systems try to place the burden of recruitment on the individuals who control the recruitment procedure, rather than on individual women.[359] The Norwegian government has a long history of quotas, dating back to the early 1980s. Since Gro Harlem Brundtland was Norway's first female prime minister in 1981, no prime minister has had a cabinet with less than 40% women in it.[360] In 1992, the Norwegian Local Government Act mandated that local standing committees should have a membership that includes at least 40% of each sex.[361] The Act Relating to Gender-Equality expanded this quota to include any committee, governing board, or council that a public body elects or appoints.[362] Although not legally mandated to do so, the major Norwegian political parties have also adopted a quota system with many political parties achieving an even 50-50 split in nominating men and women.[363] These quotas have paid off, and as of May 1, 2006, the Norwegian parliament consisted of 37.9% women.[364]

The most novel use of quotas came less than a decade ago. On February 21, 2002, the Norwegian Minister of Trade and Industry, Ansgar Gabrielsen, announced that he would force Norway's biggest companies to make 40% of the members of their boards of directors women.[365] Gabrielsen made this decision after the United Nations described Norway as a "haven for gender equality" but with some need for improvement in the economic sector.[366] Norway, in fact, did need improvement in the area of economic equality for women. In 2002, women comprised only 6.6% of the board members of public stock companies,[367] yet women constituted nearly 60% of college graduates.[368] Gabrielsen felt that it would be imprudent to ignore so many educated, potential directors.[369] The new law called for state-owned companies to meet the 40% quota almost immedi-

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359. Ingrid Guldvik, Gender Quota Regimes and Ideas of Social Justice - The Quota Regime of the Norwegian Local Government Act 2 (Sept. 18-21, 2003) (paper presented at the European Consortium for Political Research General Conference).

360. Pilita Clark, *Europe's Top 25: The Accidental Feminist*, FIN. TIMES WEEKEND MAG., Oct. 15, 2005, at 38, 40.

361. Guldvik, *supra* note 359, at 4.

362. *See* Lov om likestilling mellom kjønnene [The Act Relating to Gender Equality], § 21 (2005) (Nor).

363. *See* WHITE PAPER, *supra* note 10, at 19.

364. GENDER EQUAL. BUREAU, *supra* note 13, at 8. This number is compared to 9.4% in Japan and 15.2% in the United States. *Id.*

365. *See* Clark, *supra* note 360, at 38.

366. *See* Press Release, Comm. on Elimination of Discrimination Against Women, Norway Called "Haven for Gender Equality" as Women's Anti-Discrimination Committee Examines Reports on Compliance with Convention, U.N. Doc. WOM/1377 (Jan. 20, 2003).

367. *Id.*

368. Clark, *supra* note 360, at 41. Additionally, approximately 40% of students at Norway's business schools are women. Richard Bernstein, *Men Chafe as Norway Ushers Women into Boardroom*, N.Y. TIMES, Jan. 12, 2006, at A3.

369. Clark, *supra* note 360, at 41.

ately[370] but gave publicly traded companies until mid-2005 to voluntarily meet the 40% quota.[371] If the companies failed to do so, the law would become mandatory and companies would have until January 1, 2008 to meet the quota or would be "dissolved by order of the court of probate and bankruptcy."[372]

After the announcement of the quota, many business leaders reacted angrily.[373] Eivind Reiten, CEO of the Norwegian company, Norsk Hydro, stated, "[T]he dangerous thing is not the number of women but that the State wants to exert [its] ownership right."[374] Une Amundsen, founder of SuperOffice, declared, "I like women, but not by law."[375] Other businessmen asserted that their companies would never be able to find enough qualified women[376] and many critics of the law believed that Norway was sacrificing quality for quantity.[377] Even some women spoke out against the new law. Bente Lowendahl, the first female professor at the Norwegian School of Management, declared, "I'm glad I was chosen for my merits and not because I'm a woman."[378] Many other women worried that the new law would cause tokenism.[379]

Despite criticism, the members of the Norwegian government stood behind their new law. The Minister of Children and Family Affairs, Laila Davoy, said that the quota was a "matter of democracy."[380] Norwegian Minister of Children and Equality Affairs, Karita Bekkemellem, stated that this law would "see to it that women will have a place where the power is, where leadership takes place in this society."[381] She added, "I do not want to wait another 20 or 30 years for men with enough intelligence to finally appoint a woman."[382] Although the quota law clearly is a step forward for gender equality, the law's creator, Trade Minister Gabrielsen, adamantly denies that he implemented the law for feminist reasons.[383] Rather, Gabrielsen stated that he had read studies that showed that companies with more women in management positions did better financially and that he wanted to use the growing number of educated Norwegian women for

370. *Id.* at 40. This mandate was not a major problem as most state-owned companies were practically at that level already. *Id.*

371. *Id.*

372. Clark, *supra* note 360, at 40; *see* Martha Burk, *The 40% Rule*, Ms. MAG., July 1, 2006, at 57.

373. *See* Valeria Criscione, *Oslo's Boardroom Battle*, FIN. TIMES U.K., Mar. 13, 2002, at 15.

374. *Id.*

375. Clark, *supra* note 360, at 41.

376. *Id.*

377. *See* Vibeke Laroi & Robin Wigglesworth, *Boards Take on a New Look*, L.A. TIMES, Jan. 7, 2008, at C5.

378. *Id.*

379. *See* Clark, *supra* note 360, at 38.

380. *Id.* at 41.

381. Burk, *supra* note 372, at 57.

382. *Id.*

383. Clark, *supra* note 360, at 40.

this purpose.[384] Nevertheless, he did assert, "[I]f [individuals] want to invest in a company where they love to have men everywhere, do it. Do it! For me, it's bullshit. It's just a crazy argument."[385]

By the end of 2005, most Norwegian companies had not met the voluntary quota goal, increasing the number of women on corporate boards to only 16% and, therefore, the government implemented the quota as law.[386] Although a 10% increase from 2002, this number was still a far cry from the 40% quota and only marginally better than the United States, where women hold approximately 15% of the board seats at the 500 largest companies.[387] In an effort to assist companies to find qualified female directors, the Confederation of Norwegian Business and Industry (NHO), set up a program called "Female Future" to train women how to be board members.[388] The NHO calls this process "pearl diving" because participating companies have to search through their work forces to pick qualified, possibly hidden, women to train.[389] As of August 2007, more than 400 women have completed the Female Future program, and nearly 100 of them have offers to serve on a board.[390]

The grace period for companies to implement the 40% quota expired in January 2008.[391] So far, approximately 80% of Norwegian companies have complied with the law,[392] and women fill 37% of the 1,117 board seats of companies listed on the Oslo Stock Exchange.[393] Many of the noncomplying companies are expected to reach the quota by the end of February 2009, the date by which the second formal warning expires.[394] Other companies, however, are expecting to go private in an effort to avoid compliance with the law.[395] The media is also aiding the quota campaign by publishing a list of firms not yet in compliance with the female quota.[396] Sigrun Vageng, Executive Director of NHO, states that the government "wouldn't put people out on the streets if companies are one woman short."[397] However, Gender Equality Minister Manuela Ramin-Osmund-

384. *See id.* In a 2002 report, the Conference Board of Canada "found a strong link between female representation on boards of directors and good corporate governance." Donald J. Polden, *Forty Years After Title VII: Creating an Atmosphere Conducive to Diversity in the Corporate Boardroom*, 36 U. MEM. L. REV. 67, 85 (2005). Moreover, some studies show that women who are all alone in a male boardroom are often ineffective as agents of change, because they will be marginalized, ignored, or seen as "pushing an agenda." *See* Burk, *supra* note 372, at 58. Therefore, a board should consist of more than one woman to be truly effective. *See id.*

385. Clark, *supra* note 360, at 41.

386. *See* Bernstein, *supra* note 368, at A3.

387. *See* Laroi & Wigglesworth, *supra* note 377, at 42.

388. Clark, *supra* note 360, at 42.

389. *Id.*

390. *Id.* at 42-43.

391. *See* Laroi & Wigglesworth, *supra* note 377, at 42.

392. Robert Andersen, *Norway Rushes in Female Directors*, FIN. TIMES ASIA, Dec. 31, 2007, at 4.

393. Laroi & Wigglesworth, *supra* note 377, at C5.

394. Andersen, *supra* note 392.

395. *Id.*

396. Laroi & Wigglesworth, *supra* note 377.

397. Andersen, *supra* note 392.

sen, has warned: "The law is clear. We will enforce the procedures. They have not come out of nowhere."[398] As 2008 unfurls, the Norwegian government will have to show just how serious they are about their gender equality quota.

C. Effects and Critiques

Thanks in major part to its equality laws, Norway has a relatively high fertility rate and high workforce participation by women. As of 2001, 75.8% of women with children younger than two years old and 85% of women with children ages three to six were in the workforce.[399] As of 2002, however, 45% of these women worked part-time.[400] Additionally, there is still a difference between the wages and pension benefits of men and women,[401] with women earning 85% of what men earn.[402] Many individuals think that this wage differential is due to women taking on more domestic work than men.[403] Norwegian males do approximately 40.4% of the housework and childcare.[404] Although this figure is higher than those of both Japan and the United States,[405] women's organizations feel that fathers are receiving more rights, such as increased paternity leave, without being forced to take on increased responsibilities.[406] It is unclear how or if the government could force men to take on more responsibilities in the home as a precondition to receiving the paternity benefits.

It is also questionable whether the child and homecare allowances are beneficial to achieving gender equality. Some critics state that the allowances may cause occupational passivity, causing women to become reluctant to return to work and thereby stalling their seniority progress and decreasing their pension.[407] Due to the large discrepancy between the allowances and the average Norwegian salary, however, it is unlikely that occupational passivity would be a problem for couples of more limited means. Other critics state that many parents may not want to use the homecare allowance at all because they fear disapproval and gossip from colleagues and others.[408] Japanese women experience a similar fear regarding maternity leave. In both cases, the governments need to disseminate education about the benefits of a short period of homecare and should work with companies to devise schemes that will decrease the bur-

398. *Feminise by 40pc, Firms are Warned*, DAILY MAIL, Dec. 28, 2007, at 24.
399. Hole, *supra* note 298, at 4.
400. *Id.*
401. THE EQUALITY AND ANTI-DISCRIMINATION OMBUD, *supra* note 349, at 3.
402. THE FORUM FOR WOMEN & DEV. SECRETARIAT, THE NORWEGIAN ASSOCIATION FOR WOMEN'S RIGHTS, THE WOMEN'S FRONT OF NORWAY, & WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, SHADOW REPORT BY NORWEGIAN WOMEN'S ORGANISATIONS TO NORWAY'S 7TH PERIODIC REPORT ON THE IMPLEMENTATION OF CEDAW 23 (2007).
403. *See id.*
404. WHITE PAPER, *supra* note 10, at 14.
405. Japanese men take care of 12.5% of the housework and child care, and American men take care of 37%. *Id.*
406. FORUM FOR WOMEN & DEV. SECRETARIAT, *supra* note 402, at 15.
407. *See* Korsnes, *supra* note 355, at 113.
408. *See id.* at 115.

den on other employees when one employee takes maternity or paternity leave. Finally, many NGOs say that providing a monetary benefit for children who do not attend daycare creates a "black market for nannies," which in some cases, can lead to the exploitation of young women from poor countries.[409] Because a "black market" is hard to monitor, the only other alternative is to abolish the homecare allowance. Until further studies are conducted to determine the true risk of exploitation in the "nanny market," abolishing the homecare allowance would be too extreme of a step.

The corporate board quotas are still too new to analyze their effect on women and the corporate environment sufficiently. As of now, the quota system has received mixed reviews. Many companies feel that the "punishment" is disproportionate to the "crime" and that companies should decide on their own who is most competent to run their boards.[410] Additionally, some new female board members are experiencing the sting of colleagues who think that they are under-qualified.[411] For example, Heidi Marie Petersen, a mother of two, demonstrated spreadsheet and strategy knowledge, causing a fellow board member to exclaim, "Wow! You actually know something about business."[412] Assumptions about women's lack of knowledge and anti-women sentiments may create a hostile working environment for female board members and could cause these women to doubt themselves and their qualifications. Still, many people think that the corporations and their male board members will shortly begin to come around to the quotas.[413] Sigrun Vaageng, NHO Executive Director in Charge of Labor Issues, stated: "[T]he vigorous debate when the law was passed in November 2003 is calming down. Companies are saying, 'This is Norway. This is the law. We have to adapt.'"[414]

IV. A Possible Solution: The Comparative Approach

During the 1970s, Japan had proportionately more women in the workforce than Norway.[415] As of 2005, the roles had reversed; Japan still has an "M-shaped" curve of employment, while Norway's turned trapezoidal, with fewer women leaving the workforce due to childbirth.[416] Japan, however, has hope. If Japan takes into account its "latent labor force," or percentage of women who want to work after giving birth but do not, the "M-shaped" curve becomes flatter and trapezoidal.[417] Therefore, the Japanese government must work to make these women's wishes come true.

409. FORUM FOR WOMEN & DEV. SECRETARIAT, *supra* note 402, at 24.
410. *See* Susie Mesure, *Norway Shatters the Glass Ceiling - But Will it Promote Women's Cause?*, INDEPENDENT (U.K.), Mar. 8, 2006.
411. *See* Laroi & Wiggelsworth, *supra* note 377.
412. *Id.*
413. *See* Mesure, *supra* note 410.
414. *Id.*
415. GENDER EQUAL. BUREAU, *supra* note 13, at 13.
416. *See id.* at 10.
417. *See id.* at 16.

The case of Norway serves as a useful comparison for Japanese gender equality law. Nevertheless, Norwegian equality laws are simply a starting point for reform, as many aspects of the Norwegian laws may not fit well with Japanese culture. For example, Norwegian men spend approximately 8% less time at work per week than Japanese men;[418] therefore, the flexible Norwegian leave and time laws may not suit Japan's work-focused, corporate life. Nonetheless, Japan must look to implement some of the laws and strategies of successful, gender-equal countries, such as Norway, if it intends to correct its declining birthrate.

First, Japan needs to take positive action to achieve gender equality in the workplace. Positive action is any temporary measure that "realize[s] substantial equal opportunity by offering a certain level of special opportunities to workers who are suffering disadvantages due to . . . discrimination."[419] CEDAW allows and encourages positive action,[420] and countries, including Norway, have adopted the idea, not only as part of their gender equality laws but also as an exception to discrimination.[421] Positive action is extremely important in a culture such as Japan, where the ideals of *ryousai kenbo* are still engrained. Although Japan has made advances in gender equality since the passage of the original EEOL over twenty years ago, the advances have been slow, leaving Japan one of the lowest ranked industrialized countries with respect to gender equality.[422] These facts clearly show that Japanese culture and society make it difficult for Japanese women to achieve positions of economic and political power without some form of affirmative help.

The programs that the Japanese government recently created to help mothers re-enter the working environment are important and beneficial,[423] but they are simply not enough. Although training women does help make them marketable, it does not help change Japan's working culture. To truly achieve a more gender-equal society, Japan must implement a plan of affirmative action where companies are required, or encouraged through incentives, to hire more women.

This affirmative action plan could be a formal quota regime, as in Norway. A mandatory quota would ensure that women achieve positions of power by creating target numbers and enforcing penalties for companies who do not reach those numbers. Japan has already taken a small step toward a quota regime by setting target percentages for women in leadership positions.[424] Nevertheless, these targets are meaningless if the gov-

418. WHITE PAPER, *supra* note 10, at 15. Norwegian women spend approximately 5% less time on work per week than Japanese women. *Id.*

419. *Id.* at 19.

420. *See* Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 64, art. 4.

421. *See* Lov om likestilling mellom kjønnene [The Act Relating to Gender Equality], § 3a (2005) (Nor.).

422. *See* GENDER EQUAL. BUREAU, *supra* note 13, at 7.

423. *See supra* text accompanying notes 286-90 (discussing the Plan of Support for Women's Renewed Challenges).

424. *See supra* text accompanying notes 278-80.

ernment refuses to give companies any incentive to achieve, or any disincentive not to achieve, them. Still, mandatory quotas with penalties, such as fines or disbandment of the company, may not be the best option for the consensus-oriented culture of Japan. These quotas have been contentious even in more liberal-minded countries, such as Norway, and would not likely be well received in a culture in which nearly 80% of individuals agreed that "there are jobs made for men and others made for women."[425]

Instead of enforcing a strict quota, the Japanese government should use an incentive-based approach, giving companies that make policies favorable to women certain benefits. Today, the government gives out awards to companies that excel in the area of gender equality,[426] but an award is not sufficient. Alternatively, companies who hire or promote a certain percentage of women could receive: (1) tax benefits,[427] (2) government contracts or funding, or (3) advertisements paid for by the government. Because Japanese companies need to improve overall with regard to gender equality, the Japanese government could apply these incentives to companies who excel in areas other than hiring and promotion, areas like child care (e.g., providing daycare centers),[428] generous child care policies (e.g., providing maternity and paternity leave policies and encouraging men and women to take part-time or flex-time work), and education (e.g., educating workers and the public about the importance of gender equality in Japanese society).

Although Japan should create incentives to encourage companies to implement positive action plans, it must also create penalties for companies that violate the current gender equality laws. Today, the EEOL enforcement procedure is weak. Mediation is not only voluntary and nonbinding, but the "penalty" for non-compliance—publication—is never utilized.[429] Without an effective penalty for violations, the EEOL is nothing more than a paper tiger that employers can violate without fear of repercussions. To remedy this problem, Japan must add force to the law.

One option for enforcement is litigation. Japan is a non-litigious society, however, and the length of the proceedings and the difficulty of wading through its court system makes litigation a less attractive option.[430] Alternatively, Japan could adopt a model similar to that of Norway's Equality and Anti-Discrimination Ombud and the Equality and Anti-Discrimination Tribunal.[431] Instead of purely mediating, the EOMC could become a mandatory arbitration body whose decisions would be binding on the parties.[432] Settlements could still be encouraged, but by making the process mandatory and binding, the EOMC could provide force behind the

425. Weathers, *supra* note 9, at 39.
426. *See supra* text accompanying note 292.
427. *See* Fan, *supra* note 23, at 138.
428. *See id.*
429. *See* discussion *supra* pp. 522-23.
430. See *Starich*, *supra* note 18, at 570-71.
431. *See supra* text accompanying notes 321-33.
432. *See* Starich, *supra* note 18, at 576.

EEOL.[433] Additionally, like the Equality and Anti-Discrimination Ombud and Tribunal, the EOMC should be able to impose monetary penalties for damages relating to violations of the EEOL. The EOMC could also recommend criminal sanctions for companies or individual employers who are repeat offenders. If employers feared actual monetary or criminal penalties, they would be less likely to violate the EEOL, and women would have a more direct source of recourse if violations did occur.

To arbitrate claims of EEOL violations effectively, the EOMC would need clearer guidelines from the government. Clear guidelines mean fine-tuning the vague definition of indirect discrimination and providing additional examples of what would constitute indirect discrimination. Although it is a somewhat ethereal term, indirect discrimination *is* possible to define—Norway defines the term in Section 3 of the Act Relating to Gender Equality.[434] Japan could borrow this definition and modify it to its desired specifications. Additionally, the Diet could include more examples of what constitutes indirect discrimination. Waiting for the courts to specify further examples of indirect discrimination will be costly, time consuming, and an ineffective use of the court's time. Therefore, the Diet should further amend the EEOL to include the examples listed above,[435] as well as other illustrations that it deems pertinent. This list, of course, should also be non-exclusive to account for anything that the Diet may have missed and that could be elucidated through legislation. Courts and the EOMC will benefit from as many firm guidelines as possible, and women will benefit through effective enforcement of the gender equality laws.

Additionally, Japanese laws and policies need to move away from a "male-centric" job model[436] toward one that encompasses the idea of both a working mother and father who share child and homecare responsibilities. This shift in mentality means that Japan should amend its child care leave laws, laws regarding child care centers, and even its tax laws. As the Committee on the Declining Birthrate found in their international comparison on maternity leave laws, countries that have diverse policies for child care in the workplace have a higher birthrate than countries that are less flexible with child care options.[437] Under the current CCFCLL, workers are entitled to a fairly generous amount of leave—one year that can be extended up to one-and-a-half years.[438] Nevertheless, Japan can still improve the CCFCLL.

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433. *See id.*

434. *See* Lov om likestilling mellom kjønnene [The Act Relating to Gender Equality], § 3 (2005) (Nor.). Note, however, that Norway refers to indirect discrimination as "indirect differential treatment." *Id.*

435. *See supra* text accompanying notes 233-37.

436. A "male-centric job model" is centered around an "ideal worker" with no child care responsibilities who is able to work a minimum forty-hour week year round and who can work overtime with little or no notice. Alison A Reuter, *Subtle But Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 FORDHAM URB. L.J. 1369, 1370 n.15 (2006).

437. *See supra* text accompanying notes 202-06.

438. *See supra* text accompanying notes 224-32.

First, child care leave is available to both sexes, but as of 2003, only 0.56% of Japanese men took paternity leave.[439] In this instance, Norway serves as a perfect example for Japan to emulate. In the early 1990s, Norway also had gender-neutral child care leave, but only a small number of fathers took it.[440] After instituting the "father's month," however, the amount of fathers taking child care leave skyrocketed.[441] If Japan instituted a similar plan, reserving one month of the child care leave specifically for fathers, it may see similar results. With both men and women taking leave to care for children, companies would have less of an incentive to discriminate against women. Although Norwegian men may take child care leave in greater numbers because the leave is paid, Japan could offer incentives to companies who allow their employees a certain amount of paid leave, making it easier for families who need the money to take child care leave.

The CCFCLL should also extend its protections to children older than age six. Limiting the right to take unpaid leave to care for a sick child to parents with children under six years of age is problematic because parents with children above this age are faced with the possibility of not being able to care for their sick children. The government should extend the right to take unpaid leave to parents with children under the legal age of majority. Additionally, shortened work hours and flexible time schedules should be available to all workers with children under the legal age of majority, not just workers with children younger than three years of age. Flexible work arrangements make it easier for women to have both a meaningful career and children. With this viable alternative, women may be less likely to put off marriage and childbirth, thereby increasing Japan's birthrate.

Finally, Japan should reform both its laws regarding child care centers and its discriminatory tax laws. Currently, Japan has a discriminatory tax law that causes couples in which both spouses earn more than 1.03 million yen per year to be taxed more harshly.[442] This law is a disincentive for women who do not work or who only work part-time to join the workforce fully. Perhaps more importantly, it is a disincentive for the "parasite singles" to give up their financial freedom, get married, and have children. If Japan does not want to rescind this discriminatory law, it could utilize the money it earns from the tax to help subsidize child care centers or to give parents with young children a child care allowance. Norway has experienced much success with both its state-sponsored daycare centers and its child and homecare allowances.[443] The reluctance of some Japanese women to marry due to the high cost of child care and education shows that Japanese women may approve of similar laws.[444] It is, however,

439. Weathers, *supra* note 9, at 30.
440. *See* Brækhus, *supra* note 336, at 97-98.
441. *See id.*
442. *See* Weathers, *supra* note 76, at 74-75.
443. *See supra* text accompanying notes 336-58.
444. *See* ZIELENZIGER, *supra* note 15, at 168 (noting that low income families spend approximately half their budget on child's education but wealthy families spend approximately 22%).

unclear whether the rest of Japanese society would approve of such a liberal plan.

Conclusion

To change the track of its declining birthrate, Japan must make changes to its gender equality laws and policies. Although Japan has recently implemented reforms to the EEOL, these reforms simply do not go far enough. Japan must strive to mirror countries like Norway by implementing positive action plans to get more women into positions of power and by increasing the flexibility of its child care leave laws. Moreover, Japan must work to ease the burden of child care on women through either subsidization of child care or policies that encourage men to take paternity leave. Finally, Japan must give the paper tiger of the EEOL teeth through the creation of a binding enforcement mechanism with the power to impose monetary penalties.

Attitudes of younger Japanese citizens suggest that Japanese society may be ready to step away from the traditional ideas of *ryousai kenbo* and embrace more gender-equal practices.[445] This support from Japanese youth indicates that Japan could take the affirmative steps needed to implement effective gender equality laws. Although the process of achieving gender equality in Japan will be difficult and may require challenging the consensus-based nature of Japanese society, Japanese lawmakers must aggressively address their gender inequality problem in order to sustain their economy and ensure the necessary growth of their population.

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445. *See supra* text accompanying notes 265-67.