

# Reappearing Gender Bias in the Employment Discrimination Cases

—A Cause for Gender Training for the Judiciary in Japan\*—

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## 目 次

1. Introduction
2. Gender bias in the courts and the efforts for elimination
3. Gender bias in the employment discrimination cases in Japan
4. Judicial education for gender fairness

## 1. Introduction

This article reviews the employment discrimination against women cases to show how after 10 years from the “historic” settlement of Sumitomo Electric case, the court leads to the same old conclusion, and asserts to educate judges about how to utilize the facts and the theoretical and empirical studies for the gender fair administration of justice. This article looks mainly to the Common Law jurisdictions’ experiences and the systematic support for the judiciary, which now may be taken as constituting international standards of judicial training for gender fairness in the courts, in the way practically useful, assisting the decision making, and directed to the gender fairness. We will first look at the efforts in the

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common law jurisdictions towards the gender fair judiciary. Second we will look at Japanese indirect employment discrimination against women lawsuits, and then we will try to find out possible factors that led judiciary to the apparently “repugnant” reasoning in the cases. Lastly, the necessary steps will be discussed following the Canadian process.

## 2. Gender bias in the Courts and the Efforts for Elimination

Gender bias may be defined generally as a set of stereotypical assumptions of the roles of women and men based on gendered norms in the society. As is true of any pervasive social norm, the gender norms are difficult to perceive, identify, or take up as a problem about fairness. However, as long as the individuals are the constituent of a society and the happiness of the individuals is the goal of any political association, however prevalent the gender stereotypes are, it is a matter of the dignity and fundamental rights of individuals and social justice, which we should take seriously. Gender bias is so pervasive in our daily life and as such, the judiciary is not free of it, in the sense the justice is administered by human beings. But as a body responsible for the administration of justice, the judiciary must not overlook or underestimate the injustices brought about by gender biases in the courts. Therefore, the judiciary should take every measure to administer justice fair to the subordinate and disadvantaged in the gendered society. Then, how the gender bias is found out and addressed in the judiciary? Fortunately, there are predecessors in the legal communities in the world.

The efforts to eliminate gender bias in the courts began in U.S. in the 1970's when the number of women in the legal profession increased and

feminist jurisprudence began to have impact upon the legal practices, such as in the sexual harassment lawsuits. In the course of the legal struggles for the women's rights and equality, there emerged a framework in collaboration with the social sciences and behavioural sciences to identify the judicial gender bias and to recognize as an important issue to address. In the course of checking out the gender biases in the courts and legal professions, the National Judicial Education Programme developed the definition of the gender bias, which state taskforces adopted for the courts and legal professions to examine their practices, as follows: "the gender bias includes behaviour or decision making participants in the justice system which is based on or reveals (1) stereotypical attitudes about the nature and roles of women and men; (2) cultural perceptions of their relative worth; and (3) myths and misconceptions about the social and economic realities encountered by both sexes."(Schafran 1995:1156) This definition was widely accepted by the state taskforces on the judicial gender biases. In 1990 American Bar Association promulgated the Model Code of Judicial Conduct in which the achievements of the taskforces and the definitions of the gender biases were embodied.

Professor Mahoney, who played a central role in founding a judicial education institute in Canada (Minamino2012:118-120), describes that judicial gender bias as "systemic partiality" occurs inevitably with the uneven composition of the judiciary, following the precedents without questioning the underlying values and presumptions, relying on "societal assumptions, untested beliefs, or stereotypes that evaluate individuals on group membership rather than on individual characteristics, abilities, and needs." (Mahoney 1996:791-794) In the Japanese context, it seems that we have to carefully review the courts' use in their decision making of the "pervasive

social consciousness,” “shared understanding,” “common sense,” and “rule of thumb” and so on. Mahoney specifies gender biases as they may be observed in the decision making process and thus how law can be systematically biased against women.

Gender bias takes many forms. One form is behaviour or decision making based on, or revealing reliance on, stereotypical attitudes about the nature and roles of men and women or about their relative value. This contrasts with behaviour or decision-making that is based on an independent valuation of individual ability, life experience, and aspiration. Gender bias also can arise from myths and misconceptions about the social and economic realities that both sexes encounter. Gender bias exists when issues are viewed only from the white, male perspective, when women’s problems are trivialized or over-simplified, and when women are not taken seriously or given the same credibility that men are given. Gender bias is reflected not only in individuals’ actions, but also in cultural traditions and institutional practices. To the extent that judges labour under certain generalized biased attitudes, myths, and misconceptions about women and men, the law itself can be characterized as systemically biased. (Mahoney 1996:794-795)

Then she describes what the courts would take into account for the gender fairness as a part of their pursuit of justice.

Gender fairness requires empathy and understanding of the life experience a person’s gender creates. However, crossing the gender barrier proves a formidable task.....When balancing competing gender-

based interests and values, judges too often give insufficient (or no) weight to women's interests. This leaves women less protected or even unprotected by laws that protect men—laws that affect their equality, economic opportunity, independence, and personal freedom. (Mahoney 1996:796)

The efforts have been succeeded by the other common law jurisdictions as systematic support to the judiciary; education and training, case report and sentencing information database, and benchbooks provided by the legal education organizations run by either civil society or the state. These methodologies, systematic training and information about social and factual situations of the disadvantaged groups in the society, are in these countries proved to be effective in alleviating the gender unfair practices and behaviours in the courts. (Minamino2012:120-125) They are, thus functioning as a way to promote public confidence in the judiciary.

Before moving onto the Japanese cases, let us look at the advices to the judges in the New South Wales (hereafter NSW) on the gender biases in the judiciary clarified in the NSW Benchbook. It simply and clearly shows how we can review the cases from the gender fair perspectives. After the overview of the statistical facts that show the situations of women in the NSW community the state judiciary serve, Benchbook provides some points and directions to be taken into consideration in practice. The relevant part reads:

some examples of situations where gender bias could occur, or be perceived to occur, are:

……Assessing a woman against how a “normal” woman ought to

behave…… (NSW Benchbook 2006 section 7: 7201)

……Treat every woman as an individual, and do not make statements that imply that all women are the same or that all women are likely to act in the same way. Never assume or imply that even what you suspect or know to be the majority way of behaving and thinking for women, is the standard by which any individual woman should be judged…… (NSW Benchbook 2006 section 7:7302)

### 3. Gender bias in the employment discrimination cases in Japan

The gender bias in the judiciary can be exemplified by a series of employment discrimination lawsuits, so-called, “Sumitomo Lawsuits”, since 1995<sup>(1)</sup>. To put it briefly, the courts saw working women not as individuals with her own occupational prospect and aspiration, but as belonging to a category of ‘Women’ collectively with assumption that they are, as the normative gender role prescribes, primarily responsible for the family matters and they themselves put less importance on the occupational success or self fulfilment on the one hand<sup>(2)</sup> and, at the same time, their working contract and conditions as a result of their voluntary self-selection

(1) In the trials it was disputed if there was an employment discrimination against women based on gender. The defendants were Sumitomo Electric Co., Ltd., Sumitomo Chemical Co., Ltd, Sumitomo Metal Industries, Ltd., and the general manager of the Osaka Women’s and Young Workers’ Problems Council of Ministry of Labour. The judgment of the first trial determined that the discrimination in salary/promotion based on the employment classification was not a violation of public order and good morals according to the working trend at the time of the plaintiffs’ employment (in the 1960’s). See also Mitsuko Miyachi (2001). As one of the plaintiffs’ counsel, she critically reviews the district courts decisions and the gender biases observed.

(2) Note that this categorical way of thinking and judging on the plaintiffs, is obviously what the NSW Benchbook explicitly prescribes. See section 2 p.53-54

as individuals, on the other. Therefore, women who continue to work for her family as well as for herself are treated by the courts as deviant from perceived “social consensus” of gender norms for women, undeserving for the fair treatment in the workplace.

The judgment of the district court of Osaka on 31 July 2000 in the **Sumitomo Electric** case was referred to as a clear example of this issue. Even though the court found the disputed treatment of the plaintiffs which entailed wage gap of 3.6 million yen (approximately \$3600) per year between plaintiffs and men workers employed in the same year with the same educational qualification (graduation of high school) after 40 years would be unconstitutional discrimination based on gender and as such the disparate treatment of women workers would constitute unlawful employment discrimination in violation of Article 14, the equity (equality under the law) clause, of the Constitution. Nonetheless, finding this presumably unconstitutional employment practice was not unlawful discrimination violating Civil Code article 90, governing the private law system which includes labour law (so called “public order and good morals” clause), the court held:

“In the period between 1965 and 1974, Japanese society still had a strong consciousness of separate roles of men and women in the family context. Men were supposed to be economic providers, while their wives were supposed to stay at home and devote themselves to caring for their children. Although women were employed to work for companies, they tended to set a limit of working until marriage or childbirth and quit after a short time of employment. Many companies in Japan took this into consideration and, in return, gave men

opportunities to improve their capacity and enhance their productivity through internal training based on the premise of long-term employment until their retirement. Since it was likely that women would retire after a short time, companies did not want to spend money on their training but often hired them only for routine, supplemental and simple labour. There were other reasons, such as legal constraints against women working late at night and the possibility of maternity leave...

During this period it was held that the defendant company had no choice but to manage personnel in the most effective way based on the premise of the prevailing social consciousness and women's then usual period of employment. Therefore, the company was not found to have violated public order and good morals when they allocated only routine and supplemental labours to women high-school graduates". (Osaka District Court Judgement 2000/7/31 Case number Heisei 7(wa) 8009; Hannrei Taimuzu number 1080 at 126; Roudouhannrei number 792 at 48)

This reasoning was followed by the other courts with similar employment discrimination against women cases, such as Sumitomo Metal case, Sumitomo Chemical case, Sumitomo Life Insurance case (all of them belonged to Osaka District Court) and Kanematsu case (decided against plaintiffs on November 5<sup>th</sup>, 2003) which belonged to Tokyo District Court. Though the period of judgement and the jurisdictions were different, the cases were reasoned strikingly the same way; the disputed treatment of women workers would constitute violation of equity clause of the Constitution but not unlawful under the Civil Code Art.90.



Public order and good morals clause is one of the general provisions in the Japanese Civil Code, which fundamentally governs as the “public order” of the whole civil law system and the any legal action in violation of it is a null and void. The labour law system is governed by this article 90 as subordinate legal system to the private law system. The Equal Employment Opportunity Law, which prohibits employment discrimination based on gender, is a part of labour law system and thus governed by the public order clause. Even though, the judgement is puzzling enough because the Civil Code is a part of the whole legal system of Japan, and as such it should be under the prescription of the Constitution, which clearly provides equality under the law in article 14. Moreover, the Civil Code itself clearly provides in article 2, the civil laws shall be interpreted in consistence with the dignity of individuals and the essential equality of the both sexes. The presiding judges were, though they are in the district courts, qualified and trained judges. In Japan, the passing rate of the bar examination was extremely low, and the best of the best shall be appointed as judges after the practice qualification examinations in the end of training course administered by the Institute for Legal Research and Training affiliated to the Supreme Court. These considerations confine us to seek for some reason beyond the legal interpretation and application which are the practice the judges as professional lawyers should have expertise with which none could compare. Before starting off for the search for some reason, we would review the equal opportunity law and its restrictions which have much affected the working women’s situations and perhaps the courts’ decision making process.

The Equal Employment Opportunity Act was enacted in 1986 as required legislation for the ratification of Convention for the Elimination of

All Forms of Discriminations Against Women (CEDAW) which the Japanese government signed in 1985. When the Act passed, it was customary practice for large companies to divide their employees along with the gender, differentiating working conditions, on the job training, further education, participation to meetings, promotion, wages and so forth. For example, two employees employed in the same year with the same educational background and worked as a team were paid different wage based on their sex specific wage tables. The Act prohibited explicitly this kind of sex based differential treatment though it has actually no legal sanction to the violation as it required only the “effort” of the employers. Nonetheless, the Act had enough impact for the companies to refrain from the explicitly sex based differentiation, and it seemed the law would bring about some real change to the working women’s situations.

However, it turned out to be a hollow hope, because the responses of the companies was nothing more than to change their way of treating women employees from “direct discrimination” to “indirect discrimination.” They prepared different employment and management distinction called “courses,” which typically divides employees into two groups; one is “*sogo* (general)” course and the other is “*ippan* (ordinary, or routine)”. The former is a “course” with training as candidates for managerial positions, with higher wages and the rotation of jobs or transfer to the other local offices. The latter is explained a “course” with no rotation or transfer but routine assisting job with no prospect of promotion. The problem is, the employment practice turned out that the “*sogo*” course was 99% male while the “*ippan*” course was 100% female. This is too obvious an indirect discrimination case to make any excuse or defence in the employment discrimination lawsuits in any progressive countries. It should be asked,

then why Japanese employers could do this with no allegation from the government's executive office responsible to the enforcement of the Equal Employment Opportunity Act?

The answer is, the responsible office, Ministry of Labour (now it is Ministry of Health, Welfare and Labour) itself authorized in its administrative order, so called "guideline" for the enforcement of the Act, the different employment management and treatment for different category of workers. It should have been provided with no intention to authorize the sex discriminatory management allocating categorically women to "*ippan*" course and men to "*sogo*" course, but the effect has been a disaster to the female workers. Moreover, the guideline did not required any remedial treatment, such as giving the opportunity to change their sex based truck to the new course for the workers who had been employed under the laws which had not banned the sex based job segregation in a company before the Act was legislated.

The courts at least tolerated, not to say reinforced, the effect leaving the guideline untouched which the plaintiffs in the series of employment discrimination lawsuits challenged as authorizing indirect discrimination practice. Thus, the guideline is still in effect, even though the Act amended in 2006 now explicitly forbids indirect discrimination as a form of unlawful sex discrimination. This apparent contradiction happens because the guideline of 1986 is left unamended, to which the Act itself refer prescriptions of the detailed examples of the indirect sex discrimination in the workplace. Thus, the Act is legislated but the detailed prescriptions referred to the administrative orders consequently fail the regulative intentions to effectively prohibit the sex based discriminations in both direct and indirect ways. The courts have overlooked or deferred to the

administrative guidelines rather than the legislation leaving the contradiction unquestioned, though the plaintiffs repeatedly argued the court should repeal the guidelines allegedly unlawful or even unconstitutional.

The plaintiffs were employed in the late 1960's and they have been working for their companies more than 35 years when they brought the cases to the courts. It may be true, as the companies argue and the courts uphold, that at the time of their employment, many women left their jobs when they got married or bore their first child. The trend, however, has declined ever after the 1970 when the rate of the households with housewives was at its peak. As the figure 1 shows, the number of households with so-called housewife significantly decreased since the late 1970's while the number of households with two earners increase. The plaintiffs has been working through the time when women's labour participation rate was dramatically changed as a result of Japanese society'

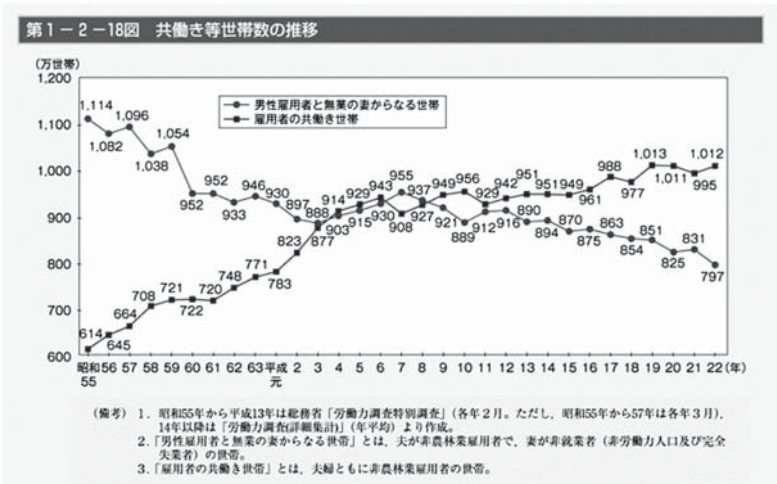
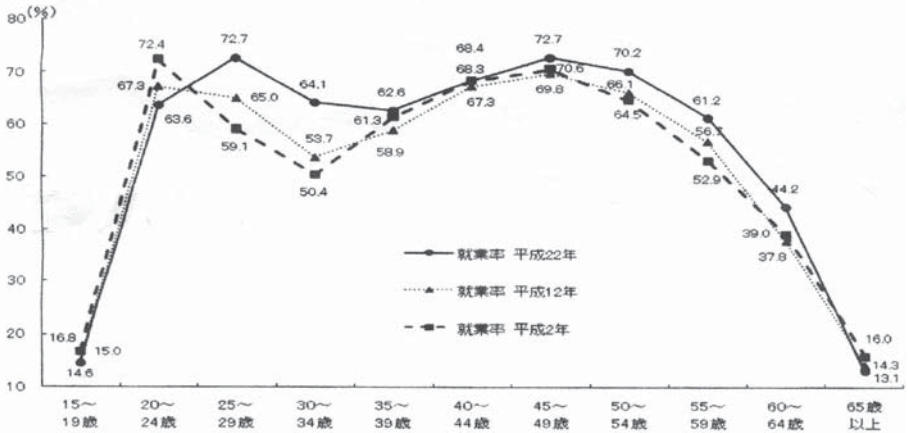


Figure 1 the change of the households with housewives and without housewives

s structural change and public consciousness changing for affirming wives' wage labour out of home. Figure 2 shows changes in the women's labour participation rates. More women tend to continue working in the 20years and the "M" curve is slowly levelling out. Figure 3 shows the ways women and men plan and hope for their life course and the expectation to the prospected spouse have dramatically changed. As shown above, the legislative change has also pushed the trend for the increasing and continuing labour participation of women explicitly prescribing employers from sex based categorically different treatment of their employees, even though the "effort" is enough to the requirement. In this context, at least after the enforcement of the Equal Employment Opportunity Act of 1986, if there should have been no opportunity provided for the women workers to change their employment classifications as "women" to the other better trained, better paid, and better promoted category, the employment contract should amount to life-time second class status engagement, a kind

(資料5) 女性の年齢階級別就業率の変化



総務省統計局「労働力調査」より

Figure 2 労働力率グラフ Women's Labour Participation Rate

ライフコースの説明：

専業主婦コース＝結婚し子どもを持ち、結婚あるいは出産の機会に退職し、その後は仕事を持たない  
再就職コース＝結婚し子どもを持つが、結婚あるいは出産の機会にいったん退職し、子育て後に再び仕事を持つ  
両立コース＝結婚し子どもを持つが、仕事も一生続ける  
DINKSコース＝結婚するが子どもは持たず、仕事を一生続ける  
非婚就業コース＝結婚せず、仕事を一生続ける

図3-2 調査別にみた、女性の理想・予定のライフコース、男性が女性に望むライフコース

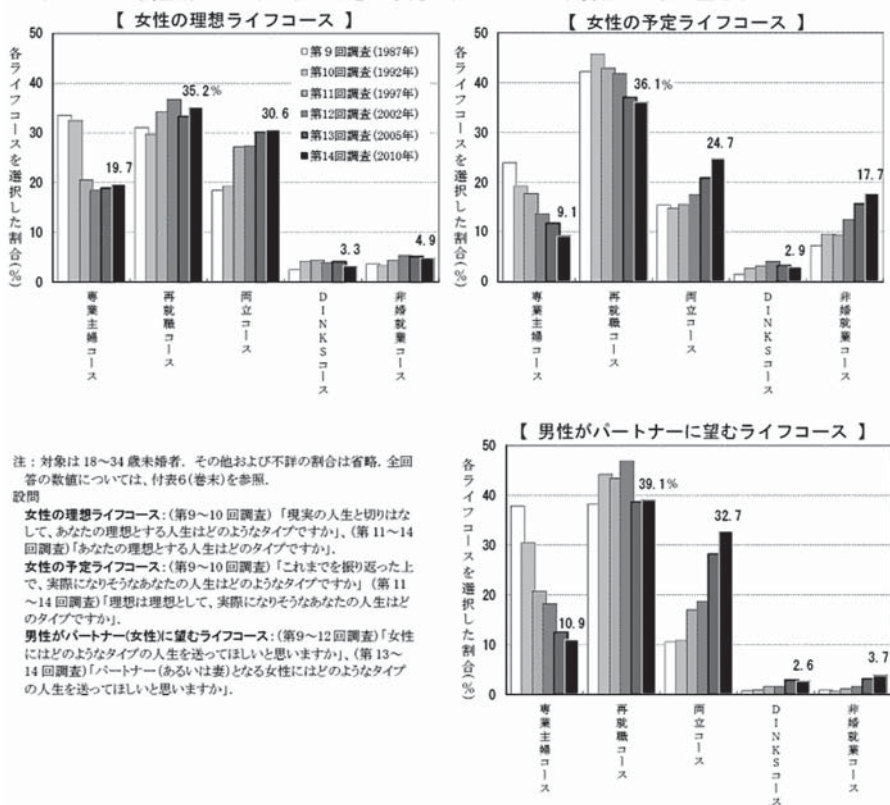


Figure 3 Life course aspirations of women (ideal and realistic) and men for the future spouse

of slavery contract, and thus in itself null and void as violation of human rights in any country. Japanese courts, however, uphold the employment practices on the basis of the fixed status at the time of employment as up to the public order clause.

The courts also find that the women's low paid, low trained, no promotion status is the result of their own voluntary choice because of the public consensus of the time of their employment. However, it is not necessarily the result of the voluntary decision for women to quit the job on their marriage or childbirth. The discriminatory employment practice is not only what the employers expect to the women workers, but also the response to the policy of the government. The government released as the Cabinet decision, to promote men's employment at the cost of dismissal of women, so called "Women return home" policy in 1945.<sup>(3)</sup> The subsequent social and economic policy was based on the "standard family" model, which assumed a household with one male breadwinner and a housewife responsible for the unpaid work in the family and their children. The tax policy, social security system, welfare services, education were constructed on the gender dichotomized policy model. These policies gave a bundle of profits, in terms of special tax deduction for a spouse with no income, namely, housewife, social security and welfare benefits to the family conforming to the "standard family model." On the other hand, companies gave special benefit such as spouse (housewife) allowances to the workers presumed to be the male breadwinner in the standard family. Therefore, women were systematically led to leave the job on their marriage or childbirth to work as domestic unpaid workers.

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(3) "Women shall return home" Policy Statement (Ministry of Welfare, reported in 1945 October 4 Asahi Shinbun)

The social consciousness and the observed women's opting out from their job to become housewives, which the court based its finding of the plaintiffs as deviance from the public order and good morals at that time, were a result of contrived forcing out of women from the labour market, to say the least, not entirely the result of their voluntary choice. It should be noted that in 1960's the court itself found the customary practice of "marry and leave" agreement in the employment contract conditioned by the employers only to the women workers unconstitutional and thus illegal under the public order and good morals clause.<sup>(4)</sup> The "customary practice" was found forged by the employer companies, and the practice was unconstitutional and illegal under the Civil Code article 90 public order and good morals clause because it restricts women's right to marry unlawfully though it was the trend of the Japanese women to give up their career to become "a good wife and wise mother." These litigations on "marry and leave" conditions and following "have a baby and leave" conditions revealed that the companies intentionally forced only women to leave the job either by explicit employment contract terms or implicit pressure to drive them off the job. What should be learned from these precedents is that the "statistically observed facts" are, often "forged facts" by the employers and as customary practices forced on the powerless women workers who were in many cases not allowed to be the members of the labour union, or the minority in the union. The courts decided these lawsuits for the women plaintiffs under the direct discrimination framework. Though in these Sumitomo cases the issue was indirect discrimination and the legal framework is not the same, but when the court carefully reviewed these old precedents, it should have learned that "customary practice" and

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(4) For example, see Sumitomo Cement Industries, Sumitomo Metal Industries cases



“statistical facts” requires strict scrutiny.

Again, the question arises how come the courts which found unlawful the sex based discriminatory employment practices in the 1960's and 1970's after about 40 years uphold as seemingly unconstitutional but not unlawful under Civil Code article 90 the customary practices which have the same discriminatory impact. We have examined the possible reasons above and the possible explanations left are; the judiciary's conformism to the administrative branch and control over the judges by the General Secretariat of the Supreme Court. The courts are apparently conforming to the conservative political majority through the judicial philosophy of passivity and concession of the Supreme Court after the late 1960's "Crisis of Judiciary" when the courts held unconstitutional several cases with highly political issues such as Self Defence Force and the Security Agreement with U.S., the political majority expressed the allegations to the judiciary as biased for the political left and the willingness to intervene the judicial autonomy through the Prime Minister's constitutional power to appoint the Supreme Court Justices. After that crisis, the Supreme Court is said to set as its judicial philosophy "deference and passivity" (as opposed to judicial "activism" in the U.S. judiciary) and begin to control the judges through administration, typically through the personnel management of the judges, and the conference of the judges as a part of the training on the issues of controversial lawsuits, calling presiding judges and explanation of legal interpretation, reasoning and the results as "examples" set forth by the Secretariat.

This was presumably the evidence of the Supreme Court's control over the judges of the lower courts through the Conference of Judges (27 October 1998) published in *Administration, Labour, and Intellectual*

*Properties Related Incident Times (Gyosei, Rodo, Chitekizaisanken Kankei Jiken Jihō)*: “Wage differences are acceptable if labourers are engaged in the same work under different employment classifications and conditions (which means this circumstance is not a violation of public order and good morals).” This suggests that in the lost trial the court simply followed this Conference’s conclusion, holding: “There is unconstitutional gender discrimination, though, it is not a violation of public order in terms of the Civil Code”. Thus, we may also have to grapple with “bureaucratic control of the judges” by the General Secretariat of the Supreme Court, whose judicial philosophy is uniformity of the results, deference to the other governmental branches. It is often referred as judicial “passivism”, but the judiciary has actively chosen to be passive or deferent to the decisions of the other branches.

In 2003, when the Sumitomo cases were appealed, Japanese NGOs joined forces in submitting an alternative report to the one due from the Japanese government for the CEDAW and holding a lunch time briefing for the committee members.<sup>(5)</sup> The concluding comments of the committee in their report stated in Paragraph 358: “The Committee recommends that a definition of discrimination against women, encompassing both direct and indirect discrimination in line with Article 1 of the Convention, be included in domestic legislation. It also recommends campaigns to **raise awareness about the Convention, in particular the meaning and scope of indirect discrimination, aimed, inter alia, at parliamentarians, the judiciary and the legal profession in general**”. (emphasis by the author) In Paragraphs 369

(5) See also WWN (2004) pp.1-65

[http://www.un.org/womenwatch/daw/cedaw/cdrom\\_cedaw/EN/files/cedaw25years/content/english/CONCLUDING\\_COMMENTS\\_ENGLISH/Japan/Japan%20-%20CO-5.pdf](http://www.un.org/womenwatch/daw/cedaw/cdrom_cedaw/EN/files/cedaw25years/content/english/CONCLUDING_COMMENTS_ENGLISH/Japan/Japan%20-%20CO-5.pdf)

and 370, the committee also recommended to amend the existing gender discrimination in wages and promotion due to the difference in employment classification, and to reform the government guidelines to the Equal Employment Opportunity Law<sup>(6)</sup>.

As a result, in December 2003, the appeal in the **Sumitomo Electric** case in the series of Sumitomo related lawsuits was “settled in favour of the plaintiffs” (WWN2004:91-92). Liability of the government was admitted and the plaintiffs’ promotion and compensation were awarded. The court settlement referred to efforts of the international community, mentioning CEDAW 2003 concluding comment on the review of the Japanese government’s report, the Japanese Constitution, and accomplishments through the women’s movement, and also mentioned the doctrine of indirect discrimination. The conciliation document released by the Osaka Court of Appeals made explicit reference, to be considered in the discrimination cases, to the doctrine of indirect discrimination as well as the direct discrimination.

After this “leading settlement,” several cases were settled or decided for the plaintiffs and it seemed to become a kind of “precedent” which could become a reference case requiring the courts to examine the customary employment practices in the light of indirect discrimination doctrine in the alleged discrimination against women cases. For example, Kanematsu case was judged in the Tokyo Court of Appeals on January 31 2008 for the

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(6) That is the main factor to sustain the discrimination against women. The “settlement in favour of the plaintiffs” in the lawsuits against Sumitomo Electric reflected these recommendations. Also, the Ministry of Health, Labour and Welfare amended the Equal Employment Opportunity Law to prohibit the indirect discrimination. However, this failed to eliminate the guideline of employment management classification, which is still used as “justification” for the discriminatory management practices against women.

plaintiffs holding the disputed treatment of the women workers are unlawful under Civil Code Art.90 and awarded damages to the plaintiffs. The Court scrutinized the wage table, labour management practices, and the comparative worth of the work of the women and men, and concluded the wage gap and the management practice constituted unlawful discrimination based on gender, thus violating the public order and good morals requirement of the Civil Code article 90. This decision was upheld, without any modification, in the Supreme Court decision on October 20<sup>th</sup> 2009. It should have been no doubt that every lower court should follow the holding of the decision and apply the doctrine of indirect discrimination and scrutiny of the wage table, management practices to find whether the gap between women and men is unlawful. At least, we expected that.

The Hiroshima district court's decision on the Chugoku Denryoku case on March 17<sup>th</sup> 2011, however, reveals the gender bias of the judiciary is still intact. Of course settlement results usually do not direct anything to the following cases as a precedent, and maybe in the eyes of the judges the case was much different from the Kanematsu case. The defendant Chugoku Denryoku allegedly discriminated against the plaintiff, resulting in the wage gap and no promotion. The plaintiff argued that the gender based discrimination, not the worker's individual choice nor ability, has caused them in 30 years. Figure 4 represents the observed facts and statistics presented as the evidence of the plaintiff's argument in the Hiroshima district court and Hiroshima High Court<sup>(7)</sup>. Though the case is still in the process of judgement writing now in August 2013, the figures show the facts enough to suspect the existence of indirect discrimination against

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(7) Those facts and figures were excerpted from WWN newsletter 66 and their paper presented in the lunch time briefing at Human Rights Commission 2013 April 29.

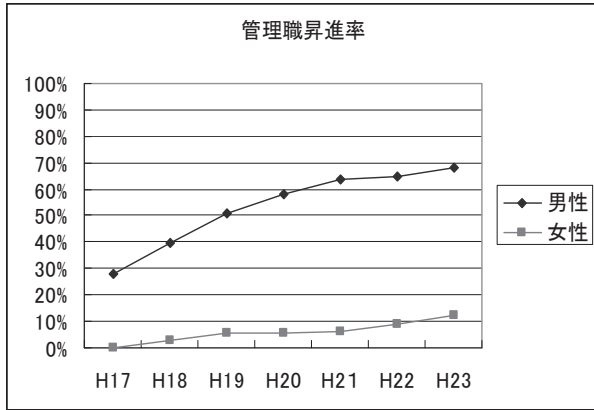


Figure 4 The rate of promotion for women and men who were employed in the same year with the same educational qualification in Chugoku Denryoku.

women in the defendant company. Figure 4 shows that the promotion rate for men and women is drastically different between 2005 -2011. The defendant insists that the wage rate of women is 85% when the men’s average wage is 100. However, figure 4 presents a serious disparity between men and women enough to suspect that the wage gap is caused by the opportunity of promotion and that is based on the worker’s gender rather than the merits of the workers. The problem is, the same view of working women as second-rank workers and the women themselves responsible for the discriminatory employment practice is reproduced after the 8 years of the Sumitomo cases, and the court admitted the obviously biased view of women workers as a normative standard for the whole women workers. Though the court found that there is a significant gap between women and men in the promotion and the assessment of the qualifications, it concluded that the significant gap is attributable to the lower motivation of women, incurring for themselves the lower assessment.

The court upheld 1997 questionnaire data of the women workers submitted by the defendant Chugoku Denryoku as the evidence that women workers are less motivated and thus less competent, resulting in the less evaluation as a whole compared to men workers. The questions were, “Do you want to challenge the managerial job?” 75% of the women workers answered negative, and the reasons provided for them to choose were as follows: “It would be difficult to cope with the family responsibility when I become a manager”; “It would require more responsibility”; “It would be necessary to transfer to the different branch.” On the basis of this “data”, the court found:

among the women workers, there seem to be not a few who think they would quit the job when they get married or pregnant, or agree that women are primarily responsible for the family matters. It might not be denied that some women workers can be thus less motivated and for that reason, ranked lower in the job assessment than men.

It should be noted that the questionnaire was done 14 years ago. Now women are more in the workforce and seriously pursuing their career. In the meantime, the gender role consciousness has been changed significantly, now more than half of women and men disagree with the “traditional” gender role. Moreover, the defendant admits the plaintiff has been working no less than, or even better than, her male colleague. In addition, the research did not done to men workers, which asked “Do you want to challenge the managerial job?” The court seem to have the gender bias against men as well, assuming that all men workers are motivated to be a manager. But, recent research done by WWN (Working Women’s

Network), shows that the percentage of the workers who want to be managers are not significantly different between women and men.

What can be the reason of the decision against the plaintiff in Hiroshima District Court? As described above, first, it is obvious is that the legal doctrine of indirect discrimination and its application and the understanding of the typical cases are not, to say the least, well shared in the Japanese judiciary. The second thing which should be considered is whether the judicial bureaucracy holds its power. The judgement text reads much alike as district courts decisions of the Sumitomo cases and the Kanematsu case: there is a significant gap between women and men, and it might be unconstitutional discrimination but not unlawful under the Civil Code public order and good morals clause. It is highly in suspect that Conference of the Judges conclusion in 1998 is still sincerely followed by the district court judges, who are relatively young with the occupational aspiration and have the long way to go in the judicial bureaucracy with the unstable ( in the sense that it is in the discretion of the Secretariat ) reappointment in every ten years.

The third is what we may call the judicial stereotyping of women. The “evidential data” produced by the defendant seemed to have strong resonance with the judges’ gender role expectations shared in the judiciary. For example, Foote (2006: 239-248) concludes that employment conditions for Japanese judges conform to those of employees in major Japanese companies.<sup>(8)</sup> In other words: even judges are not free from their individual

(8) Japanese big companies traditionally hold the discretion over employment practices. Employment, reassignment and promotion are within the employers’ discretion, but dismissals are rather restricted de facto. In the courts, the employment practices seem much the same; the General Secretariat of the Supreme Court holds the discretion over appointment, reappointment, promotion and transference, but dismissals are rare.

experiences in everyday life. They, too, operate according to the principle that requires men to be breadwinners. Therefore, judicial education is needed to show them that current social norms and consensus are filled with gender bias and stereotyping, including their own perception of them.

#### 4. Judicial education for Gender Fairness

This is more than enough to show the judicial education in Japan has not affected judges' understanding of the social facts and situations of disadvantaged groups. Considering that even judges are not free from being influenced by personal, subjective experiences, the way and focus of training for the judges would be called into question. Japan has been recommended to introduce such training by every human rights treaties monitoring body, over and over again, every time the government's reports undergo their review. And the government's answer is always there is, as one of the training courses for the fifth year assistant judges, one hour course on the women's human rights in the Institute for Legal Research and Training. It is true, and the fifth year trainings are compulsory trainings for the judges.(Watanabe2012: 248-250) That means, judiciary should have the more than enough understanding of the Japanese women's situations and what constitutes the gender biases in their behaviour and decision making. However, this is not the case.

Because the Judicial Research and Training Institute does provide one hour lecture on women's human rights, the case should be taken seriously, in the sense the lecture was not effective, and as the education institute, it should scrutinize the curricula itself and the course contents. It should be pointed out that the first step is for the Japanese judiciary to acknowledge



that there are gender biases in the courts as a matter of fact. Mahoney describes the process in Canada:

Within the Canadian judicial system, acknowledgement of unequal and unfair treatment of women and racial minorities was the crucial first step toward equality. The second step was the recognition that, in order to remove these biases, judges need to better understand that variables such as gender, poverty, race, illiteracy, disability, discrimination, alcohol and drug abuse, and sexual and physical abuse have an impact on both social behaviour and the judges' own decisions. This awareness led to further recognition that legal principles must be linked to the social context in order to achieve complete justice and fairness within the legal system. (Mahoney 1996:820)

The thick knowledge on these variables in theoretical and empirical social scientific studies have been accumulated in Japan. Legal professions and academics have been fostering collaborative relationships in the area of women's and gender studies. Thus the supportive networks are emerging and willing to assist the gender fair administration of justice. The second step would not be too difficult for the judiciary to take, if there is a will, in the way the leading legal communities had taken. The judicial education for the gender fairness in the courts may be described as follows:

To remove gender bias from the judicial processes, judges must understand how sex-role stereotypes, myths, and biases affect their thinking and decision making. Deeply held cultural attitudes and beliefs about "proper" roles for women and men must be examined and

challenged when they interfere with the fair and equitable administration of justice……This requires education programs that stimulate a sense of personal discovery and enable judges to identify and eliminate their own biases. Presentation of new facts and sensibilities assists this process, as does the involvement and commitment of nonjudges. The key element to sustainable and successful reform, however, is the realization that change must come within the judiciary and that judges must lead the reform. Not only would this give the reform legitimacy and credibility in the eyes of the judges, but it also would address the requirement of judicial independence. (Mahoney1996:814)

If the judges were equipped with better understanding of the social facts and theories about how gender inequality is produced and reproduced, making a cleavage between women workers' aspirations and their observed (forced) behaviour. The lack of sufficient and regular opportunities of gender related training for the judiciary means judges do not have the opportunities to do better their job in administering justice which no doubt contains as an important element, fairness to women, half of the member of the Japanese society. So far, however, the situation still leaves a long way to go. Nonetheless, there is a hope in that the judiciary does have the aspiration for the justice and fairness with at least as much commitment shared with the legal community and the citizens of Japan.

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