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Gender Equality in the European Union and Japan

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A Comparative Case Law Analysis

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Abstract

The Japanese political discourse has shifted toward a gender-friendly strategy under the economic recovery programme of the Prime Minister, Shinzo Abe. But is this discourse echoed in the case law of Japanese courts? This paper explores the position of the Japanese judiciary with regard to gender equality at work and compares it with that of the European Court of Justice. Applying the European conceptual framework to the Japanese case law suffers several limitations. As a matter of fact, if Japan formally embraces certain European legal concepts pertaining to gender equality, such as direct and indirect discrimination, confronting the Japanese case law with such concepts allows the present analysis to shed light on their relative incompatibility with the particularism of the Japanese judicial approach to labour relations and labour issues. Fundamentally this comparison is meant to highlight the extent to which Japan's ranking as the 114th country that best achieves "gender equal economic participation and opportunity"[1] is not reducible to mere neglect or bias from the legislature and judiciary, so that the temptation to invite the latter to simply endorse a more aggressive approach in favour of gender equality, identical to that of other legal orders, such as the EU, can be resisted and questioned. This paper rather suggests that Japan should develop its own legal tools that would respond to the current issue of gender equality in a more integrated and effective manner.

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[1] World Economic Forum, "Global Gender Gap Report 2017" < http://reports.weforum.org/global-gender-gap-report-2017/dataexplorer/#economy=JPN > accessed on 4 November 2018.

KEYWORDS

Gender equality – Case Law – Japan – European Union – Comparison – Direct/Indirect Discrimination

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1. Introduction

1.1. Defining the issue beyond the political and economic context

The Japanese Government has since 2013 endorsed the vision of a society "in which all women can shine"[2]. Prime Minister Shinzo Abe instituted the principle of gender equality as one of the cornerstones of his economic recovery policy[3]. Under the term "womenomics", this program envisions women as pool of talent to be leveraged for the sake of the economy[4]. Nonetheless, increasing female labour participation in both quantity and quality as part of a broader economic recovery policy does not seem to elicit unanimity. Recently the management of the Tokyo Medical University, one of the most renowned medical schools in Japan, acknowledged that the results of their entry exams have been systematically altered (at least) since 2006 in order to prevent female candidates from accessing education in the school[5]. This scandal is entwined in the broader context of the deeply rooted gender roles prevailing in Japan, according to which women are expected to be the sole caregivers of children and the elderly[6]. Interestingly, one could argue that the Japanese Government is now endeavouring to set aside the family model and work structures that it had in the past contributed to put into place. As a matter of fact, the full-time housewife model took its roots in the good wife and wise mother ideology of the Meiji Restoration (1868-1912)[7], which was originally an attempt of the Japanese government to instil a strong nationalist feeling among female citizens – giving them a common role to play at the service of the nation[8]. This was maintained, if not reinforced, after the Second World War for economic purposes[9]. Accordingly, we can expect the current "shin-

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[2] Ministry of Foreign Affairs of Japan, *Women's empowerment and gender equality* (last update, 10 May 2018) < https://www.mofa.go.jp/fp/pc/page23e_000181.html > accessed on 12 August 2018.

[3] Prime Minister of Japan and His Cabinet, "Speech by Prime Minister Shinzo Abe at Global Leaders Meeting on Gender Equality and Women's Empowerment" *Speeches and Statements by the Prime Minister* (September 27, 2015) < https://japan.kantei.go.jp/97_abe/statement/201509/1213045_9928.html > accessed 7 August 2018.

[4] CNN, "The Women Behind Japan's Womenomic" *Leading Women – Japan* < https://edition.cnn.com/videos/tv/2017/11/06/leading-women.cnn > accessed on 12 August 2018.

[5] Justin MacCurry, "Tokyo medical school admits changing results to exclude women" *The Guardian* (8 August 2018) < https://www.theguardian.com/world/2018/aug/08/tokyo-medical-school-admits-changing-results-to-exclude-women > accessed on 12 August 2018.

[6] S. Ikeda, "Childcare Leave System and Women's Job Continuity – Comparative Analysis by Company Size – Summary" *JILPT Research Report* n°109 (2009) (see also: M. Ishii-Kuntz, "Sharing of Housework and Childcare in Contemporary Japan" *United Nations – Division for the Advancement of Women* EGM/ESOR/2008/EP.4 (2008) < http://www.un.org/womenwatch/daw/egm/equalsharing/EGM-ESOR-2008-EP4Masako%20Ishii%20Kuntz.pdf > accessed on 12 August 2018).

[7] N. Akiko rightly points out that promoting the idea of an active woman at the service of the nation "contrasts with Confucian female attributes like passivity and submission" [N. Akiko and T. Yoda, "The Formation of the Myth of Motherhood in Japan" *U.S.-Japan Women's Journal* 4 (1993) p. 75].

[8] N. Akiko and T. Yoda, *ibidem*, pp. 75-76.

[9] A. S. Aronsson, *Career Women in Contemporary Japan: Pursuing Identities, Fashioning Lives* (London: Routledge, 2014) [see also: C. Ueno, "The Position of Japanese Women Reconsidered" *Current Anthropology* 28:4 (August-October 1987)

ing women" policy to still sputter for a long time, just as the good wife and wise mother ideology took decades to leak into the Japanese collective sub-conscience. Whilst new and diversified lifestyles can be observed today among young Japanese women, as many seem to shy away from the traditional gender roles by delaying marriage and childbirth in order to focus on their personal wellbeing or career[10], this does not necessarily mean that Japanese men and women benefit from equal opportunities at work and strike a healthier balance between their professional and personal aspirations[11].

By comparison, the European Union has since 1970 strived to foster gender equality within the labour markets of all European Member States. The principle became a predominant social policy regarding which the Union achieved a far-reaching level of political integration. This undoubtedly represented (and still represents) a considerable task in view of the significant disparities in gender social roles, family models and labour markets structures of the Union's Member states. Whilst one cannot deny that there still remain various degrees of compliance with the European standards[12], concrete efforts have been made to align national policies with the European requirement[13]. Furthermore, the generalised entry of women into the labour market in the 90s marked the end of the male breadwinner model[14] and prompted further discussions with regard to gender equality, such as work/life balance issues. More interestingly, these years were also marked by the promotion of gender equality as a tool to trigger economic growth and higher fertility rates[15]. If it has been argued that this European liberal discourse contrasts with Japan's stance on gender equality[16], the previous comments on Japan's "womenomics" suggest the opposite, as a current shift toward a similar policy can be observed in the archipelago. But it is also gen-

80].

[10] R. L. Miller, "The Quiet Revolution: Japanese Women Working Around the Law" *Harvard Women's Law Journal* 26 (2003).

[11] C. Steinberg and M. Nakane, "Can Women Save Japan?" *IMF Working Paper* 12/248 (October 2012) pp. 1-50.

[12] See the statistical analysis in further paragraphs [see also: N. Countouris and M. Freedland, "Labour Regulation and the Economic Crisis in Europe: Challenges, Responses and Prospects", in J. Heyes, J. and L. Rychly (eds.), *Labour Administration in Uncertain Times: Policy, Practice and Institutions* (Cheltenham: Edward Elgar/ILO, 2013)].

[13] S. Berghahn, "The Influence of European Union Legislation on Labour Market Equality For Women", in J. Z. Giele and E. Holst (eds.) *Changing life patterns in Western Industrial Societies* (vol. 8 of *Advances in Life course research*) (London: Elsevier Science, 2003) 211-230.

[14] M. Karamessini and J. Rubery, "The Challenge of Austerity or Equality, a consideration of eight European countires in the crisis" *Revue de l'OFCE* 133:2 (2014) 15-39.

[15] Commission of the European Communities, "European social policy: a way forward for the union" White Paper Part A COM(94) 333 final (July 1994) < http://aei.pitt.edu/1118/1/social_policy_white_paper_COM_94_333_A.pdf > accessed on 12 August 2018 (see also: A. Elomäki, "The economic case for gender equality in the European Union: Selling gender equality to decision-makers and neoliberalism to women's organizations" *European Journal of Women's Studies* 22:3 (2015) 288-302; G. Perrier, "La politique d'égalité des sexes de l'Union européenne. Portée et limites de l'égalité pour le marché" *Revue des Politiques Sociales et Familiales* 126 (2018); S. Jacquot, *L'égalité au nom du marché? Emergence et démantèlement de la politique européenne d'égalité entre les hommes et les femmes* (Berne: Peter Lang, 2014).

[16] J. Repo, "The governance of fertility through gender equality in the EU and Japan" *Asia Eur J* 10 (2012).

erally argued that in the EU gender equality is (disputably)[17] no longer encapsulated in a self-serving market-oriented logic but now constitutes an end in itself articulated in the human rights discourse of the European Court of Justice[18]. While major progress in favour of gender equality has been achieved under this 'social integration' approach, more recent critical views highlight that the Union's commitment to gender equality currently runs out of momentum[19], as "real equality" now requires challenging private and family-related social norms[20].

The European Union and Japan record significantly different degrees of achievement in the protection against gender discrimination at work. Beyond the political discourse, one might discover the reality on the ground with fundamental disparities between their legislative strategies and judicial practices. Hence, the purpose of this paper is to highlight the key elements that differentiate (or not) the Japanese and European legal systems in the field of gender equality in the workplace. Namely, it focuses on the development of their case law pertaining to the matter. The reason for this case law-oriented approach is that the legal protection provided against gender discrimination has first been initiated and articulated by the judiciary both in the EU and Japan. This paper explores the Japanese case law on gender equality in the workplace through the conceptual lens of the European legal framework elaborated by the ECJ in the area. Applying the European conceptual framework to the Japanese case law suffers several limitations. If Japan formally embraces certain European legal concepts with regard to gender equality, such as direct and indirect discrimination, confronting the Japanese case law with such concepts allows the present analysis to shed light on their relative incompatibility with the particularism of the Japanese judicial approach to labour relations and labour issues. This comparison is meant to highlight the extent to which Japan's ranking as the 114th country that best achieves "gender equal economic participation and opportunity"[21] is not reducible to mere neglect or bias from the legislature and judiciary, so that the temptation to invite the latter to simply endorse a more aggressive approach in favour of gender equality, identical to that of other

[17] For recent opposing views, see: J. Rubery, "Austerity and the Future for Gender Equality in Europe" *ILR Review* 68:4 (August 2015); A. Elomäki, "The economic case for gender equality in the European Union: Selling gender equality to decision-makers and neoliberalism to women's organisations" *European Journal of Women's Studies* 22:3 (2015).

[18] S. Prechal, "Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes", *Common Market Law Review* 41:2 (2004) 533; A. Masselot, "The State of Gender Equality Law in the European Union" *European Law Journal* 13:2 (March 2007) 153.

[19] M. Smith and P. Villa, "The ever-declining role of gender equality in the European Employment Strategy" *Industrial Relations Journal* 41:6 (2010).

[20] C. McGlynn "Ideologies of motherhood in European community sex equality law" *European Law Jounal* 6:1 (March 2000); E. Caracciolo di Torella and P. Foubert, "Surrogacy, pregnancy and maternity rights: a missed opportunity for a more coherent regime of parental rights in the EU" *European Law Review* 40:1 (2015); E. Caracciolo di Torella and A. Masselot, "Work and Family Life Balance in EU law and Policy 40 Years on: Still Balancing, Still Struggling" *European Gender Equality Law Review* 2 (2013).

[21] World Economic Forum, "Global Gender Gap Report 2017" < http://reports.weforum.org/global-gender-gap-report-2017/dataexplorer/#economy=JPN > accessed on 4 November 2018.

legal orders, such as the EU, can be resisted and questioned. This paper rather suggests that Japan should develop its own legal tools that would respond to the current issue of gender equality in a more integrated and effective manner.

1.2. Key legislation in Japan: a brief historical overview

In Japan, legal protection against gender discrimination in the workplace is regulated under the Equal Employment Opportunity Law (hereinafter EEOL), in addition to the Child Care and Family Care Leave Law[22] and the Basic Act for a Gender Equal Society[23]. A brief historical overview of the EEOL is first necessary, starting with the adoption of the Labour Standards Act[24] (hereinafter, LSA) in 1947. Under this legislation, several 'protective' but discriminatory labour practices were imposed upon female workers, such as prohibition from overtime work or late night work, general prohibition from manual work etc. Nevertheless, the first pragmatic gender equality rule[25] was enshrined in the Act: the prohibition of wage discrimination (art. 4)[26].

This legal insufficiency received fierce criticism from the international community, and it is believed that this international pressure, mainly coming from the United Nations, is the main incentive[27] that pushed Japan to adopt the Equal Employment Opportunity Law (hereinafter, EEOL)[28]. Japan ratified the UN Convention on the Elimination of All Forms of Discrimination Against Women[29] in 1980, and complied with its commitments with the adoption of the EEOL in 1985. It should be incidentally noted that the adoption (and the two main subsequent amendments) of this law were accompanied by the abolishment of most of the special protections guaranteed under the LSA[30].

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[22] Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members [Act no. 76] 15 May 1991 < https://www.mhlw.go.jp/english/policy/children/work-family/index.html > accessed on 21 October 2018.

[23] Basic Act for Gender Equal Society [Act no. 78] 23 June 1999 < http://www.gender.go.jp/english_contents/about_danjo/lbp/laws/pdf/laws_01.pdf > accessed on 21 October 2018.

[24] Japanese Labour Standards Act [Act no. 49] 4 April 1947 < https://www.ilo.org/dyn/natlex/docs/WEBTEXT/277/6484676/E95JPN01.htm > accessed on 9 August 2018.

[25] S. Yamada, "Equal Employment Opportunity Act, Having Passed the Quarter-Century Milestone", *Japan Labour Review* 10:2 (Spring 2013) 6-7.

[26] "A woman may be paid differently for performing the same tasks as a make employee so long as the employer can provide some real justification other than the employee's gender or gender stereotypes" [K. Sugeno, "Japanese employment and labour law (*translated*)" *Carolina Academic Press* 161 (2002) 161-162].

[27] K. T. Geraghty, "Taming the Paper Tiger: A Comparative Approach to Reforming Japanese Gender Equality Laws", *Cornell Int'l L.J.* 41:503 (2008) 508.

[28] Japanese Equal Employment Opportunity Law [Act n° 113] 1st July 1972 < https://www.ilo.org/dyn/travail/docs/2010/Act%20on%20Securing%20etc%20of%20Equal%20Opportunity%20and%20Treatment%20between%20Men%20and%20Women%20in%20Employment%201972.pdf > accessed on 9 August 2018.

[29] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, 13, < http://www.refworld.org/docid/3ae6b3970.html > accessed on 18 October 2018.

[30] For further information, see: K. T. Geraghty, *ibidem*, 510.

In its original content, the Equal Employment Opportunity Law[31] was an attempt to discourage gender discrimination in five areas[32]: recruitment and hiring, job assignment and promotion, vocational training, employee benefits and retirement and dismissal[33]. Even though the introduction of this reform represented an important change in the Japanese legal landscape[34], the act did not enshrine any strong obligation upon employers, as these were only required to "endeavour to treat men and women equally in the recruiting and hiring processes"[35]. It must also be highlighted that the initial law is to be considered as an employment protection measure and not as a human rights-related measure, as only women were subject to protection under the act[36]. Furthermore, it was accompanied by an ineffective enforcement mechanism, consisting mainly in non-binding administrative recommendations and mediation without the guarantee of neither any private right of action nor any civil or criminal sanction[37].

In addition to the shortcomings of the law, the decreasing birth rate of Japan, together with the increase in complaints challenging gender discriminatory treatments in the workplace[38] were at the origin of the 1997 reform of the EEOL[39].

The first and most important element of this reform is that it transformed the employers' mere obligation to endeavour to implement gender equality into the strict prohibition of gender discrimination in recruiting and hiring, promotion, training and job assignment[40]. Secondly, the act introduced the notion of positive action[41] (former Art. 9). This article was labelled only as enabling companies to "take measures in connection with women workers with the purpose of improving circumstances that impede securing of equal opportunity

[31] The act actually already existed under the title "Act to promote the welfare of working women" which was adopted in 1972. The introduction of the Equal Employment Opportunity Law in 1985 consists in a reform of this act [H. Nakakubo, "'Phase III' of the Japanese Equal Employment Opportunity Act" *Japan Labour Review* 4:3 (2007) 9].

[32] This is particularity of the law: to identify the specific matters where discrimination is to be avoided (as opposed to a general prohibition of discrimination in the employment relationship) (H. Nakakubo, *ibidem* 13).

[33] K. T. Geraghty, *ibidem* 510 (see also: S. Yamada, *op. cit.* 8).

[34] S. Yamada, *ibidem* 8.

[35] H. Nakakubo, *ibidem* 11.

[36] R. Sakuraba, "Employment Discrimination Law in Japan: Human Rights or Employment Policy?", *Bulletin of Comparative Labour Relations* n. 68/2008, 233. This aspect of the law had adverse effects on the consequent treatments of men and women (*see also*: S. Yamada, *ibidem* 8 and 9).

[37] K. T. Geraghty, *ibidem* 510 and 511. Only 106 employees applied for mediation and the responsible Commission mediated only *one* of these cases (J. 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) 122).

[38] K. T. Geraghty, *ibidem* 515.

[39] Under the impulse of the 1996 Report drafter by the Japanese Office of gender equality, and the UN's 4th World Conference on Women in 1995 (K. T. Geraghty, *ibidem* 515).

[40] M. L. Starich, "The 2006 revisions to Japan's equal opportunity employment law: a narrow approach to a pervasive problem", *Pacific Rim Law and Policy Journal* 16:2 (March 2007) 559.

[41] H. Nakakubo, *op. cit.* 12.

and treatment between men and women in employment"[42]. Thirdly, the revision introduced the notion of sexual harassment within the law, and included it in the category of gender discrimination occurring in the workplace[43] (Art. 21), as it was then only enshrined in the Civil Code and had no correlation to gender discrimination. Fourthly, procedural reforms were introduced in order to reinforce the mechanisms through which employees could find remedies to their claims[44]. Two main elements are to be highlighted. The first one concerns the new possibility for employees to force their employer into mediation with the Ministry of Health, Labour and Welfare[45] (while mediation had initially to be agreed upon by the two parties, i.e. the employee and the employer). The second element relates to the sanction chosen by the legislator in case of non-compliance with the recommendations resulting from the mediation, i.e. the public announcement to the media of the name of the concerned company[46].

By 2005, the situation of women in the workplace had not improved tremendously. But also, the persisting recession and the ever-declining birth rate (1.26 in 2005, the lowest ever reached)[47] were the first concerns of the Japanese Government[48]. These elements help understand the reasons why a second reform was introduced in 2006 and entered into force in 2007. Most importantly, under this reform the scope of protection provided by the law was extended to men[49]. This change affected the nature of the law, as it became an equal rights-related measure, as opposed to a protective measure destined only to women[50].

In addition to this major change, four elements of the reforms should be highlighted. First of all, the reform extended the protection against discrimination to additional matters[51]. Not only would the notion of placement then include allocation of duties and grant of authority (Art. 6, item 1), but demotion of workers, change in job type or employment status, encouragement of retirement, and renewal of labour contract were added to the list of protected matters (Art. 6, items 1, 3 and 4)[52]. Secondly, the reform introduced the notion of indirect discrimination (Art. 7). Interestingly, the Labour Policy Council issued a bill containing only three work practices that would officially consist in indirect discrimination: "(i) applying criterion concerning body height, weight or physical capacity when

[42] H. Nakakubo, *ibidem* 12.

[43] K. T. Geraghty, *op. cit.* 516.

[44] K. T. Geraghty, *ibidem* 516 and 517.

[45] K. T. Geraghty, *ibidem* 516.

[46] K. T. Geraghty, *ibidem* 516 (see also: M. L. Starich, *ibidem* 560).

[47] Fertility rate of Japan (births per woman), The World Bank Data, < http://data.worldbank.org/indicator/SP.DYN.TFRT.IN?locations=JP&name_desc=false > page accessed on July 29, 2017.

[48] K. T. Geraghty, *ibidem* 504 and 505.

[49] As to the textual changes, see H. Nakakubo, *ibidem* 11-13 (see also: S. Yamada, *op. cit.* 12).

[50] For further comments, see R. Sakuraba, *op. cit.* 233.

[51] M. L. Starich, *ibidem* 562.

[52] H. Nakakubo, *ibidem* 11 and 14.

recruiting or hiring workers, (ii) in case the employer adopts dual career ladder system, requiring workers to be able to accept future transfers with a change of residence when recruiting of hiring workers for main positions of the core career course, and (iii) requiring workers to have experiences of jobs relocation when deciding their promotion"[53]. These were incorporated in a new ordinance issued by the Ministry of Health, Labour and Welfare (Art. 2 of EEOL Enforcement Ordinance[54]). Thirdly, special provisions have been reframed and also added as regards the prohibition of disadvantageous treatment of female workers by reason of pregnancy and childbirth[55]. The revision mainly strengthened this specific protection provided to women by an independent article (Article 9)[56]. Fourthly, procedural reforms have been introduced as a result of the critiques on the weaknesses of the Act's enforcement mechanisms[57]. In sum, the revision expands the cases relating to gender discrimination that can be subject to the procedural mechanisms provided by the act, i.e. essentially mediation and publication of names. Also, the Commission in charge of the mediation procedures has seen its powers of investigation increase in order to make the resolution process more efficient. Finally, assistance for companies is also provided in their attempt to implement positive action measures.

2. Direct and indirect discrimination: two different approaches

2.1. Direct and indirect gender discrimination in the EU, a judicial bottom-up approach

In the European legal framework, the distinction between direct and indirect discrimination emerged as a key notion through the development of the European normative system pertaining to employment discrimination based on sex. This development stems from the interaction of the ever-increasing European legislative instruments regulating the subject with the European Court of Justice's interpretation of these instruments and its initial judicial activism in the field[58]. One must note that this proactive commitment to gender

[53] H. Nakakubo, *op. cit.* 15 and 16.

[54] Japanese Ordinance for Enforcement of the Act on Ensuring Equal Opportunity for and Treatment of Men and Women in Employment [Ordinance n° 2] 2 January 1986 < http://www.japaneselawtranslation.go.jp/law/detail_download/?ff=09&id=2318 > accessed on 15 August 2018.

[55] H. Nakakubo, *ibidem* 17 and following.

[56] H. Nakakubo, *ibidem* 19.

[57] H. Nakakubo, *ibidem* 23 and following.

[58] D. Schiek, L. Waddington and M. Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007) 187.

equality was initially based on pure economic considerations[59]. The Court had first to delineate the principle of equal pay for equal work originally enshrined in Article 119 of the 1957 Treaty establishing the European Economic Community[60]. Although this paper has no pretention to address the specific issue of equal pay[61], it is important to highlight that the equal pay principle was the starting point of both the European[62] and the Japanese[63] legal framework for gender equality at work. As for the European Union, *Defrenne II*[64] was a landmark decision in which the European Court of Justice held that the right to equal pay has direct effect, meaning individuals can avail themselves of this right directly before national courts. This has the effect of allowing a large stream of equal pay cases to be brought before the European courts through the preliminary reference procedure[65]. The Recast Gender Employment Directive[66] encapsulates the definition of direct and indirect discrimination that the Court has articulated throughout its case law[67]. The ECJ has adopted an Aristotelian understanding of the concept of direct discrimination[68], meaning that "persons in a similar situation must be treated in an equal manner, but also that persons whose situations are significantly different must be treated differently"[69], i.e. a formal approach to equality. In this regard, important questions arise with respect to the complexity in judging whether situations are similar and are therefore to be treated alike and vice

[59] C. Barnard, "The Economic Objectives of Article 119", in T. Hervey and D. O'Keeffe (eds.), *Sex Equality Law in the European Union* (Wiley, 1996).

[60] Now Article 157(1) TFEU.

[61] M. Smith, "Social Regulation of the Gender Pay Gap in the EU" *European Journal of Industrial Relations* 18:4 (2012) 365-380; Directorate-General for Justice (European Commission), *Tackling the Gender Pay Gap in the European Union* (Luxembourg: Publications Office of the European Union, 2011); Directorate-General for Justice (European Commission), "European added value of applying the principle of Equal Pay for men and women for equal work or work of equal value" (research paper on economic aspects) *European Added Value Assessment on the Application of the Principle of Equal Pay* (Brussels: European Parliament, 2013).

[62] S. Haverkort-Speekenbrink, *European Non-Discrimination Law – a Comparison of EU law and the ECHR in the Field of Non-Discrimination and Freedom of Religion in Public Employment with an Emphasis on the Islamic Headscarf Issue* (Intersentia, 2012) 33 (see also: H. Meenan, *Equality Law in an Enlarged European Union* [Cambridge University Press, (2007) 147].

[63] S. Yamada, *op. cit.* 6 (see also: H. Nakakubo, *ibidem* 10).

[64] Case 43/75 *Defrenne v Sabena SA* [1976] ECR 00455, 24.

[65] For further comments see: C. Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* [Antwerp, *Intersentia* 2005) 116-122].

[66] "'[D]irect discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation" (Council Directive 2006/54/CE on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] *O.J. L* 204 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006L0054 > accessed on 9 August 2018).

[67] The process of incorporating the notion direct discrimination in European legal provisions began with the Burden of Proof Directive. But an express definition was first included in the Employment Equality Directive as amended in 2002 and was retained in the Recast Directive as amended in 2006 (see D. Schiek, L. Waddington and M. Bell, *op. cit.* 193).

[68] D. Schiek, L. Waddington and M. Bell, *ibidem* 191 and 205.

[69] S. Besson, "Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?" *Human Rights Law Review* 8:4 (2008) 661 (see: Case 251/83 *Eberhard Haug-Adrion v Frankfurt Versicherungs-AG* [1984] ECR 04277, 14; Case 148/02 *Garcia Avello v Belgium* [2003] ECR 11613, 31).

versa[70]. Under EU law, direct discrimination can only be observed when the ground on which the differential treatment is applied, is expressly prescribed by law[71]. Considerations over sex and "characteristics indissociable from sex"[72] constitute the ground on which no differential treatment is allowed "when making decisions on whom to hire, promote or dismiss"[73], because it is deemed irrelevant, thus illegitimate[74]. In this respect, it must be noted that the ECJ tends to interpret broadly the notion of sex[75]. Besides pay discrimination, the Court has also undertaken to protect gender equality regarding access to employment and working conditions, to which it has generally given a large meaning[76]. Notably, the Court has shown most sympathy for dismissal cases[77].

Criticism addressed to the alleged insufficiency and barrenness of Aristotle's postulate has guided the formulation of a substantive conception of equality that is meant to tackle the discriminatory treatments that fall between the cracks of formal equality. Substantive equality is said to address the unjust imbalances derived from socio-economic and cultural factors that have contributed to place a specific group at a systematic disadvantage[78]. It is often argued that a legal system based on formal equality is not sufficient to achieve by itself "genuine equality" because "treating people in a consistent fashion merely leads to a perpetuation of inequality"[79]. In this respect, if the notion of direct discrimination could either embrace a formal or substantive take on equality[80], the substantive approach to equality requires, at any rate, the implementation of an additional concept, that is, indirect discrimination.

Indirect sex discrimination arises from the employment of an apparently neutral criterion of differentiation between individuals, which produces a disparate effect among male and

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[70] L. Betten, "New Equality provisions in European Law: some thoughts on the fundamental value of equality as a principle", in K. Economides, L. Betten, J. Bridge, A. Tettenborn and V. Shrubsall (eds.), *Fundamental Values* (Oxford, Hart Publishing, 2000) 73; J.H. Gerards, *Judicial Review in Equal Treatment cases* (Martinus Nijhoff 2005) 566-567.

[71] M.H.S. Gijzen, *Selected Issues in Equal Treatment Law: A Multi-layered Comparison of European, English and Dutch Law* (Intersentia Antwerpen – Oxford, 2006) 54 (see also: S. Besson, *ibidem* 665-666).

[72] Case 79/99 *Schnorbus v Land Hessen* [2000] ECR 10997, Opinion of AG Jacobs 11008

[73] D. Schiek, L. Waddington and M. Bell, *ibidem*. 205 (save for exceptions and justifications)

[74] M.H.S. Gijzen, *ibidem* 53. This ground is enshrined in primary and secondary law provisions (S. Besson, *ibidem* 666).

[75] Case 13/94 *P v S an Cornwall County Council* [1996] ECR I-02143, 19-21.

[76] E. Ellis and P. Watson, *EU Anti-Discrimination Law* (2nd ed., Oxford EU Law Library, 2012) 287 and 288.

[77] E. Ellis and P. Watson, *ibidem* 288 and following.

[78] See N. E. Romas Martìn, "Positive Action in EU Gender Equality Law: Promoting Women in Corporate Decision-Making Positions" *Spanish Labour Law and Employment Relations Journal* 3:1 (November 2014) 20-33.

[79] M.H.S. Gijzen, *op. cit.* 61 subs. (see also: S. Fredman, "Less Equal than Others – Equality and Women's Rights" in C. Gearty, A. Tomkins (A.) (eds.) *Understanding Human Rights* (London/New-York, Mansell 1996); C. E. Baker, "Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection" *University of Pennsylvania Law Review* 131:4 (March 1983)). For an opposite view, see: R. A Epstein, "Standing Firm, on Forbidden Grounds" *San Diego L. Rev.* 31:1 (1994) 1-56.

[80] C. Tobler, "Limits and Potential of the Concept of Indirect Discrimination" Paper for the European network of legal experts in the non-discrimination field (European Commission 2008) 49.

female individuals to which this criterion is applied[81]. The purpose of this concept is two-fold. First of all, it enables the principle of equality to reach situations that are not formally discriminatory toward one sex but which end up in practice being indirectly disadvantageous for one over the other[82]. Precisely, what fails to be addressed are the attempts made to circumvent the prohibition of discrimination on one of the listed grounds by the use of seemingly neutral requirements that end up having a similar impact to that of a blatant direct discrimination practice[83]. Second, indirect sex discrimination is meant to tackle the more insidious forms of discrimination, which are to be found in the very structures of the labour market and society at large[84]. In this respect, the ban on indirect sex discrimination addresses the disparities in the historically rooted distribution of power and goods between men and women[85], thus taking into account material differences between men and women[86].

The ECJ has recognised and constructed the notion of indirect discrimination[87], which has later on been enacted in the Recast Directive[88]. Three of the most important ECJ cases with regard to the matter are to be highlighted. In 1972, the ECJ first recognised substantially though not formally the unlawfulness of indirect sex discrimination in the *Sabbatini* case[89] under the general principle of equality and under what is today Article 157 of the TFEU[90]. The *Jenkins* case[91] was the first implementation of the prohibition of indirect sex discrimination against the practice of an employer[92]. This case was delivered as the European

[81] M.H.S. Gijzen, *ibidem* 57.

[82] C. Tobler, "Limits and potential," *ibidem* 24.

[83] This is specifically relevant for Japan even though Japanese law, just as EU law, does not formally take account for the intent of the perpetrator as a relevant factor for establishing indirect sex discrimination (see Section II. of this part).

[84] C. Tobler, *Indirect Discrimination, op. cit.* 145 (see also: T. K. Hervey, "Thirty years of EU sex equality law: looking backwards, looking forwards" *Maastricht J. Eur. & Comp. L.* 12 (2005) 311.

[85] R. Townshend-Smith, "Justifying Indirect Discrimination in England and American Law: How Stringent Should the Test Be?" *IJDL* 1 (1995) 105 (see also: C. Tobler, *Indirect discrimination, ibidem* 58; D. Schiek, L. Waddington and M. Bell, *op. cit.* 327).

[86] M.H.S. Gijzen, *ibidem* 62.

[87] Y. Sui and L. Zhu, "Law of the European Union on Indirect Discrimination against Women in Working Life: From a Perspective of Improving the Law of China on Non-Sex Discrimination against Women in Working Life" *Frontiers L. China* 8 (2013) 783 (for an account of the different stages of this development, see: C. Tobler *Indirect discrimination, ibidem*).

[88] "'[I]ndirect Discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary" (Council Directive 2006/54/CE on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] *O.J. L* 204 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006L0054 > accessed on 9 August 2018).

[89] Case 20/71 *Sabbatini* [1972] ECR 00345.

[90] This case concerned a woman who had seen her application for expatriation allowance being refused under national legislation on the ground that she was no longer the head of her household thenceforth her marriage. See C. Tobler, *Indirect discrimination*, *op. cit.* 108-109

[91] Case 96/80 *Jenkins* [1981] ECR 911.

[92] See M.H.S. Gijzen, *op. cit.* 69-70 (see also: C. Tobler, *Indirect discrimination, ibidem* 142).

Council had just adopted the 1976 Equal Treatment Directive[93] that expressly enshrined the distinction between direct and indirect discrimination without defining the two[94]. The *Bilka* case[95] brought further details as to the factors to be taken into account in the identification of indirect discrimination. Particularly, under EU law, as opposed to Japan, the intent of the perpetrator is irrelevant in assessing whether the differential treatment amounts to unlawful indirect discrimination[96].

As it currently stands under EU law, the identification of indirect discrimination requires examining three demonstration stages: i) "does the case fall within the field of application of the non-discrimination law that is to be applied in the relevant EC MS (i.e. national law as seen against the background of EC law)?; ii) can the victim of the alleged discrimination prove that there is apparent indirect discrimination on a particular ground?; iii) can the perpetrator prove that there is objective justification that will prevent a finding of indirect discrimination?"[97]. As regards the second stage, one must note that the burden of proof lies with the claimant, and the ECJ requires two conditions to be met. It must be established that there exists a *neutral* criterion, provision or practice that is not based on the prohibited ground, but that triggers a *disproportionate disadvantage* for the protected group[98]. Nevertheless, in *Danfoss* the Court held that "where an undertaking applies a system of pay which is totally lacking in transparency, *it is for the employer to prove* that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men"[99].

The fact that the ECJ had been confronted with an ever-increasing number of indirect sex discrimination cases and that it derived the notion of indirect discrimination from the common law tradition explains the broad approach it eventually implemented regarding the matter. Precisely, "the development of indirect discrimination was purely a matter for the ECJ in interaction with domestic courts (notably German and English)" which fostered "the bottom up shaping of community law, given that the latter is moulded on the basis of a factual scenario that occurs at the municipal level which raises questions of the correct interpretation of community sex equality law"[100]. This is where the main difference between

[93] Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] *OJ L* 39.

[94] C. Tobler, *Indirect discrimination, ibidem* 145.

[95] Case 170/84 *Bilka v von Hartz* [1986] ECR 01607.

[96] D. Schiek, L. Waddington and M. Bell, *op. cit.* 356 subs. (see also: Tobler, *Indirect discrimination, ibidem* 148).

[97] C. Tobler, "Limits and potential," *op. cit.* 38.

[98] C-A. Ivanus, "Justification for Indirect Discrimination in EU" *Persp. Bus. L.J.* 3 (2014) 155 (see also: Case 109/88 *Danfoss* [1989] ECR 03199, 10-11; Case 381/99 *Brunnhofer* [2001] ECR I-04961, 1-52).

[99] Case 109/88 *Danfoss* [1989] ECR 03199, 16 (emphasis added).

[100] M.H.S. Gijzen, *ibidem* 69.

the European and the Japanese systems with regard to indirect discrimination lies, as it will be explained in the next section.

Thus, in the EU if gender equality was initially framed within a market-oriented discourse, it has rapidly turned into a social goal and has become an integral part of the human rights logic under the Court's case law[101]. What is more, the adoption of Article 13 of the TEU[102] under the Amsterdam Treaty and the enactment of the EU Charter of Fundamental Rights[103] have entrenched the Union's intent to endorse a substantive conception of equality[104] and to foster equal rights among individuals beyond the working sphere[105]. Be that as it may, compelling strategies have recently given way to softer implementation means such as gender mainstreaming[106], as today's issues on gender equality in the EU relate more and more to private sphere-related and work/life balance concerns rather than overtly discriminatory employment practices[107]. Specifically, it is argued that what has slowed down (but not stopped) the Union's commitment to substantive gender equality is associated with the arguable non-economic character of the current challenges relating to gender discrimination[108]. On the one hand, it is contended that the ECJ and the EU in general lack control over these issues[109], which would prevent further integration in the field. On the other hand, critiques have also been put forward against the court's (and the EU's

[101] S. Prechal, "Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes", *Common Market Law Review* 41:2 (2004) 533.

[102] Consolidated version of the Treaty on European Union, art. 13 [2012] *OJ. C* 326 < https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A12012M%2FTXT > accessed on 19 October 2018 (this article grounds the Union's competence to undertake actions against discriminatory treatments outside the field of employment) (for further comments, see: A. Masselot, "The State of Gender Equality Law," *op. cit.* 153).

[103] Charter of Fundamental Rights of the European Union [2012] *OJ C* 326 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012P/TXT > accessed on 19 October 2018.

[104] J. Bain and A. Masselot, "Gender Equality Law and Identity Building for Europe" *Canterbury Law Review* 18 (2012) 107.

[105] A. Masselot, "The State of Gender Equality Law," *ibidem* (see for comments on the court's recent judicial activism: K. Koldinska, "Case law of the European Court of Justice on Sex Discrimination 2006-2011" *Common Market Law Review* 48:5 (2011).

[106] Gender mainstreaming consists in screening all political or legislative initiatives of any kind with gender equality considerations in order to prevent discrimination at source (see: European Institute for Gender Equality, "What is Gender Mainstreaming?" < http://eige.europa.eu/gender-mainstreaming/what-is-gender-mainstreaming > accessed on 22 July 2018; S. Jacquot, "The Paradox of Gender Mainstreaming: Unanticipated Effects of New Modes of Governance in the Gender Equality Domain" *West European Politics* 33:1 (2010) 118-135; E. Lombardo and P. Meier, "Framing Gender Equality in the European Union Political Discourse" *Social Politics: International Studies in Gender, State and Society* 15:1 (2008) 101-125).

[107] S. Jacquot, "The Paradox of Gender Mainstreaming," *ibidem*.

[108] S. Walby, "The European Union and Gender Equality: Emergent Varieties of Gender Regime" *Social Politics* 11:1 (Oxford University Press: 2004).

[109] S. Mazey, "L'Union européenne et les droits des femmes: de l'européanisation des agendas nationaux à la nationalisation d'un agenda européen?", in R. Balme, R. Chabanet, V. Wright (eds.), *L'action collective en Europe* (Paris: Presses de Science Po, 2002) 405-432; E. Lombardo and P. Meier, "Framing Gender Equality in the European Union Political Discourse" Social Politics: International Studies in Gender, State & Society 15:1 (March 2008).

at large[110]) development of a "dominant ideology of family and motherhood which privileges heterosexual marriage and legitimates the sexual division of labour in the home"[111]. Finally, the extent to which the ECJ commits to substantive equality is not always quite clear in view its persisting endorsement of the formal "fault model" which ignores that "inequality is frequently a consequence of institutional arrangements for which no single actor is 'to blame'"[112].

2.2. Direct and indirect gender discrimination in Japan, an artificial legal artefact?

Just as in the EU, in Japan gender equality at work finds its origins in the equal pay for equal work principle. Articles 3 and 4 of the 1947 Labour Standards Law[113] lay down the equal pay principle with an explicit emphasis placed upon the protected category of women. Article 4 has been construed so as to mean that a woman who holds identical work responsibilities as a male colleague's, can be discriminated against with regard to her salary if her employer provides for a "real justification other than the employee's gender or gender stereotypes"[114], making the issue of justification crucial in the Japanese courts' case law on equal pay[115]. Interestingly, the European Court of Justice allows for discrimination in salary treatment between men and women under a limited set of exceptions[116].

Unlike the EU, the courts did not rely on a general principle of non-discrimination despite the fact that the Japanese Constitution expressly enshrines the fundamental right to gender equality. As a matter of fact, Article 14 of the Constitution[117], known as the equity clause,

[110] E. Lombardo, "EU Gender Policy, Trapped in the 'Wollstonecraft Dilemma'?" *The European Journal of Women's Studies* 10:2 (2003); R. Guerrina, "Mothering in Europe: Feminist Critique of European Policies on Motherhood and Employment" *The European Journal of Women's Studies* 9:1 (2002).

[111] C. McGlynn, "European Union Family Values: Ideologies of 'Family' and 'Motherhood' in European Union law" *Social Politics: International studies in Gender, State & Society* 8:3 (October 2001) 343

[112] Case 256/01 *Allonby v Accrington & Rossendale College* [2004] IRLR 224; Case 320/00 *Lawrence v Regent office Care* [2002] ECR I-7325 [S. Fredman, "Changing the Norm, Positive Duties in Equal Treatment Legislation" *MJ* 12:4 (2005) 390].

[113] Japanese Labour Standards Act [Act no. 49] 4 April 1947 < https://www.ilo.org/dyn/natlex/docs/WEBTEXT/27776/64846/E95JPN01.htm > accessed on 9 August 2018 (respectively, "Employers shall not discrimination among workers in respect to wages, working hours, or other labour conditions on the basis of nationality, creed, or social status", and "Employers shall not discriminate against female employees in respect to wages").

[114] Judgment of Dec. 4, 1986, 37-6 *Rōdō Kankei Minji Saibanreishū* 512 (the Court endeavoured to define the meaning of equal work) (see also: M. L. Starich, *op. cit.* 554; K. Sugeno, *op. cit.*).

[115] Akita D. Ct., Apr. 10, 1975, 778 *Hanrei Jihō* 27 (*Akita Sōgo Bank* case: discriminatory wage structure against women declared unlawful under Article 4 of the LSA); Morioka D. Ct., Mar. 28, 1985, 1149 *Hanrei Jihō* 79 (*Iwate Bank* case: discrimination in payment of allowance for dependents declared unlawful under Article 4 of the LSA) (for further comments on equal pay in Japan see: T. Kato and N. Kodama, "Work-Life Balance Practices, Performance-Related Pay, and Gender Equality in the Workplace: Evidence from Japan" *IZA Discussion Paper* No. 9379 (September 2015).

[116] E. Ellis and P. Watson, *op. cit.* 143-144 (see also: J. Tudor, "Closing the Gender Pay Gap in the European Union: the Equal Pay Guarantee Across the Member-States" *North Dakota Law Review* 92:2 (2017) 424-427).

[117] Constitution of Japan, 3 November 1946 < http://www.refworld.org/docid/3ae6b4ee38.htm > accessed on 30 July 2018

has been interpreted restrictively by courts[118], so as to exclude relationships between private parties from its scope of application[119]. Instead, the judiciary has systematically challenged discriminatory labour practices against women on the basis of two articles of the Japanese Civil Code. On the one hand, Article 90 of the Civil Code[120] protecting public order and good morals is applied to declare null and void *legal* acts[121] that the courts find to be discriminatory on the ground of gender[122] and to which no objective justification has been found[123]. This provision, better known as the public order doctrine[124], has been applied by Japanese courts against an important number of discriminatory practices perpetrated against women[125] such as the requirement to resign upon marriage[126] and/or pregnancy[127], as well as mandatory early retirement[128]. Like the ECJ, courts have specifically been active in protecting job security for women[129] under this legal basis, and this, even after the enactment of the Equal Employment Opportunity Law (EEOL). As a matter of fact, the Japanese labour law system including the EEOL is subordinate to and thus governed by the private law system, and precisely by Article 90 of the Japanese Civil Code[130]. On the other hand, Article 709 of the Japanese Civil Code[131] serves as a legal basis for the development of tort law regarding discriminatory factual acts, being referred to in order to compensate the damage suffered by the discriminated victim[132]. For example, a District Court held that encouraging female employees to retire at a younger age than their male

[118] Tokyo D. Ct., Dec. 4, 1986, *The Japan Iron and Steel Federation* case, 37-6 *Rōdō Kankei Minji Saibanreishū* 512 (for further comments on the case see: C. J. Milhaupt, J. M. Ramseyer and M. D. West, *The Japanese Legal System: Cases, Codes and Commentary* (Foundation Press 2006) 587.

[119] H. Nakakubo, *op. cit.* 10 (see also: M. D. Helweg, "Japan's Equal Employment Opportunity Act: A Five-Year Look at Its Effectiveness", *B.U. Int'l L.J.* 9 (1991) 297)

[120] "A juristic act with any purpose which is against public policy is void" (Japanese Civil Code [Act n° 89] 27 April 1896 < http://www.moj.go.jp/content/000056024.pdf > accessed on 3 November 2018).

[121] I.e. "acts with legal force such as a transfer, a suspension, termination by agreement or a firing" [L. Parkinson, "Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change", *Columbia Law Review* 604 (1989) 657].

[122] H. Nakakubo, *op. cit.* 10 (see also: M. L. Starich, *op. cit.* 555).

[123] L. Parkinson, *op. cit.* 657.

[124] M. L. Starich, *ibidem* 555 [see also: D. H. Foote, "Judicial Creation of Norms in Japanese Labour Law: Activism in the Service of Stability?", in *UCLA Law Review* 635 (1996) 672 and following].

[125] For further comments on this case law, see K. Nemoto, *Too Few Women at the Top: the Persistent of Inequality in Japan* (Ithaca: Cornell University Press, 2016) 56 and following.

[126] Tokyo D. Ct., Dec. 20, 1966, *Sumitomo Cement* case, 17-6 *Rōdō Kankei Minji Saibanreishū* 1407.

[127] Osaka D. Ct., Dec 10, 1971, *Mitsui Engineering and Shipbuilding* case, 22-6 *Rōdō Kankei Minji Saibanreishū* 1163.

[128] Supreme Court (3rd Petty Bench), Mar. 24, 1981, *Nissan Motor* case, 35-2 *Saikōsaibansho Minji Hanreishū* 300; Tokyo D. Ct., Jul. 1, 1969, *Tōkyū Machinery Industries* case, 20-4 *Rōdō Kankei Minji Saibanreishū* 715.

[129] D. H. Foote, *ibidem* 672.

[130] K. Minamino, "Reappearing Gender Bias in the Employment Discrimination Cases – a cause for gender training for the judiciary in Japan", *JSPS Grants-in-Aid for Scientific Research* 24330033 (2012-2016) 57.

[131] "A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence" (Japanese Civil Code [Act n° 89] 27 April 1896).

[132] S. Yamada, *op. cit.* 7.

counterparts constituted a tort[133]. Thus unlike the ECJ, Japanese courts did not take the initiative to create a system of law that would protect women's equal rights at work on the ground of a constitutional provision. Interestingly enough, the actual protection found its original foundation in civil law provisions, thus placing this system of protection initially far from the human right-related and far-reaching approach adopted under EU law.

If Japanese courts have been active in protecting job security by recognising directly discriminatory treatments, for example, in dismissal cases and retirement cases (and equal pay cases for that matter), they have generally shown much more reluctance to extend the public order doctrine to discriminatory treatment in hiring[134] and promotions[135]. On the basis of the freedom of contract principle, Japanese courts have shown significant deference to employers, which they have best expressed in the *Mitsubishi Plastics* case[136]. Under this case, some argue that, if wage differences are ensued by different hiring categorisations between male and female employees (even though they engage in equivalent work), this does not necessarily amount to unlawful discrimination under Article 4 of the Labour Standards Act (LSA)[137], since the latter is not a "specific statutory ban"[138]. Nevertheless, the EEOL, that expressly prohibits gender discrimination in hiring and promotion[139], had a relative influence on the courts' later interpretation of Article 4 of the LSA and the public order doctrine[140], as it will be highlighted further.

Most importantly, the EEOL introduced the distinction between direct and indirect discrimination in the 2006 reform. The act does not provide for a definition of these two concepts. Nevertheless, it contains two provisions devoted to the protection against discrimination "on the basis of sex" (Articles 5 and 6)[141], i.e. the legal ground for direct discrimination disputes. These Articles are followed by another provision dealing with discrimination "on the basis of conditions other than sex" (Article 7)[142]. This dichotomy outlined from the dif-

[133] Tottori D. Ct., Dec. 4, 1986, *Tottori Prefecture Board of Education* case, 486 *Rōdō Hanrei* 53.

[134] Tokyo D. Ct., Dec. 4, 1986, *The Japan Iron and Steel Federation* case, 37-6 *Rōdō Kankei Minji Saibanreishū* 512 *translated in* C. J. Milhaupt et al., *op. cit.* 587 ("the failure of an employer to grant an equal opportunity in recruitment and hiring [is] not a violation of public order").

[135] Tokyo D. Ct., Dec. 4, 1986 *The Japan Iron and Steel Federation* case 37-6 *Rōdō Kankei Minji Saibanreishū* 512.

[136] Supreme Court, Dec. 12, 1973, *Mitsubishi Plastics* case, 27-11 *Saikōsaibansho Minji Hanreishū* 1536.

[137] R. Sakuraba, *op. cit.* 185.

[138] H. Nakakubo, *op. cit.* 10 [for further critiques, Y. Yunoki, "From the Court: Showa Shell Co. Wage Discrimination case", *Bulletin of the society for the study of working women* [Josei Rōdō Kenkyū Zasshi] 54 (2010) 160-162].

[139] For further comments see: H. Nakakubo, *ibidem* 13-14.

[140] L. Parkinson, *op. cit.* 656-657.

[141] These two articles forbid gender discrimination with regard to recruitment, assignment, loans for housing, transfer, status and retirement (Japanese Equal Employment Opportunity Law [Act n° 113] 1st July 1972).

[142] The article reads as follows: "An employer shall not take measures which concern the recruitment and employment of workers, or any of the matters listed in the items of the preceding Article and apply a criterion concerning a person's condition other than the person's sex, and which is specified by Ordinance of the Ministry of Health, Labour and Welfare as measures that may cause a virtual discrimination by reason of a person's sex, considering the proportion of men and women who satisfy the criterion and other matters, except in a case where there is a legitimate reason to take such

ferent wording of these articles draws a line between direct and indirect discrimination, as understood under EU law.

According to Article 7 of the EEOL, it is for the Ministry of Health, Labour and Welfare to produce a list of supposedly neutral criteria of employment whose use would constitute, except under justified circumstances, indirect discrimination under the law. In order to do so, the Equal Employment Opportunity Policy Meeting had already released a report in 2004 that shed light on numerous job requirements likely to trigger indirect discrimination[143]. Among these requirements, only three were embedded in the Ministry Ordinance, namely "the condition for recruitment relating to a worker's height, weight and physical strength, the condition for recruitment for the main career track requiring a worker's availability for nationwide transfer, and the condition for promotion requiring the worker to have the experience of a transfer"[144]. The Ministry has provided for guidelines in order for the courts to interpret the provision[145].

Critiques have been addressed to this narrowly drafted legal framework on indirect discrimination[146], as it does not comply satisfactorily with the goals set under the EEOL and the Japanese Constitution[147]. The strategy consisting in enumerating the specific circumstances under which unlawful indirect discrimination occurs will undoubtedly fall short both in practice and in view of the theoretical purposes of indirect discrimination. As a matter of fact, a "closed" list of conditions rather than a generic definition for coping with indirect sex discrimination is tantamount to a toothless tiger, as companies generally develop alternative practices to circumvent the ban. Including additional job conditions in the Ordinance, such as "being the head of the household" or "graduating from a prestigious university when it appeared not to be necessary for the position" is thus the least that is expected from the Japanese legislature according to some academics[148]. Japanese courts had already recognised its potential discriminatory impact, at least in wage discrimi-

measures, such as a case where such measures are specifically required for the purpose of performing the relevant job in the light of the nature of that job; or a case where such measures are specifically required for the purpose of employment management in the light of the circumstances of the conduct of the employer's business" (Japanese Equal Employment Opportunity Law [Act n° 113] 1st July 1972).

[143] "Requiring a standard height, weight and physical strength as a condition for recruitment; requiring the availability for nationwide transfer as a condition for recruitment for the main career track; requiring a standard academic level (including the major subject) as a condition for recruitment; requiring the experience of a transfer that required relocation of residence as a condition for promotion; requiring the status of the head of a household recorded in the residence certificate (e.g. being the primary breadwinner or having dependents) as a condition for receiving fringe benefits or family allowances, etc.; treating full-time workers more favourably than part-time workers; etc." (S. Yamada, *op. cit.* 13-14).

[144] Article 2 of the Ordinance for Enforcement of the Equal Employment Opportunity Act (see also: S. Yamada, *ibidem* 14).

[145] R. Sakuraba, *op. cit.* 190.

[146] H. Nakakubo, *ibidem* 16 (see also: K. Nemoto, *Too few Women*, *op. cit.* 54; M.L. Starich, *op. cit.* 566).

[147] Article 1 of the EEOL lays down as follows: "promote securing equal opportunity and treatment between men and women in employment in accordance with the principle in the Constitution of Japan of ensuring equality under law".

[148] H. Nakakubo, *op. cit.* 16 (see also: M.L. Starich, *op. cit.* 566).

nation under Article 4 of the LSA[149], just as the ECJ originally did in the *Sabbatini* case. Second, it is hard to see how the dismantling of the structural inequalities rooted in the employment system could find any effectiveness with such rigid legal tool, as it lacks a systemic approach[150]. These arguments were arguably taken into account by the Ministry, who included in the Ordinance the possibility for courts to recognise other job requirements as amounting to indirect discrimination under the law[151]. In that respect, it should be highlighted that Japanese courts tend to apply strictly the principle of non-retroactivity of laws[152]. This implies that they prefer applying the public order doctrine as explained above, rather than directly relying on the EEOL when adjudicating sex discrimination cases since they usually consider the discriminatory treatments to have occurred before the enactment of the law despite the continuance of their effects. This further hinders the efficacy of this already restricted provision, as courts are not likely to construct their approach to gender equality according to its wording.

Indirect discrimination remains a fundamental issue to be addressed in the context of gender equality at work. As it will be further argued in the next part, Japanese companies have been known to adapt their employment strategies in order to circumvent the ban on gender discrimination. This generally implied the use of indirect discrimination practices. This first materialised with the reworking of the dual track hiring system as a reaction to the adoption of the EEOL. This system distinguishes between a management track (*sōgōshoku*) and a general track (*ippanshoku*)[153]. The first one was exclusively destined to men and implies management responsibilities in planning, development and negotiations, overseas assignment, and frequent transfers[154]. The second one was originally reserved to women and involves clerical duties such as photocopying, serving tea and basic office work[155]. The general track does not offer lifetime employment guarantees and provides for fewer benefits than the management track[156]. In its original form, the system was explicitly meant to divide female and male office workers and companies made it harder if not forbidden for women to access the managerial track[157]. While one might argue that the dual-track hiring system lost its predominant place in the employment practices of most Japanese com-

[149] R. Sakuraba, *op. cit.* 184 subs. (H. Nakakubo, *ibidem* 17).

[150] S. Yamada, *op. cit.* 14.

[151] M. L. Starich, *ibidem* 567.

[152] C. F. Goodman, *The Rule of Law in Japan: A Comparative Analysis* (Kluwer Law International, 2008) 144.

[153] K. Sugeno, *op. cit.* 132.

[154] K. Kamio Knapp, [Still Office Flowers: Japanese Women Betrayed by the Equal Employment Opportunity Law", *18 Harv. Women's L.J.* 83,87:18 (1995) 123.

[155] M. L. Starich, *ibidem* 558 (see also: G. T. Shimoda, "Japan's New EEOL: Combating Sexual Harassment in the Workplace", *The Transnational Lawyer* 16:215 (2002) 224].

[156] H. A. Goff, "Glass Ceiling in the Land of the Rising Sun", *Law and Policy in International Business* 26 (1995) 1153.

[157] K. Kamio Knapp, *op. cit.* 123.

panies, others contend that it persisted in other forms[158]. For example, many employers tend to now outsource the clerical work[159]. However, one thing is certain: the dual-track system remains legal if it is accessible to both men and women, which led some to argue that "only those few women who could afford to choose the career track were blessed with equal employment opportunities and treatment"[160]. Yet, Japanese courts have shown reluctance in applying the public order doctrine to discriminatory treatments in hiring and recruiting that most likely consist in indirect discrimination[161]. Notably, it has been argued that some seemingly neutral job requirements for the managerial track tend to exclude most women from the competition, such as long working hours and frequent transfer to distant locations[162]. This is due to the deeply rooted tradition according to which women alone are to take care of their family, an idea that is being relatively challenged today.

Despite its overtly discriminatory nature, the track hiring system has generally been regarded by Japanese courts as a fair use of the businesses' right to freedom of association[163]. Interestingly enough, in rare cases Japanese courts would hold indirect discrimination practices unlawful, but only when they consist in blatant attempts on the part the employer to exclude women from certain positions or benefits[164]. In these cases, Japanese courts did not highlight the difference between direct and indirect discrimination. This is why it has been argued by Japanese scholars that these borderline cases are straddling both notions of direct and indirect discrimination[165]. In other words, even if formally speaking these cases were falling with the realm of indirect discrimination, they did not consist in landmark cases with regard to the notion. For example, the *San'yō Bussan* case[166] concerned an employer's practice excluding from the seniority-based wage system employees

[158] K. Nemoto, *Too Few Women*, *op. cit.* 55-64; J. Benson, M. Yuasa and P. Debroux, "The Prospect for Gender Diversity in Japanese Employment" *Int. J. Human Resource Management* 18:5 (May 2007); U. Frey, "Towards Gender Equality at the Work Place: Women's Work Opportunities versus Life Style Preferences – Changes in Selected Japanese Legislation during the Last Quarter of the 20th Century" *Social Systems: Political, legal and economic studies* 18 (2015) 67.

[159] E. Mun, "Negative Compliance as an organisational response to legal pressures: the case of Japanese Equal Employment Opportunity Law" *Social Forces* 94:4 (2016) 1418.

[160] M. Ikuko, "Promoting Gender Equality in Japan: An Examination of Labour Law" *Osaka University Law Review* 64 (February 2017) 163 [see also: Y. Abe, "The Equal Employment Opportunity Law and Labor Behaviour of Women in Japan" *International Economies* 25:1 (2011) 39-55].

[161] M. L. Starich, *op. cit.* 567 (see also: D. H. Foote, *op. cit.* 672).

[162] C. Weathers, "In Search of Strategic Partners: Japan's Campaign for Equal Opportunity" *Social Science Japan Journal* 8:1 (2005) 71.

[163] K. Nemoto, "When culture resists progress: masculine culture and its impacts on the vertical segregation of women in Japanese companies" *Work, employment and society* 27:1 (2013) 156.

[164] Tokyo High Ct., Jan. 31, 2008, *Kanematsu* case, 959 *Rōdō Hanrei* 85 (for further comments see: Asia-Japan Women's Resource Center, "Kanematsu Sex Discrimination Case" [Kanematsu danjo sabetsu chingin saiban], 2012, < http://ajwrc.org/jp/modules/bulletin/index.php?page=article&storyid=500 > accessed on February 23, 2018).

[165] H. Nakakubo, *op. cit.* 17 (see also: K. Minamino, *op. cit.* 64).

[166] Tokyo D. Ct., June 16, 1994, 651 *Rōdō Hanrei* 15.

who were not the head of their households and of employees with limited work areas[167]. The court recognised that this practice adversely affected female employees, as they were far less likely to comply with these two requirements[168]. But as already mentioned, this isolated case did not set a 'precedent' with regard to indirect discrimination as the court did not formally recognise the relevance of the principle and rather focused on the intention of the employer[169]. Therefore, despite the official recognition of indirect discrimination by the law, it does not seem to have fundamentally shaped the judicial discourse on gender discrimination at work in Japan.

3. The comparability issue in gender discrimination cases

3.1. Comparability in the EU: officially recognised but not always relied upon

Under EU law, direct discrimination is confined by the following conditions. From the wording of Article 2.1 (a) of the Recast Directive, unlawful direct discrimination requires four conditions to be established: a less favourable treatment on a forbidden ground compared to a present/past/hypothetical comparator who is *similarly situated* as the plaintiff[170]. A challenging issue in this sense is the comparability of situations, especially in gender discrimination cases[171]. Although the ECJ recognises the importance of the comparability test, it finds it difficult in practice to draw its objective contours[172]. Sometimes this has even led the Court to elude the question altogether[173]. What is more, the presupposition of inherent neutrality in the standard of treatment that serves as comparator may hide "organisational culture or behaviour that runs counter to a substantive notion of equality"[174]. This may be even truer for Japan, as it will be suggested in the last part of this paper. Put shortly, behind the idealised image of the standard male worker may stand structural working conditions that are objectionable from many viewpoints and thus undesirable for any person, be that person a man or a woman. On the other hand, the same uncertainty

[167] R. Sakuraba, *op. cit.* 184.

[168] R. Sakuraba, *ibidem* 184 subs.

[169] H. Nakakubo, *ibidem* 17.

[170] M.H.S. Gijzen, *op. cit.* 53 [see further: S. Fredman, *Discrimination Law* (Oxf. Univ. Press, 2002) 93-102].

[171] D. Martin, *Egalité et Non-Discrimination dans la Jurisprudence Communautaire* (Bruylant, 2006) 151-153 (see for example: Case 356/09 *Pensionsversicherungsanstalt v Christine Kleist* [2010] ECR 11939).

[172] Case 256/01 *Allonby v Accrington & Rossendale College* [2004] IRLR 224.

[173] S. Besson, *op. cit.* 664.

[174] D. Schiek, L. Waddington and M. Bell, *op. cit.* 206 (for further comments see: N. Lacey, *Unspeakable subjects – feminist essay in legal and social theory* (Hart Publishing 1998) 24)

is seen by others as the sign that there isn't always a need for a comparator for a directly discriminatory treatment to be established. From their perspective, this is because the need for a comparator might in some cases be seen as superfluous[175] or because direct discrimination can simply be the result of roles ascribed by society to the discriminated group[176].
There is one specific case in which the Court has incontestably recognised the existence of direct discrimination without the need for a comparator to exist[177]. In the *Dekker* case[178], the ECJ held that discriminatory treatment on the ground of pregnancy amounts to direct discrimination. Since there is no relevant comparator to a pregnant woman[179], the Court somewhat circumvents this problem by extending the legal discrimination ground of sex to characteristics "indissociable from sex"[180].
As regards indirect discrimination, it is argued that it consists in a "hidden kind of different treatment of comparable cases"[181]. This is the reasoning that the ECJ seems to have adopted[182], making the issue of comparability more complex but as fundamental as for direct discrimination. Thus in indirect sex discrimination cases, even if two situations are factually different, taking into account these differences would be irrelevant for the concerned treatment[183]. Under such reasoning, the ECJ has recognised that equality cannot be achieved without taking into account the socio-economic positions of members of the disadvantaged group. Precisely the fact that women, more than men, are under pressure to reconcile their professional lives with their domestic duties put them at a disadvantage in the job market[184]. This socio-economic disadvantage exerts an influence on how the detrimental effects of a seemingly neutral employment criterion are allocated among male and female workers. The main argument for this pertains to the early cases of the ECJ in

[175] This is when "the less favourable treatment is overtly based on a suspect characteristic" (D. Schiek, L. Waddington and M. Bell, *ibidem* 206-207).

[176] N. Bamforth, "The Changing Concept of Sex Discrimination" *The Modern Law Review* 56:6 (1993) 880.

[177] For further critiques, see: S. Fredman, "European Community Discrimination Law: A Critique" *Industrial Law Journal* 21:2 (June 1992).

[178] Case 177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* [1990] ECR I-03941, 10-12; Case C-32/93 *Webb v EMO* [1994] ECR I-1963; Case C-421/92 *Habermann-Beltermann v Arbeiterwohl- fahrt* [1994] ECRI-1657.

[179] M.H.S. Gijzen, *ibidem* 54.

[180] Case 79/99 *Schnorbus v Land Hessen* [2000] ECR 10997, Opinion of AG Jacobs 11008 (see also: Case C-506/06, *Sabine Mayr* v. *Bäckerei und Konditorei Gerhard Flöckner OHG*, [2008] ECR I-1017; Case C-116/06, *Sari Kiiski* v *Tampereen kaupunki*, [2007] ECR I-7643; Case *460/06 Paquay v Societé d'Architectes Hoet and Minne SPRL* [2007] *ECR I-8511*) (for further comments, see: K. Koldinska, "Case law of the European Court of Justice on Sex Discrimination 2006-2011" *Common Market Law Review* 48:5 (2011) 1620-1628) [for critiques of the Court's case law in this specific field, see: E. Caracciolo di Torella and P. Foubert, "Surrogacy, pregnancy and maternity rights: a missed opportunity for a more coherent regime of parental rights in the EU" *European Law Review* 40:1 (2015)].

[181] C. Tobler, *Indirect discrimination, op. cit.* 218 [see specifically: S. Burri, "Annex I legal aspects and direct and indirect discrimination", Research Paper for Gender in equality in employment and occupation – European Implementation Assessment (March 2015) 29].

[182] Joint cases 4/02 and 5/02 *Hilde Schönheit and Becker* [2003] ECR I-12575, 67.

[183] S. Fredman, *Discrimination Law* (Oxford: OUP Oxford, 2011) 177.

[184] M.H.S. Gijzen, *op. cit.* 57-58 (see also: C. Tobler, *Indirect discrimination, ibidem* 58 subs.).

which the court protected female part-time workers on the ground of indirect sex discrimination[185]. In practice the question whether the differentiation criterion between part-timers and full-timers triggers unlawful indirect discrimination is never simple[186].

In the *Seymour-Smith* case[187] the ECJ laid down two alternative tests in order for the national court to determine whether the disparate effect of the challenged measure amounts to indirect discrimination under EU law[188]. Either "the statistics available" should "indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years' employment required by the disputed rule", or they should reveal "a lesser but persistent and relatively constant disparity over a long period between men and women who satisfy the requirement of two years' employment"[189]. Moreover, a comparison between male and female employees who do not comply with the criterion *as well as* a comparison between male and female employees who do comply with the criterion should be undertaken[190]. Nevertheless the Court did not apply this principle in this very same case[191]. At any rate, only focusing on whether the criterion disadvantages more women and favours more men[192] seems like an over-simplified solution[193].

3.2. The intent of the employer or the prevailing criterion under Japanese case law

As for Japan's case law on gender equality, the issue of comparability is as crucial as in the EU. Since the development of the 1947 Labour Standards Act (LSA), Japanese companies have carefully organised their employment strategy in order to circumvent legal progress made in the field of gender equality at work[194]. Most notably the dual-track hiring system has institutionalised differential treatments between men and women in all stages

[185] Case 170/84 *Bilka v von Hartz* [1986] ECR 01607; Case 285/02 *Elsner-Lakeberg v Land Nordrhein-Westfalen* [2004] ECR I-05861; Case 96/80 *Jenkins* [1981] ECR 911; Case 300/06 *Voß v Land Berlin* [2007] ECR I-10573.

[186] See for example: Case 189/91 *Kirsammner-Hack* [1993] ECR I-06185, 24 (for an analysis of indirect sex discrimination cases relating to the treatment of part-time workers, see E. Ellis and P. Watson, *op. cit.* 149 subs.).

[187] Case 176/97 *Seymour-Smith* [1999] ECR I-00623 (C. Tobler, *Indirect discrimination*, *ibidem* 229).

[188] For comments on this case see: D. W. Vick, "Disparate Effects and Objective Justifications in Sex Discrimination Law" *Int. J. of Discrimination and the Law* 5:1 (2001) < http://journals.sagepub.com/doi/pdf/10.1177/135822910100500102 > accessed on March 25, 2018 [see also: C. Barnard and B. Hepple, "Indirect Discrimination: Interpreting *Seymour-Smith*" *The Cambridge Law Journal* 58:2 (1999)].

[189] Case 176/97 *Seymour-Smith* [1999] ECR I-00623, 60-61 (for comments on this test, see: C. Tobler, *Indirect discrimination*, *ibidem* 230 subs.).

[190] M.H.S. Gijzen, *ibidem* 81 (see also: C. Barnard & B. Hepple, "Substantive Equality" *The Cambridge Law Journal* 59:3 (2000) 571) Case 176/97 *Seymour-Smith* [1999] ECR I-00623 (see: C. Tobler, *Indirect discrimination*, *ibidem* 233).

[191] It only compared the pools of workers comp.lying with the criterion (Case 176/97 *Seymour-Smith* [1999] ECR I-00623, 63)

[192] C. Tobler, *Indirect discrimination*, *op. cit.* 233.

[193] Case 249/97 *Gruber v Silhouette International Schmied* [1999] ECR I-05295 (see also: Case 313/02 *Wippel* [2004] I-09483, 61-62).

[194] M. L. Starich, *op. cit.* 554.

of employment, and primarily in promotions, vocational training, and wages[195]. When sufficiently sophisticated and apparently neutral, this system prevents comparison between the situation of female employees and that of their male counterparts. With the enactment of the EEOL in 1985, some argue that the system has not been reduced but was actually reinforced and adapted to the new legal framework[196]. Most large companies would make both tracks available for men and women[197], but make the management track conditional to outwardly neutral conditions with which most Japanese women would not be likely to comply, i.e. overtime work and transfer requirements[198]. Besides this type of indirect discrimination case, the dual-track hiring system has also been a source of direct discrimination which Japanese courts seeks to set aside. For example, in the *Kanematsu* case, the dual track hiring system put into place by the company was an artificial artefact hiding discriminatory treatment in pay and promotions between male and female employees performing the same work. This concealed direct discrimination was declared unlawful by the Tokyo High Court and this was upheld by the Japanese Supreme Court[199]. Nonetheless, Japanese courts have usually legitimised the dual-track hiring system on the ground that it has generally been established before the enactment of the EEOL and that workers from the clerical track are given opportunities to change track by acquiring experience[200]. In Japan, discrimination on the ground of pregnancy and maternity has been regarded as a distinct issue from the other grounds of discrimination. The inherent insolubility of the comparability issue for these cases justified the adoption of a distinct article devoted to discriminatory treatments on the ground of marriage, pregnancy or childbirth (Article 9)[201]. Article 9[202] focuses on dismissal but prevents also employers from giving "disadvantageous treatment by reason of pregnancy, childbirth" or maternity leave (essentially) to their fe-

[195] K. Kamio Knapp, *op. cit.* 123.

[196] C. F. Goodman, *op. cit.* 146.

[197] For detailed statistics and comments see: L. Parkinson, *op. cit.* 625 and 646-647.

[198] C. F. Goodman, *ibidem* 146.

[199] Tokyo High Ct., Jan. 31, 2008, 959 *Rōdō Hanrei* 85 < http://ajwrc.org/jp/modules/bulletin/index.php?page=article&storyid=500 > accessed on 4 November 2018 [K. Minamino, *op. cit.* 68: "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") 2009].

[200] K. Nemoto, "When culture resists progress," *op. cit.* 156.

[201] H. Nakakubo, *op. cit.* 14. It is argued that the *Tōhō Gakuen* Case (Supreme Court (1st petty bench) Dec. 4, 2003, 862 *Rōdō Hanrei* 14) was the leading case from which this reform was inspired (S. Yamada, *op. cit.* 14).

[202] Article 9: "(1) Employers shall not stipulate marriage, pregnancy or childbirth as a reason for retirement of women workers.
(2) Employers shall not dismiss women workers for marriage.
(3) Employers shall not dismiss or give disadvantageous treatment to women workers by reason of pregnancy, childbirth, or for requesting absence from work as prescribed in Article 65, paragraph 1, of the Labour Standards Act (Act No. 49 of 1947) or having taken absence from work as prescribed in the same Article, paragraph 1 or 2, of the same act, or by other reasons relating to pregnancy, childbirth as provided by Ordinance of the Ministry of Health, Labour and Welfare"

male employees. This entails that this type of discriminatory treatment is to be considered as a separate issue from the case of direct discrimination on the ground of sex prohibited under Articles 5 and 6. Interestingly, a 2006 statistical study of the Equal Employment Opportunity Offices of Prefectural Labour Bureaus revealed that 90,8% of cases relating to dismissal and retirement were by reason of pregnancy or childbirth[203]. While this may reveal the Japanese companies' lack of commitment to respect the rights of their employees in relation to pregnancy and childbirth, it might also indicate that these are issues regarding which Japanese female workers are most aware of being entitled to protection. Even though discrimination upon marriage can occur against men too, the article only provides women with this protection, which expresses the legislature's attempt to acknowledge what it recognised as the historically discriminated group.

When it comes to indirect discrimination, as the Japanese legislature adopted a practical approach under which a listed number of criteria are susceptible to trigger discrimination, one could expect that the Japanese courts would presume the use of these criteria to be unlawfully discriminatory without regard for the intent of the employer. That, however, would mean forgetting the general reluctance of Japanese courts to address the core issue of indirect sex discrimination, that is, the strict *social* segregation between male and female workers. Accordingly, the courts have generally recognised the existence of unlawful indirect discrimination when it constituted a rather blatant attempt of the employer to discriminate their female employees. In this regard, the EEOL and its enforcement Ordinance do not seem to bring about any substantial change. This could pertain to the very inadequacy of the EEOL's narrow approach. With regard to the formulation of the different provisions, there are two specific hurdles to be highlighted. Primarily the absence of a generic definition of indirect discrimination represents a fundamental obstacle to the judicial expansion of the list of indirectly discriminatory criteria. As Japanese law currently stands, the courts are not provided with any legal marker in order to distinguish what constitutes indirect discrimination from what does not[204]. However a definition had emerged from the discussions of the labour policy council's subcommittee on equal employment[205] according to which indirect discrimination occurs "when rules, standards[,] and customs appear facially to be gender neutral but one sex is receiving substantially disadvantageous treatment, and

(4) Dismissal of women workers who are pregnant or in the first year after childbirth shall be void. However, this shall not apply in the event that the employers prove that dismissals are not by reasons prescribed in the preceding paragraph".

[203] H. Nakakubo, *op. cit.* 18.

[204] K. T. Geraghty, *op. cit.* 522-523.

[205] This governmental body is in charge of investigating and deliberating on the enforcement and required amendments of Japanese law on gender equality [see: K. Nakamura, "The Process of Formulating Policy in Labor Matters: Derailment? Or Transformation?" *Japan Labor Review* 6:2 (Spring, 2009)].

that treatment has no relationship to job duties and no legal or rational basis"[206]. This definition was rejected under the pressure exercised by companies that deemed the general concept of indirect discrimination to entail too much legal uncertainty[207]. This being said, it has also been argued that Japanese courts only regard the EEOL "as merely a statement of policy that illustrates the current social trends"[208] with the fundamental legal tools being instead Articles 90 and 709 of the Civil Code[209]. Thus there can still be expectations that the courts will extend the scope of application of the latter articles in the light of the new legal trend instigated under the EEOL[210].

The second semantic critique is addressed to the enforcing Ordinance[211]. Under Article 2, the second criterion represents a limit to the manner in which the dual track hiring system can be put into place while it actually legitimises the system itself. It is probably an important disappointment for those who expected the system to be regarded as unlawful altogether. As a matter of fact, not only are there other indirectly discriminatory criteria at the basis of the system[212], but it is also particularly difficult for an employee to change track in practice even though they are formally allowed to do so by their employer[213]. Specifically, in light of the guidelines provided by the Ministry, the system put into place with regard to indirect discrimination provides for protection only to those cases where it is obvious that the employer established a "meaningless category to disguise sex discrimination"[214]. It does not seem to address the inherent discriminatory nature of the dual track system when the separation of tracks is "genuine"[215].

One could argue that this reform only consisted in the endorsement of a strict interpretation of the Japanese courts case law with regard to the dual track hiring system. Two important cases are to be highlighted in this regard. First of all, the *Nomura* case[216] is considered to be the earliest attempt of the Japanese judiciary to defy the dual track hiring system. This 2002 case concerned female employees who had been discriminated against

[206] Rōdō Seisaku Shingikai Koyō Kintō Bunkakai [Labor Policy Council's Subcommittee on Equal Employment], Order of Proceedings of the 52nd Session (October 7, 2005) 1 < http://www.mhlw.go.jp/shingi/2005/10/s1007-5.html > accessed on 21 March 2018

[207] H. Nakakubo, *op. cit.* 15.

[208] M. L. Starich, *op. cit.* 567 (see specifically: Tokyo D. Ct., Dec. 4, 1986, *The Japan Iron and Steel Federation* case, 37-6 *Rōdō Kankei Minji Saibanreishū* 512, *translated in* C. J. Milhaupt, et al., *op. cit.*).

[209] See footnotes 123 and 134.

[210] R. Sakuraba, *op. cit.* 190 and 200.

[211] Japanese Ordinance for Enforcement of the Act on Ensuring Equal Opportunity for and Treatment of Men and Women in Employment [Ordinance n° 2] 2 January 1986 < http://www.japaneselawtranslation.go.jp/law/detail_download/?ff=09&id=2318 > accessed on 15 August 2018.

[212] S. Yamada, *op. cit.* 13-14.

[213] K. Nemoto, "When culture resists progress," *op. cit.* 162.

[214] R. Sakuraba, *ibidem* 190.

[215] R. Sakuraba, *ibidem* 190.

[216] Tokyo D. Ct., Feb. 20, 2002, 822 *Rōdō Hanrei* 13.

in the original hiring process under the dual track hiring system, which entailed discriminatory treatments in promotion and wage throughout their career[217]. Importantly, one must note that the first reform of the EEOL (1997) transformed the employers' mere invitation not to discriminate on the ground of sex into a legally binding obligation[218]. But whilst this reform instigated a relative shift in the Japanese case law regarding the matter, it did not trigger any significant progress in indirect discrimination cases. The *Nomura* case perfectly exemplifies the mixed picture of this reform. In this case, even though the plaintiffs had been hired in the 1950s and 1960s under the dual track hiring system, thus before the 1997 amendment entered into force (i.e. on April 1, 1999), the Court held that the discriminatory effects of the hiring process persisted hitherto. The plaintiffs were thus to be compensated for the discriminatory treatment in wages and promotion suffered after April 1, 1999. It has been advanced that this date constitutes a pivotal event with regard to the legality of the dual-track hiring system[219]. However, when interpreted strictly, the judgment reveals that the court exclusively targets the situation where the employer uses the dual track hiring system in order to purposely discriminate their female employees[220]. This strict interpretation, which avoids jeopardising the whole dual-track hiring system itself only sanctioning its blatant abuses, has been confirmed in the *Sumitomo Metal* case[221]. In this 2005 case, the court recognised the track-transfer policy of the company to be indirectly discriminatory as the unclear promotion requirements had a disproportionately detrimental effect on female employees[222]. The court was provided with clear proof and again focused on the treatment in promotion but not on the hiring process itself. Essentially, despite the fact the notion of intent was not included as a determinant factor for the identification of indirect discrimination in the 2006 reform, it is expected to remain a fundamental element of the courts' considerations regarding the matter, as opposed to EU indirect discrimination law.

[217] S. Yamada, *ibidem* 11.

[218] S. Yamada, *ibidem* 10

[219] S. Yamada, *ibidem* 11 (for critical details see: K. Nemoto, *Too Few Women*, *op. cit.* 59-60).

[220] K. T. Geraghty, *op. cit.* 519.

[221] Osaka D. Ct., Mar. 28, 2005, *Sumitomo Metal Industries* case, 898 *Rōdō Hanrei* 40.

[222] M. L. Starich, *op. cit.* 567.

4. The necessary limitations to the prohibition of gender discrimination

4.1. Direct discrimination: EU law exceptions and Japanese judicial conservatism

Under EU law, a specific system of exceptions and justification to gender equality has been construed on the basis of the dichotomy made between direct and indirect discrimination. While indirect discrimination is open to justification on a case-by-case analysis, direct discrimination can only be regarded as justified when it falls within one exception expressly provided by EU legislation[223]. Despite the fact that there is no clear-cut distinction between justification and exceptions, the former "can be defined as the open-ended possibility for a perpetrator of direct discrimination to propose a good reason why their actions should not be treated as unlawful", while the latter "are specific circumstances identified in law where acts that would otherwise be unlawful direct discrimination will not be so treated"[224]. The reason why gender equality law does not allow for direct discrimination to be justified on a case-by-case analysis but only on the ground of express exceptions is best explained as follows: "[i]f justifications of direct discrimination is permitted, then courts will be drawn into the thorny task of deciding when stereotypes should be upheld. By excluding the justification of direct discrimination, the law becomes a potent weapon to deconstruct such stereotypes"[225] [226].

Drawing an accurate picture of the Japanese legal framework that delineates the prohibition of direct discrimination reveals to be a much more complex enterprise. The reason for this can be found in the Japanese case law. While the ECJ envisages gender equality as a system based on a permanent and universal principle to which it attaches exceptions, Japanese courts tend to adopt a sociological approach for determining what it means to be equal according to society at a given time, without substantiating the equality principle with any permanent nature. As already explained, this latter approach leads Japanese courts to focus heavily on the time at which the differential treatment occurred in order to determine whether it is tantamount to unlawful discrimination. Despite this important conceptual difference, two general fields of exceptions can be highlighted in both the European and the Japanese legal frameworks devoted to gender equality. First, both recognise that the particular characteristics of an occupation can justify that a man or a woman is to be preferred in the hiring process. Second, the EU and Japan tend to allow for differen-

[223] M.H.S. Gijzen, *op. cit.* 54 (see Case 147/95 *Dimossia Epicheirissi v Efthimios Evrenopoulos* [1997] ECR I-02057, 25-9).

[224] D. Schiek, L. Waddington and M. Bell, *op. cit.* 270.

[225] D. Schiek, L. Waddington and M. Bell, *ibidem* 270.

[226] See for example: Case 273/97 *Sirdar v Army Board and Secretary of State for Defence* [1999] ECR I-07403 (see: E. Ellis and P. Watson, *op. cit.* 389-390).

tial treatment between men and women when it is justified by characteristics specific to women, precisely and essentially on the ground of pregnancy and maternity. Nevertheless, the important conceptual difference between both judicial approaches overshadows these common characteristics, as it will be detailed in the following paragraphs.

First of all, under EU law the exception of 'genuine and determining occupational requirement' included in the Recast Directive under Article 14(2)[227] enables Member States to justify situations in which it is deemed necessary for the job to be performed by a man rather than a woman (and vice versa). One must note that this exception only holds for the hiring and training processes, as expressed in the article. National courts and the ECJ have a central role to play in determining the practical boundaries of this exception[228]. In this regard, there are three yardsticks on which the ECJ has put emphasis through its case law. Primarily, the Court has screened out national measures adopted under the exception rule that did not comply with the proportionality test. As a matter of fact, it is apparent from the wording and spirit of Article 14(2) that categories encompassing a broad number of occupations cannot fall within the scope of the exception[229] and that a case-by-case analysis must be preferred[230]. For example, in *Commission v UK* the ECJ held that excluding from the field of application of the then Equal Treatment Directive private households and enterprises counting no more than five employees from the gender equality rule went "beyond the objective which may be lawfully pursued within the framework of Article 2(2) [now Article 14(2)] of directive"[231]. But Member States are given a certain room of manoeuvre, especially when the genuine and determining occupation requirement is related to public safety[232]. Secondly, the ECJ assesses whether the national exception has been instituted with enough transparency[233]. The principle of transparency goes hand in hand with gender equality in hiring since the person who has been refused the position must be informed of the reasons for this refusal in order to guarantee an effective protection against discrimination[234]. Thirdly, the ECJ also stresses the important role that the "social

[227] Council Directive 2006/54/CE on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] *OJL 204*.

[228] D. Schiek, L. Waddington and M. Bell, *op. cit.* 283.

[229] D. Schiek, L. Waddington and M. Bell, *ibidem* 276-278.

[230] E. Ellis and P. Watson, *op. cit.* 382-383.

[231] Case 165/82 *Commission v UK* [1983] ECR 3431, 3448 (See also: Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651).

[232] Where the ECJ recognised this degree of discretion: Case 273/97 *Sirdar v Army Board and Secretary of State for defence* [1999] ECR I-07403, 7442; Where the court did not recognise it: Case 285/98 *Kreil v Bundesrepublik Deutschland* [2000] ECR I-00069, 27.

[233] Case 318/86 *Commission v France* [1988] ECR 3559, 21 (where the Court refused the French argument according to which the national police force was only to be composed of men since its members were at any time to be able to use force in order to deter potential troublemakers, for further comments see E. Ellis and P. Watson, *ibidem* 388 and D. Schiek, L. Waddington and M. Bell, *ibidem* 285).

[234] E. Ellis and P. Watson, *ibidem* 389.

developments" play in the assessment of the disputed exception[235]. Interestingly, it will be seen that Japanese courts heavily rely on such type of argument in order to justify derogation from the gender equality principle.

As for Japan, the EEOL does not provide for such kind of provision on which Japanese courts could ground the appropriate limits to the ban on direct discrimination. Nevertheless, relying on Article 90 of the Japanese Civil Code in order to address direct discrimination has had a tremendous impact on how would the courts welcome justification to discriminatory treatment. This is best explained by K. Minamino, who argues that Japanese courts, when adjudicating gender equality cases, have considered working women not as individuals but through the prism of their *social* role for which they are responsible as a group[236]. Specifically, the practice of employment tracks that finds deep roots in the Japanese labour culture has most of the time been held lawful on the ground that it was part of what constituted public order and good morals at the time the practice was put into place. The *Mitsubishi Plastics* case best expressed this judicial trend under which differential treatment was held to be lawful when consistent with the then existing social consensus[237]. The *Sumitomo Electric Industries* case[238] is a more recent but as emblematic illustration of how Japanese courts tend to excuse the dual track hiring system on the very same legal ground with which they tackle discriminatory treatment. In this case, the Osaka District Court recognised that the female and male job applicants originally had the same qualifications but received differential treatment in hiring, training, transfers, promotions, meeting participation and business travel[239], but did not sanction this discrimination on the ground that this unconstitutionality was not a violation Article 90 of the Japanese Civil Code[240]. Even though a compromise was reached in December 2003 under the recommendation of the Osaka Court of Appeal, and despite the fact that other similar cases have subsequently been adjudicated in favour of the claimants[241], these cases do not seem

[235] See for example: Case 165/82 *Commission v UK* [1983] ECR 03431, 3449.

[236] K. Minamino, *op. cit.* 54-55.

[237] L. Parkinson, *op. cit.* 657-658 (Supreme Court, Dec. 12, 1973, *Mitsubishi Plastics Case*, 27-11 *Saikōsaibansho Minji Hanreishū* 1536).

[238] Osaka D. Ct., Jul. 31, 2000, *Sumitomo Electric Industries* case, 792 *Rōdō Hanrei* 48.

[239] K. Nemoto, *Too Few Women*, *op. cit.* 58.

[240] In 2000, the Osaka District 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. (…) [W]omen (…) tended to set a limit of working until marriage or childbirth and quit after a short time of employment. (…) 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 (emphasis added)" (Osaka D. Ct. Jul. 31, 2000, 792 *Rōdō Hanrei* 48).

[241] Tokyo D. Ct., Feb. 20, 2002, *Nomura* case, 822 *Rōdō Hanrei* 13; Osaka D. Ct., Mar. 28, 2005, *Sumitomo Metal Industries* case, 898 *Rōdō Hanrei* 40 (as far as it concerned promotions) (for comments see: M. L. Starich, *op. cit.* 555); Tokyo High Ct., Jan. 31, 2008, *Kanematsu* case, 959 *Rōdō Hanrei* 85.

to have set a "precedent"[242]. In 2015 the Japanese Supreme Court rejected the appeal formulated by a woman whose case[243] concerned direct discrimination in upgrading and promotion[244]. In this case, the claimant argued that her employer had held a biased judgment in assessing her performance in team working which prevented her from accessing management positions[245]. But her accusations were held to be unfounded despite statistics supporting her claim[246].

Thus, just as the ECJ, Japanese courts take into account the social consensus in order to determine whether is it justifiable that the occupation is given to a man rather than a woman (and vice versa) but the extent to which they do so bears no relation with that of the European judicial practice. Japanese courts are less restrictive and consider the social consensus to encompass more factors than those taken into account by the ECJ. There are three elements that seem to exert most influence on what the courts consider to be the social consensus. First of all, Japanese courts focus essentially on the usual hiring practices of companies[247] and thereby exempt themselves, on the ground of freedom of contract, from reviewing these practices[248]. Secondly, the legislative progress made in the field has pushed Japanese courts to adapt their case law that could no longer be legally sustained, especially in the light of the EEOL[249] with the best illustration of this being the *Nomura* case as explained in the next part. Finally, one cannot deny that the international community has always played a fundamental role in the matter. As a matter of fact, K. Nemoto argues that several cases have been settled in favour of the claimants thanks to the pressure of severe international criticism[250].

Second, Article 28(1) of the Recast Directive[251] contains a specific provision allowing for differential treatment to be applied to protect women in relation to pregnancy and maternity. As already mentioned, the ECJ has generally provided for a broad interpretation

[242] The Japanese judiciary is not bound by the principle of *stare decisis* [see: C. Martin, "Glimmers of Hope: The Evolution of Equality Rights Doctrine in Japanese Courts from a Comparative Perspective", *Duke J. Comp. & Int'l L.* 20 (2010) 219].

[243] Hiroshima High Ct., July 18, 2013, 2188 *Rōdō Keizai Hanrei Sokuhō* 3.

[244] It was rejected on March 11, 2015 [T. Kanno, "Study on Legal Issues Involving Intermediate Age Brackets: Aiming to Facilitate Work-Life Balance", *Japan Labour Review* 13:1 (2016) 81].

[245] T. Kanno, *ibidem* 81-82.

[246] K. Minamino, *op. cit.* 68-71 (see also: T. Kanno, *ibidem* note 18).

[247] For commentaries on the change in employment practices of the Japanese companies, see: T. Hamada, "Japanese Company's Cultural Shift for Gender Equality at Work" *Global Economic Review* 47:1 (2018) (for another standpoint, see: K. Nemoto "When culture resists progress," *op. cit.*).

[248] Tokyo D. Ct., Dec. 4, 1986, *The Japan Iron and Steel Federation* case, 37-6 *Rōdō Kankei Minji Saibanreishū* 512, *translated in* C. J. Milhaupt et al., *op. cit.* (as for the EU, for the question whether fundamental rights such as freedom of association or the right privacy can also constitute valid grounds of exception to the ban on direct discrimination, see D. Schiek, L. Waddington and M. Bell, *op. cit.* 289-294).

[249] S. Yamada, *op. cit.* 18-19 (see also: L. Parkinson, *op. cit.* 660) (but see another view point: E. Mun, *op. cit.* 1409-1437).

[250] N. Nemoto, *Too Few Women*, *op. cit.* 58-60.

[251] Council Directive 2006/54/CE on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] *OJL 204*.

of this provision. In *Commission v Italy*[252] the Court did not censure an Italian legislation granting to certain adoptive mothers specific maternity rights that were not equally open to adoptive men[253]. Specifically, in the *Johnson* case the Court defines Article 28(1) as to protect both women's biological conditions related to pregnancy and maternity, and the special relationship between the mother and her child[254]. In the same vein, in the *Hofmann* case[255] the Court added the term motherhood to its semantic field regarding the interpretation of this provision that, let us remember, employs the word 'maternity'. An excessive emphasis on women's rights on the ground of motherhood might sideline fathers who have an equally important role to play in parenting[256]. Notably, the Court mitigated its case law on the matter in the *Lommers* case[257] where it held that preferential treatment in favour of women with regard to parental leave should not be absolute and automatic. One must also remember that a national act that seeks to protect women from risks to which both men and women were exposed cannot be tolerated[258]. In other words, the Court is required to grant this protection when necessary, i.e. when the case is connected "in some fairly close but unspecified way with the process of childbearing"[259]. Despite this latter remark, one could still follow the viewpoint that the ECJ case law still promotes a traditional and restrictive conception of motherhood under which women are considered the primary caregivers of new-borns[260], thereby not only relegating women's career prospects but also discriminating male workers[261].

When dealing with gender equality, the Japanese legislature seems to implement a more prudent approach as it generally lists specific hypothesises that fall within the scope of a rule rather than enacting a general provision left to the discretion of the courts. Not only is it the case for indirect discrimination, but it was also the approach adopted for regulating specific protection owed to workingwomen specifically. As one might guess, this led the legislature to adapt the provisions of the LSA throughout the changes in political,

[252] Case 163/82 *Commission v Italy* [1983] ECR 03273, 3288.

[253] Case 163/82 *Commission v Italy* [1983] ECR 03273.

[254] Case 410/92 *Johnson v Chief Adjudication Officer* [1994] ECR I-05483, 44 and 45.

[255] Case 184/83 *Hofmann v barmer* [1984] ECR 03047, 26.

[256] C. McGlynn "Ideologies of motherhood," *op. cit.* 29 [for further comments, see: T. Harvey, "EC law on justifications for sex discrimination in working life", in R. Blanpain (ed.) *Collective Bargaining, Discrimination, Social Security and European Integration* (Kluwer 2003) 123].

[257] Case 476/99 *Lommers* [2002] ECR I-02891, 47.

[258] Case 312/86 *Commission v France* [1988] ECR 6315, 6336 (see also: Case 366/99 *Griesmar* [2001] ECR I-9383; Case 218/98 *Abdoulaye v Renault SA* [1999] ECR I-5723).

[259] Ellis and P. Watson, *op. cit.* 399.

[260] A. Forna, *Mother of all Myths – How Society Moulds and Constrains Mothers* (London: Harper Collins, 1998).

[261] C. McGlynn, "European Union Family Values," *op. cit.*; A. Glasner, "Gender and Europe: Cultural and Structural Impediments to Change" in J. Bailey (ed.) *Social Europe* 2nd ed. (London: Longman, 1998); J. Millar and A. Warman, *Family Obligations in Europe* (London: Routledge, 1996).

social and economic considerations regarding the role of women in the labour force[262]. Originally, the provisions of the LSA concerning women at work were overly protective as they excluded women from night and overtime work, and from positions that were considered "dangerous or injurious"[263]. Throughout the subsequent amendment of the EEOL, the legislature modified these provisions for finally limiting them to the protection of "expectant or nursing mothers"[264] with an additional provision regarding "work during menstrual periods"[265]. With regard to childbirth and childcare leave, the challenge is different than that dealt with by the ECJ. In overall, Japanese law does not enshrine exceptionally larger advantages to women than to men in the matter. Notably Article 65 of the LSA *compels* female workers to take a childbirth leave of minimum 8 weeks, or 6 weeks under their request and the approval of a doctor. Interestingly enough, under Japan's Childcare and Family Care Leave Act employers cannot reject an application for childcare leave duly formulated by their employees and this right is the same for both men and women[266]. Nevertheless, the real hurdle in the matter lays in the fact that despite a relatively fair and protective legal framework, the significant gender wage gap almost always leads women to make the rational choice to take the childcare leave instead of their male partner[267]. This has given rise to the important issue of discriminatory reassignment that Japanese courts have addressed to a certain extent[268]. For example, the Supreme Court held in 2014 that "demotion accompanying a transfer to lighter work during pregnancy under Article 65, §3 of the Labor Standards Act in principle violated [Article 9, §3 of the EEOL] [269]"[270].

4.2. Indirect discrimination: justification under EU law and externalisation in Japanese employment practices

The ECJ has gone relatively far in the implementation of the indirect discrimination principle, and this necessarily required the elaboration of legal barriers to prevent the principle from producing abusive effects. Once the claimant has proven the existence of indirect

[262] For an evolution of the provision, see J. 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) 134 (see also: H. Nakakubo, op. cit. 25-26).

[263] H. Nakakubo, *ibidem* 25.

[264] Articles 64.2 – 67 LSA [1947].

[265] Article 68 [1947].

[266] Childcare and Family Care Leave Act [1991].

[267] A. Okuyama, H. Ikezoe, T. Kawada, et al., "Comparative Law Study on Work-Life Balance <Final Report> Summary", *JILPT Research* 151 (2011) 7.

[268] For details and commentaries, see: T. Kanno, *op. cit.* 74-82 [see also: M. Okutsu, "Women's Reemployment after the Period of their Child Rearing – Issues and Solutions (Summary)" *JIPLT Research Report* 96 (2007-2008)].

[269] "Employers shall not dismiss or give disadvantageous treatment to women workers by reason of pregnancy, childbirth, or for requesting absence from work as prescribed in Article 65, paragraph 1, of the Labor Standards Act (Act No. 49 of 1947) or having taken absence from work as prescribed in the same Article, paragraph 1 or 2, of the same act, or by other reasons relating to pregnancy, childbirth as provided by Ordinance of the Ministry of Health, Labor and Welfare".

[270] T. Kanno, *ibidem* 76.

discrimination, the defendant Member States or company is given the possibility to objectively justify its discriminatory practices under certain conditions first developed under the ECJ case law then summarised in Article 2.1(b) of the Recast Directive[271]. The ECJ developed important legal parameters based on which national courts assess the alleged justification claimed before them. In the *Bilka* case[272], the ECJ set a strict standard of scrutiny according to which the employer has to ground their justification on a legitimate aim unrelated to sex[273]. This aim must consist in a "real need on the part of the undertaking"[274]. Under the test, the measure pursuing this aim has to be "necessary", that is, the measure has to achieve the aim in question. Finally, the measure must be "proportionate" which implied that there cannot exist another means as efficient but less detrimental to the rights of the disadvantaged sex[275].

In the *Rinner-Kühne* case[276], the ECJ articulated a similar test to that of *Bilka* for the assessment of the Member States' justification to their discriminatory measures. Nevertheless, the Court subsequently softened the stringency of the test compared to that applied to employers[277]. Specifically, in the *Seymour-Smith* case[278] the ECJ changed its habitual formula and referred to a test of reasonableness[279]. This can be explained by the fact that in order to achieve "the aims of their employment and social policy" Members States are granted a relatively large margin of discretion[280].

When the piece of legislation being challenged relates to social security policy, some argue that the ECJ tends to relax even more the scrutiny test. As a matter of fact, with regard to this area of competence the Court blurs the three-step analysis of the proportionality test and summarises the assessment as follow: "in exercising its competence, the national legislature was *reasonably* entitled to consider that the legislation in question was necessary in order to achieve that aim (emphasis added)"[281]. Social security falls within the

[271] "[U]nless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary" (Council Directive 2006/54/CE on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] *OJL 204*).

[272] Case 170/84 *Bilka v von Hartz* [1986] ECR 01607.

[273] Case 170/84 *Bilka v von Hartz* [1986] ECR 01607, 30.

[274] Case 170/84 *Bilka*, 36.

[275] Case 170/84 *Bilka*, 35-37 (see also: Case 196/02 *Nikoloudi* [2005] ECR I-01789, 47-48).

[276] Case 171/88 *Rinner-Kühne* [1989] ECR 02743, 14.

[277] C. Tobler, *Indirect discrimination*, *op. cit.* 209; D. Schiek, L. Waddington and M. Bell, *op. cit.* 444; T. K. Hervey, "Thirty years," *op. cit.* 409-410.

[278] Case 176/97 *Seymour-Smith* [1999] ECR I-00623.

[279] Case 176/97 *Seymour-Smith* [1999] ECR I-00623, 77.

[280] Unlike Member States, employers cannot ground the justification for their discriminatory practices on social policy concerns (Case 281/97 *Krüger* [1999] ECR I-05127, 28-29) (see also: Case 317/93 *Nolte* [1995] ECR I-04625, 33).

[281] Case 317/93 *Nolte* [1995] ECR I-04625, 34 and 36.

well-guarded purview of Member States' competences, which the Court has recognised by leaving to Member States a larger degree of freedom[282].

While some see in this irregular case law a lack of consistency in the Court's commitment to protect gender equality[283], it could be said that the logic of the assessment remains the same[284] but that the stringency of the test is necessarily adapted to the different levels of legal integration under EU law. In any event, the ultimate decision with regard to the admissibility of the justification lies in national courts[285]. But this did not prevent the ECJ from addressing judicial comments to specific types of justification. For example, "budgetary considerations […] cannot themselves constitute the aim pursued by that policy and therefore justify discrimination against one of the sexes"[286].

Under the Japanese case law, the intention of the employer remains a key factor in determining whether his practice consists in unlawful indirect discrimination. Given this observation, it could be argued that where it is not clear whether the employer *sought* to discriminate their employees on the ground of sex by using one of the Ordinance's criteria, they will succeed in justifying their practice with economic- or managerial-based arguments as provided under Article 7 of EEOL. Nothing indicates that courts will change the low level of scrutiny that they had initially implemented with regard to indirect discrimination practices. Fundamentally, the impact of the Ordinance is highly dependent on the courts' willingness to strengthen this level of scrutiny[287]. Furthermore, given that the ban on indirect discrimination is limited to specific cases listed under the law, companies tend to develop different stratagems in order to fall outside its scope of ambit.

In Japan, the use of the dual track hiring system is in decline[288], or at least is not rising as much as during the years following the enactment of the EEOL[289], specifically in the Japanese corporation world[290]. Also the number of female workers entering the managerial track has slightly but continually increased[291]. This might be a sign that the Japanese legal reforms and case law regarding the dual track hiring system is paying off and curbing the companies' likelihood to rely on such employment practice. But it might also be the

[282] Case 187/00 *Helga Kutz-Bauer v Freie und Hansestadt Hamburg* [2003] ECR I-02741, 49 (see also: Case 196/98 *Hepple* [2000] ECR I-03701, 26-29).

[283] C. Barnard, B. Hepple, "Indirect discrimination," *op. cit.* 409 [see also: K. Hervey, "EC Law on Justification for Sex Discrimination in Working Life" Paper for the VII European Regional Congress of Labour Law and Social Security (Stokholm University, 2002), 122].

[284] C. Tobler, *Indirect discrimination*, *op. cit.* 210-211.

[285] Case 170/84 *Bilka v von Hartz* [1986] ECR 01607, 36.

[286] Case 343/92 *Roks* [1994] ECR I-00571, 35-36 (see also: Case 226/98 *Jørgensen* [2000] ECR I-02447, 39).

[287] R. Sakuraba, *op. cit.* 190.

[288] C. Weathers "In search of Strategic Partners" *op. cit.* 82.

[289] A. Gordon, "New and Enduring Dual Structures of Employment in Japan: The Rise of Non-Regular Labor, 1980s–2010s" *Social Science Japan Journal* 20:1 (2017) 26.

[290] C. Weathers, "Equal Opportunity for Japanese Women – What Progress?" *The Asia-Pacific Journal* 3:10 (2005) 4.

[291] A. Gordon, *ibidem* 28.

sign that companies develop alternative means to outsource the problem and avoid the risk of prosecution. The main substitute to the dual track hiring system is the employment of non-regular workers, which has noticeably risen throughout the lifespan of the EEOL and its subsequent amendments[292]. It is argued that the rise in both male and female non-regular workers finds its origins in the liberalisation of the Japanese employment market in the years 1980s[293]. If the unstable and disadvantageous work conditions of Japanese non-regular workers constitute a specific issue to be addressed as a whole, the fact they may trigger indirect discrimination against women falls into the scope of this paper. In this regard, one must note the odd timing correlation between the enactment of both the 1985 EEOL and the 1985 worker-dispatching law[294] that "authorised private temporary employment agencies for the first time in the post-war era and enabled their use for hiring women for clerical positions while providing little job security"[295]. According to some, it is no mere coincidence, as the Dispatching-worker Law enabled companies to circumvent the protection against discriminatory dismissals and reassignment under the EEOL[296]. Additionally, 1998 is also seen as a landmark year for companies' widespread and increasing employment of female non-regular workers, "as an intensified cost-cutting and the liberalisation of temporary worker and other labour regulations brought increased use of non-regular workers"[297].

One third of Japanese workers officially employed under part-time contracts work the same number of working hours as full-timers[298]. If part-time workers formally benefit from the same job security rights as full-time workers[299], Japanese courts tend to protect more

[292] A. Gordon, *ibidem* 15 subs. (see also: C. Weathers "In search of Strategic Partners" *ibidem*, 82).

[293] It has been argued that this liberalisation ensuing the employment of non-regular workers constituted a viable solution for coping with the then economic recession (G. D. Blind and S. Lottantivon Mandach "Decades not Lost, but Won: Increased Employment, Higher Wages, and More Equal Opportunities in the Japanese Labour Market" *Social Science Japan Journal* 18:1 (2015) 63–88).

[294] Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers [Act n°88] 5th July 1985 < http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=04&re=01 > accessed on 8 Sept. 2018.

[295] D. H. Foote, *op. cit.* 674 (see also: T. Ishii, "Employment conditions and emerging labour movements of non-regular workers in Japan" *Asia Pacific Journal of Human Resources* (March 16, 2018 4).

[296] D. H. Foote, *ibidem* 675 [see also: R. Yamakawa, "Labour law Reform in Japan: a response to recent socio-economic changes", in *The American Journal of Comparative Law* 49:4 (autumn 2001), 641: "Although the former Worker Dispatching Law limited worker dispatching businesses to professional jobs, employers demanded the relaxation of this limitation. However, there was a strong concern from the labor side that worker dispatching may erode the employment of regular workers. In order to avoid such erosion, the amendment specified that worker dispatching should only be available as a temporary measure"]. From another standpoint, the employment of dispatched workers enabled companies to preserve their regular employees as non-regular workers are usually seen as a buffer against financial and economic fluctuations (see: T. Ishii, *ibidem* 3; K. Nemoto, *Too Few Women*, *op. cit.* 36).

[297] C. Weathers "In search of Strategic Partners" *op. cit.* 83 (see also: C. Weathers, "Equal Opportunity" *op. cit.* 4.

[298] M. Osawa, M. J. Kim and J. Kingston, "Precarious Work in Japan" *American Behavioral Scientist* 57:3 (2013) 314.

[299] C. Weathers, "Equal Opportunity", *ibidem* 4 [for more details with regard to the regulation of non-regular work in Japan, see: F.L. Cooke and R. Brown, *The regulation of non-standard forms of employment in China, Japan and the Republic of Korea* (Geneva ILO 2015)].

forcefully the rights of full-time workers[300]. Yet the courts' readiness to judicial activism represents the only chance for indirect sex discrimination to be recognised behind the hiring and employment treatments of female part-time workers[301]. This problematic, already visible in other legal orders such as that of the EU, is considered in Japan as a, if not the, current crucial issue for the regulation on sex discrimination in the employment field[302]. Under the pressure of the EEOL, many companies outsourced the female workforce previously employed with part-time contracts, even if it is also recognised that the law and its 1997 revision fostered initially compliant companies to hire even more women[303].

5. Institutional settings, judicial strategies and limits to the action of the judiciaries

5.1. The judiciaries' strategies: European constitutional doctrines v Japanese labour market protectionism

With regard to the specific strategies put in place by courts, fundamental differences can be highlighted between the ECJ and Japanese courts. The ECJ has authoritatively held that individuals can directly avail themselves of Article 157 TFEU before national courts. They can even do so against their employer in their private disputes, which means that Article 157 also has a "horizontal effect"[304]. Regarding the Gender Equality Directive, there are still controversies as to whether it produces a direct horizontal effect. It should be recalled that directives are not considered to have a horizontal effect[305] but can be given vertical direct effect when they include sufficiently clear, unconditional and unreserved provisions and when the concerned Member State has failed to implement it within the set deadline[306].

[300] A. Gordon, *op. cit.* 9. In addition, companies have adopted the habit to include to the part-timers' employment contracts clauses that prevent employment renewal (*yatoidome*), so that they do not need to dismiss them. Additionally, some authors point out the employees' common lack of knowledge of their own social rights (C. Weathers, "Equal Opportunity", *ibidem* 4).

[301] R. Sakuraba, *op. cit.* 191 and 200.

[302] C. Weathers, "Temporary workers, women and labour policy-making in Japan" *Japan Forum* 16:3 (2004) 424.

[303] E. Mun, *op. cit.* 1428 subs.

[304] J. Kantola and K. Nousiainen, "Institutionalizing Intersectionality in Europe" *International Feminist Journal of Politics* 11:4 (2009) 464.

[305] Case 148/78 *Ratti* [1979] ECR 01629.

[306] Case 41/74 *Van Duyn v Home Office* [1974] ECR 01337.

More recent cases[307] and certain opinions of Advocate Generals[308] suggest that the ECJ is on the track to recognise a right to individuals to directly avail themselves of the general principle of equal treatment against their employers before national courts, indirectly acknowledging a horizontal direct effect to the Directive[309]. This would deprive Member States from an ever-increasing part of their sovereignty in favour of the European judiciary, as individuals will be expected to rely on the European interpretation of the general principle of equality.

By developing such constitutional doctrine, the ECJ gives individuals access to systematic and relatively harmonised judicial protection against gender discrimination. By contrast, in Japan an unequal treatment would amount to a violation of the public order doctrine if it were deemed "unreasonably discriminatory" [310] in light of the social consensus prevailing at the time of the treatment itself. This led to a rather rigid but somewhat weak Japanese case law on gender equality. As to the reason for this lack of commitment to the construction of an objective method of scrutiny, several factors have been put forward by researchers. As S. E. Merry points out, the legal culture of a country also concerns its judicial culture, which is expressed through the institutional setting of the judiciary and its judicial philosophy[311]. Without entering the debate on whether the culturalist paradigm is pertinently used to analyse the Japanese legal system[312], one cannot deny that researchers tend to draw different archetypes of the Japanese judge. On the one hand, the Japanese judiciary is described as being conservative[313], exercising a high degree of judicial restraint and as being under administrative control[314]. On the other hand, it is also argued that Japa-

[307] Case 144/04 *Mangold* [2005] ECR I-09981, 74-77 (see also: Case 555/07 *Kücükdeveci v Swedex GmbH* [2010] ECR I-00365, 21; Case C-471/08, *Sanna Maria Parviainen* v *Finnair Oyj*, judgment [2010], nyr, and Case C-116/08, *Christel Meerts* v. *Proost NV*, [2009] ECR I-10063) (for further comments, see: K. Koldinska, "Case law of the European Court of Justice on Sex Discrimination 2006-2011" *Common Market Law Review* 48:5 (2011) 1601-1607).

[308] Case 236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others* [2011] ECR I-00773, Opinion AG Kokott, 38; Case 45/09 *Gisela Rosenbladt v. Oellerking GmbH* [2010] ECR I-09391, Opinion AG Trstenjak, footnote 27.

[309] See for more details: E. Howard, "ECJ Advances Equality in Europe by Giving Horizontal Direct Effect to Directives", *European Public Law* 17:4 (2011).

[310] C. Martin, "Glimmers of Hope," *op. cit.* 216.

[311] S. E. Merry, "What is Legal Culture? An Anthropological Perspective", *Department of Anthropology* 5:2 (2010) 43-44.

[312] See: F. Von Benda-Beckmann and K. Von Benda-Beckmann, "Why Not Legal Culture?", D. Nelken (ed.), *Using Legal Culture* (London: Wildy, Simmonds & Hill, 2012); I. Ozaki, "Law, Culture and Society in Modernizing Japan," Dimitri Vanoverbeke et al. (eds.), *The Changing Role of Law in Japan: Empirical Studies in Culture, Society and Policy Making* (Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, 2014); E. Feldman, "Law, culture and conflict: Dispute Resolution in Postwar Japan" *Faculty Scholarship*, Paper 148 (2007).

[313] For the reasons of this conservatism, see: D. S. Law, "The Anatomy of a Conservative Court: Judicial Review in Japan", *Texas Law Review* 87 (2009) 1545-1593.

[314] For example, lower courts are under the control of the General Secretariat of the Supreme Court. For the explanation of this administrative control, see: M. Setsuo, "Administrative Control of Japanese Judges", *Kobe University Law Review* 25 (1991) 45-61.

nese judges count among the most independent and impartial judiciaries in the world[315] and demonstrate a certain level of judicial activism in private litigations[316], with employment litigation being often taken as an example for this claim[317].

The question as to how these conflicting views can be reconciled is best answered through the words of Daniel H. Foote: "judicial creation of norms in Japanese labour law: activism in the service of stability?"[318]. Precisely, rather than being driven by the implementation of equality rights *per se*, Japanese courts have sought to protect women's employment in order to secure the traditional life-long employment system[319]. For example, it extended the scope of its abusive dismissal doctrine in order to thwart the employers' avoidance strategies[320]. Under the logic of the courts, the fact that businesses have to face a profoundly protective case law in dismissal cases acts as a counter-balance for the wide freedom they benefit from in the recruitment and promotion processes. This rigid jurisprudence is the price to pay for the cost-saving benefits that businesses enjoy from the lack of labour market mobility[321].

5.2. Political and conceptual factors: gender equality in the bigger picture

The Japanese judiciary's stubbornness led some academics to conclude that its case law is gender-biased[322]. This serious allegation needs to be nuanced. Most importantly, it can be argued that, just as the ECJ with its own doctrines, Japanese courts have adopted such a conservative course of action for the sake of institutional and ideological coherence, and ultimately, for the sake of legitimacy. Accordingly two different arguments can be highlighted to explain the judiciary's judicial restraint in the matter.

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[315] J. O. Haley, "The Japanese Judiciary, Maintaining Integrity, Autonomy and the Public Trust", in D. J. Foote (ed.) *Law in Japan: A Turning Point* (University of Washington Press, Seattle 2007) 1.

[316] N. Kadomatsu, "Judicial Governance through Resolution of Legal Disputes – A Japanese Perspective", *NTU L. Rev.* 4 (2009) 152 (see also: D. H. Foote, *op. cit* 637-638).

[317] F. K. Upham, "Stealth Activism: Norm Formation by Japanese Courts", *Washington University Law Review* 88:6 (2011) 1495.

[318] D. H. Foote, *op. cit.* 637-638.

[319] For details on the impact of such system on women's employment, see: D. H. Foote, *ibidem* 651-654.

[320] D. H. Foote, *ibidem* 637-638.

[321] L. Wolff argues that "employers' preference for at-will hiring and hiring will replace lifelong employment once regulatory barriers to market-based employment practices are dismantled" (L. Wolff, "The Death of Lifelong Employment in Japan?" in L. Nottage, L. Wolff and A. Kent (eds.) *Corporate Governance in the 21st Century Japan's Gradual Transformation* (Cheltenham: Edward Elgar Publishing, 2009) 66 (see also: T. Kato, "The End of Lifetime Employment in Japan?: Evidence from National Surveys and Field Research" *Journal of the Japanese and International Economies* 15 (2001) 489-514; P. Matanle and K. Matsui, "Lifetime Employment in the 21st Century: Stability and Resilience Under Pressure in the Japanese Management System" in S.A. Hoen (ed.) *Emerging Perspectives in Japanese Human Resource Management* (Berlin and New York: Peter Lang, 2011 15-44).

[322] K. Minamino, *op. cit.* 51; C. Watanabe, "Japanese Judicial Education: working toward gender equality in the judiciary", *Int. J. of the legal profession* 21:3 (2014).

First of all, structural features of the judiciary can be put forward as a factor that hinders judicial activism. A fundamental institution within the Japanese judicial system is the General Secretariat of the Supreme Court (GS). Lower courts are expected to abide by the guidelines of this powerful body[323] and are not given much room of manoeuvre with regard to controversial legal issues[324]. Academic research exerts a very limited influence on the courts' views[325], as most judges ground the legitimacy of their case law on their obedience to internal standards. These standards are set during conferences of judges whose prime objective is to preserve the homogeneity of the judicial outcome[326]. These conferences have been found to be a mean for the GS to diffuse its own views[327]. When it comes to gender equality, it is contended that judges still follow the conservative conclusion of the 1998 judges conference[328]. As the GS decides for the transfer, salary and promotion of judges[329], it also exerts extended powers on the very bureaucratic career path of judges, which might ultimately jeopardise their individual judicial independence[330]. But is this tight control politically driven? One could argue that the alleged neutrality of the Japanese judiciary merely amounts to fundamentally conservative ideas[331] under the dominance of the Liberal Democratic Party[332]. On the other hand, it could also be contended that the apparent conservative judicial restraint of courts is a pledge of independence and is what grounds its very legitimacy in the eyes of the public[333]. Contrary to what Y. Taniguchi had expected[334], the Japanese judiciary did not become an instrument of social change, but rather protects "basic civil liberties guaranteed by the Constitution and recognised by the Diet and a majority of the Japanese population"[335].

Secondly, it is also argued that Japanese judges are influenced by their own professional experience where career path and professional structure bear resemblance to that of the

[323] I. Sonobe, "Structure and Roles of the Supreme Court", *Hōgaku Kyōshitsu* 67 (1986) 42.

[324] M. Setsuo, "Administrative Control," *op. cit.* 54.

[325] I. Sonobe, *Gendai gyōsei to gyōsei soshō* [Contemporary Administration and Administrative Litigation] (Kōbundō, Tokyo 1987) 302.

[326] J. O. Haley, "Judicial Independence in Japan Revisited", *Japan Law* 25:1 (1995) 14.

[327] M. Setsuo, "Administrative Control," *ibidem* 55.

[328] K. Minamino, *op. cit.* 71.

[329] M. Setsuo, "Administrative Control," *ibidem* 55.

[330] P. R. Luney, "The Judiciary: its Organisation and Status in the Parliament System" *Law and Contemporary Problems* 53:1 (1990) 153 [for further comments on the independence of Japanese judges, see: F. K. Upham, "Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary", *Law and Social Inquiry* 30:2 (2006)].

[331] M. Setsuo, "Administrative Control," *ibidem* 55.

[332] J. M. Ramseyer and E. B. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (University of Chicago Press, New-York and London, 2003) 9-10.

[333] J. O. Haley, "The Japanese Judiciary," *op. cit.* 29 [see also: M. A. Srour, "Restrained Judicial Constitutionalism in Japan: A Reflection of Judicial Culture Rather than Political Interests" *ZJapanR / J. Japan. L* 33 (2012) 178].

[334] Y. Taniguchi, "The Post-War Court System as Instrument for Social Change", in G. DeVos (ed.) *Institutions for change in Japanese Society* (Institute of Asian Studies, University of California 1984) 20-39.

[335] P. R. Luney, "The Judiciary," *ibidem* 162 (for an opposite view, see: F. K. Upham, "Stealth Activism," *op. cit.* 1498-1502).

Japanese world of work[336]. Accordingly, their life-long position is ensured by re-appointment that counts almost no exception and "low performances" can lead to downgrading of one's position under the supervision of the GS (which enjoys a large zone of discretion)[337]. Likewise, K. Minamino ascertains that judges are themselves embedded in the very same structure that exacerbates "cultural attitudes and beliefs about 'proper' roles for women"[338]. For example, D. H. Foote sees in the public order doctrine the judicial translation of Confucian values in which Japanese judges have themselves always been immersed:

"In the Confucian tradition, the subordinate owes a duty of obedience (viewed in the employment context, this would embrace the duty to obey overtime and transfer requests), but the superior owes a concomitant duty of benevolence (the obligation to support a faithful worker, even one who is not very skilled)"[339].

In the same vein, M. Srour contends that the Japanese Supreme Court has endeavoured to protect traditional values, which can be explained by the persisting influence of the pre-war judicial education on contemporary judges[340]. It is thus no surprise that the reception of the notion of gender equality in Japan after the WWII constitutional reform "was interpreted as equivalent to the traditional Japanese idea of aristocratic honour in society, which is consistent with the original western notion"[341]. This cultural approach adopted to explain the practices of the judiciary has been challenged by authors who believe institutional and procedural hurdles to be the instrumental factor hindering individual claims to be appropriately adjudicated, deterring a litigious predisposition within the Japanese population[342], and therefore obstructing the development of a comprehensive and effective approach to the issue of gender inequality by courts. If the necessary limits of this paper do not allow for further discussion regarding this critique, one could argue that the judicial ethos of a system and its institutional setting are entwined in a complex interplay where they necessarily exert reciprocal influence on one another[343].

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[336] D. H. Foote, *op. cit.* 689-690.

[337] D. H. Foote, *ibidem* 689.

[338] K. Minamino, *ibidem* 73.

[339] D. H. Foote, *op. cit.* 693 ("Yet, at another level, these decisions represent the antithesis of Confucian traditions–for, in the pure version of those traditions, benevolence by the superior is not something that can be demanded or commanded; it must spring up spontaneously and voluntarily").

[340] M. A. Srour, "Restrained Judicial Constitutionalism in Japan," *op. cit.* 177 ("As at 1995, no judge born after 1929 had ever served on the Supreme Court, and until 1990, no Justice of the Court had received his or her legal education in postwar Japan") (see specifically: J. Haley, "Judicial Independence," *op. cit.* 14).

[341] M. A. Srour, "Restrained Judicial Constitutionalism in Japan," *ibidem* 178.

[342] T. Ginsburg and G. Hoetker, "The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation" *Law and Economics Working Papers* 14 (University of Illinois College of Law, 2004); M. Muryama, "Culture, situation and behavior" in D. Vanoverbeke et al. (eds.) *The Changing Role of Law in Japan: Empirical Studies in Culture, Society and Policy Making* (Cheltenham, UK, and Northampton, MA, USA: Edward Elgar, 2014).

[343] For further discussion, see: E. Feldman, "Law, Culture and Conflict: Dispute Resolution in Postwar Japan" *Faculty Scholarship*, Paper 148 (2007).

As regards the EU, the course of action of the European Court of Justice is also framed by intergovernmental and ideological constraints, which, interestingly, set the limits to its judicial activism in the field of gender equality.

First of all, the question whether the ECJ is influenced by the overall political position of Member States in its decision-making has been subject to important debates[344]. In this regard, the scope of enforcement and the substantive standards set by European court in the field of gender equality are much more constraining than what the Member States originally expected[345]. Also, Member States have come to indirectly accept the ECJ's jurisdiction over this field of law, as national courts have progressively made a significant use of the preliminary reference procedure[346]. In this view, the opposition expressed by Member States do not represent a concrete obstacle to the course of action of the ECJ[347]. On the other hand, it is contended that the ECJ always seeks to strike a balance between its objectives and the interests of Member States in order to preserve a necessary degree of legitimacy[348]. This might explain why the Court has scarcely been confronted to fierce opposition from Member States. For example in the *Barber* case[349], the ECJ held that pension age was to be the same for men and women under all occupational pension schemes. Member States subsequently enacted a protocol to the Maastricht Treaty in order to set aside the Court's ruling[350]. But this is a rather unique case, as Member States usually accept

[344] See for example: F. Wasserfallen, "The Judiciary as a Legislator? How the European Court of Justice Shapes Policy-making in the European Union" *Journal of European Public Polics* 17:8 (2010); J. C. Carrubba, M. Gabel and C. Hankla, "Judicial Behaviour under Political Constraints: Evidence from the European Court of Justice" *The American Political Science Review* 102:4 (2008); K. J. Alter, "Who Are the 'Masters of the Treaty'? European Governments and the European Court of Justice," *International Organization* 52 (1998) 121-147; A. Stone Sweet and T. Brunell, "The European Court of Justice, State Noncompliance, and the Politics of Override" *The American Political Science Review* 106:1 (2012) 204-213; C. J. Carrubba, M. Gabel and C. Hankla, "Understanding the Role of the European Court of Justice in European Integration" *The American Political Science Review* 106:1 (February 2012) 214-223.

[345] A. van der Vleuten, *The price of Gender equality: Member States and Governance in the European Union* (Aldershot, Hampshire: Ashgate, 2007) 9 [see also: R. A. Cichowki, "Women's Rights, the European Court, and Supranational Constitutionalism", *Law & Society Review* 38:3 (Sept. 2004) 496].

[346] "Few preliminary rulings do not necessarily indicate that implementation has been successful but rather that the national legal system is not easily accessible" (A. van der Vleuten, *ibidem* 173). For more details on the national courts' propensity to refer their case before the ECJ, see: R. A. Cichowki, "Women's Rights," *ibidem* 497-498 [see for an opposite point of view: A. Hofmann, "Resistance Against the Court of Justice of the European Union" *iCourts Working Paper Series* 121 (2018)].

[347] See for example: K. Alter, "The European Court's Political Power" *West European Politics* 19:3 (1996); W. Mattli and A-M. Slaughter, "Law and Politics in the European Union: A Reply to Garrett" *International Organization* 49:1 (1995) 183–90; R. A. Cichowski, "Integrating the Environment: The European Court and the Construction of Supranational Policy", *J. of European Public Policy* 5 (1998) 387-405; R. A. Cichowski, "Women's Rights", *ibidem* 493-500.

[348] S. Pager, "Strictness vs. Discretion: The European Court of Justice's Variable Vision of Gender Equality" *The American Journal of Comparative Law* 51:3 (Summer 2003) 555.

[349] Case 262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-01889.

[350] G. Garrett, R. D. Kelemen and H. Schulz, "The European Court of Justice, National Governments, and Legal Integration in the European Union" *International Organisation* 52:1 (Winter 1998) 166-174.

the costs of integration as a lesser evil[351]. However, financial bargaining is not the only constraining factor faced by the ECJ. Jo Shaw goes as far as to say that the Court "cloaked itself in something akin to a feminist cloak almost always only where some gain can be obtained in terms of reinforcing its own legitimacy within the system"[352]. Accordingly, being now faced with much more controversial facets of gender equality, the ECJ does not seem to be willing to show the same degree of judicial activism over fundamentally political issues[353].

In addition to the intergovernmental constraint, another element that might currently restrain the ECJ in its attempt to further foster gender equality is the definition it gives to gender equality itself, and hence, the conceptual framework it puts itself into. The following and conclusive paragraphs explore how the conceptual barriers in which the ECJ (and Japanese courts) are embedded necessarily shape the limits of their case law on gender equality.

The conceptual framework of a court includes the values and socio-political goals that it purports to protect[354]. As it has been argued in the previous part, the European Court has passed from a formal to a more substantive understanding of gender equality[355]. More importantly it has always promoted a certain conception of equality, that is, equality of opportunity[356]. Its cases on positive action have induced the Court to challenge such ideological background and illustrate its attempt to preserve the coherence of its entire case law on gender equality.

In *Marschall*, the Court argued that such preferential treatment is only admissible "when the challenged provision contain[s] a saving clause to the effect that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour" [357]. With this reasoning, the Court did not modify its conceptual framework as it considers positive action as an *exception* to the principle of equality. In that sense, positive action is "not conceived as a means to achieve equality among groups or equality of results but, instead, as an instrument to bring about effective equality of

[351] B. Werner, "Why is the Court of Justice of the European Union not more Contested? Three Mechanisms of Opposition Abatement" *Journal of Common Market Studies* 54:6 (2016) 1449-164.

[352] J. Shaw, "Gender and the Court of Justice", in G. De Burca and J.H.H. Weiler (eds.) *The Court of Justice* (Oxford: Oxford University Press, 2000) 142.

[353] See specifically: M. Shapiro, "The European Court of Justice: of Institutions and Democracy" *Isr. L. Rev.* 32:3 (1998) 3-50.

[354] See for example: S. E. Merry, *op. cit.* 43 and 48.

[355] N. De Charilaos, *The Right to Equality in European Human Rights Law: the Quest for Substance in the Jurisprudence of the European Courts* (London and New York: Routledge, 2014) 114 (see for example: Case 136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés v Thibault* [1998] ECRI-2011, 24-26; Case 158/97, *Badeck's Application* [2000] ECR I-1875, 32; Case 407/98, *Abrahamsson and Anderson v Fogelqvist* [2000] ECR I-5539, 48; Case 319/03, *Serge Briheche v Ministre de l'Intérieur, Ministre de l'Education Nationale and Ministre de la Justice* [2004] ECR I-08807, 25).

[356] Case 319/03 *Briheche v Ministre de l'Intérieur* [2004] ECR I-08807, opinion of Advocate General Poiares Maduro, 42.

[357] Case 409/95 *Marschall* [1997] ECR I-06363, 24.

opportunities"[358]. But the fact that the Court endorses positive discrimination as a means to trigger equality of opportunity may indicate that it takes for granted the idea that inequality of opportunity on the ground of gender represents the only factor preventing women from being more and better represented in the workplace[359]. In fact, recent psychological researches shed doubt on the assumption that equality of outcome would necessarily be the result in a society where equality of opportunity is best achieved[360]. This opens the question as to whether putting positive action at the service of equality of opportunity would not ultimately prove to be contradictory[361]. Aside from these considerations, these remarks illustrate the fact that further steps toward equality of opportunity as understood by the Court, would require the latter to admit additional exceptions to its current ideological basis in order for its overall case law to remain coherent.

This last remark might help consider the stagnant case law of Japanese courts on gender equality in the bigger picture. As it has been argued in earlier paragraphs, Japanese courts have sought to protect employment practices and specifically lifelong employment[362],

[358] Case 319/03 *Briheche v Ministre de l'Intérieur* [2004] ECR I-08807, opinion of Advocate General Poiares Maduro, 50. For critiques and comments of this reasoning, see: E. Holzleithner, "Subversion from within. Opposition to gender Equality in the Court of Justice of the European Union" in M. Verloo (ed.) *Varieties of Opposition to Gender Equality in Europe* (New York: Routledge, 2018); A. van der Vleuten, *op. cit.* 107-178; A. Timmer, "Gender Stereotyping in the case law of the EU Court of Justice" *European Equality Law Review* 1 (2016) 40; N. E. Ramos, Martin, "Positive action in the EU gender equality law: promoting women in corporate decision-making positions" *Spanish Labour La wand Employment Relations Journal* 3:1-2 (2014) 20-33.

[359] "In my view any temptation to distinguish *Kalanke* on *narrow technical grounds* should be resisted. (…) It is unquestionable that – as submitted by the United Kingdom in *Kalanke* – unequal representation of women is the result of a cocktail of factors, and it may be that such preferential treatment of women is a method of improving one of the ingredients" (Case 409/95 *Marschall* [1997] ECR I-06363, Opinion of Mr Advocate General Jacobs, 37 and 46)

[360] R. Su, J. Rounds and Pl. Armstrong, "Men and things, women and people: a meta-analysis of sex differences in interests" *Psychol Bull.* 135:6 (2009) 859-884; S. Baron-Cohen, "The Essential Differences: Men, Women and the Extreme Male Brain" *British Medical Journal* 327:7405 (2003); R. A. Lippa, "Sex Differences in Personality Traits and Gender-Related Occupational Preferences across 53 Nations: Testing Evolutionary and Social-Environmental Theories" *Archives of Sexual Behavior* 39:3 (2008) 619-636 [for an alternative perspective, see: E. M. Trauth, J. L. Quesenberry and A. J. Morgan, "Understanding the under representation of women in IT: toward a theory of individual differences" *SIGMIS CPR '04* (April 22-24, 2004)].

[361] See for example: E. S. Anderson, "What is the Point of Equality?" in A. Mancilla (ed.) *Theories of Justice* (London: Routledge, 2012). For an opposing view, see: H. Collins, "Discrimination, Equality and Social Inclusion" *The Modern Law Review* 66:1 (2003) 40-43. For further discussion, see: J. Rawls, "Equality of Opportunity or Equal Social Outcome?" *Economics and Philosophy* 11:1 (1995) 25-55; R. Dworkin, "What is equality? Parts 1 and 2: equality of welfare" *Philosophy and Public Affairs* 10:3 (1981) 185-246 and 283-345

[362] N. Nagase and M. C. Brinton, "The gender division of labor and second births market institutions and fertility in Japan" *Demographic Research* 36:11 (2017) 348-349; T. Araki, "Changing Employment Practices, Corporate Governance and the Role of Labor Law in Japan" *Comp. Lab. L. & Pol'Y J.* 28 (2007) 253; R. Kambayashi, "Dismissal regulation in Japan" in K. Hamada, K. Otsuka, G. Ranis and K. Togo (eds.) *Miraculous Growth and Stagnation in Post-War Japan* (London: Routledge, 2011); N. Yashiro, "Myths about Japanese employment practices: An increasing insider-outsider conflict of interests" *Journal of the German Institute for Japanese* 23:2 (2011) 143 ("dismissal of employees due to a lack of job capability is not admitted, in principle, by Japanese courts. The logic of the court is that the firm plays a crucial role in the skill formation of its employees and has to share responsibility for the alleged incapability").

which is deeply embedded in a Confucian conception of work[363]. Therefore, courts did not hesitate to enforce the principle of gender equality as long as it could reinforce this conceptual framework. On the other hand, they have promoted gender equality much more sparingly in hiring-, promotion- and transfer-related cases, as these employment aspects have traditionally been left to the discretion of Japanese companies[364]. For example, if the judiciary decided to deny the possibility for employers to require nationwide transfer from job applicants as a hiring condition on the ground that it indirectly discriminates female workers[365], it would set aside one the most important trade-off from which employers benefit in exchange of the life-long employment custom. Therefore, one could argue that Japanese courts sparingly enforce gender anti-discrimination laws, not necessarily because of a gender-biased stance in labour disputes, but because it would fundamentally contradict the Japanese employment structure. On the other hand, a more optimistic view suggests that courts become more and more concerned not only about gender inequality in the workplace, but also about the abuses that the Japanese employment system can bring about in general. For instance, it has been argued that while Japanese courts have traditionally legitimised the practice of overtime work, they now seem to have become more willing to hold employers liable for unreasonable overworking[366]. Therefore, a shift toward more gender equality in the workplace may need to be understood as part of this larger movement in favour of better working conditions for both male and female workers. This way, instead of being perceived as an isolated issue ruled by way of exception, gender equality would arguably find a more fertile soil for growing coherently within a Japanese case law oriented towards the amelioration of the rights of workers in general. With this in mind, one might conclude that the core issue in Japan is not so much that Japanese women need and should have the opportunity to reach the same level of financial independence and career prospects as that of Japanese men[367], but that Japan's current work culture and its subsequent work practices[368] need to be seriously regulated so that both

[363] T. Hanami and F. Komiya, *Labour Law in Japan* (Kluwer Law International, 2011) 29; C. Moruguchi and H. Ono, "Japanese lifetime employment – A century's perspective" in M. Blomström and S. La Croix (eds.) *Institutional Changes in Japan* (London: Routledge, 2006) 161-164.

[364] H. Kano, *Japanese Labor & Employment Law and Practice* (3rd ed.) (CCH Japan, 2014) 212 [see also: K. Koshiro, "Labour Market Flexibility in Japan" in A. Gladstone, H. Wheeler, J. Rojot, F. Eyraud and R. Ben-Israel (eds.) *Labour Relations in a Changing Environment* (Berlin: Walter de Gruyter & Co., 2015) 126-12].

[365] Article 2 of the Ordinance for Enforcement of the Equal Employment Opportunity Act.

[366] K. E. S. Kidani, "Japanese Corporate Warriors in Pursuit of a Legal Remedy: The Story of Karoshi, or Death from Overwork in Japan", *U. Haw. L. Rev.* 21 (1999); C. Weathers and S. North, "Overtime Activists Take on Corporate Titans: Toyota, McDonald's and Japan's Work Hour Controversy" *Pacific Affairs* 82:4 (Winter 2009); S. North and R. Morioka, "Hope found in lives lost: karoshi and the pursuit of worker rights in Japan" *Journal of the German Institute for Japanese Studies* 28:1 (2016).

[367] K. T. Geraghty, *op. cit.* 543.

[368] These labour practices are essentially seniority-based promotion and benefits, life-long employment, and more importantly long working hours. It should be born in mind that these aspects of the Japanese work culture become less and less dominant, as they are being challenged by market-based strategies and public health concerns [see: L. Wolff, *op.*

men and women can adopt a more balanced life-style. This perspective emphasises the fact that, if it is necessary to offer men and women identical work opportunities, this necessity loses its very relevance when these opportunities, which men supposedly benefit from, are not desirable for anyone.

6. Conclusion

Throughout this paper, key features of the Japanese and European case law on gender equality have been highlighted. By focusing on direct and indirect discrimination, there has also been an attempt to define the strategies adopted by the Japanese courts regarding gender equality in the light of the European legal framework. As it has often been highlighted, the latter does not generally fit the Japanese judicial stance on the matter. In that sense, this paper could not have reasonably been an attempt to enjoin Japanese courts to simply follow the European steps with regard to gender equality. On the contrary, it rather emphasises how each system deals with its own issues and controversies.

As regards direct discrimination, a fundamental difference had to be emphasised from the outset. Unlike Japanese courts, the ECJ has always attempted to ground its case law on gender discrimination on a fundamental right basis. But as economic considerations were at the origin of the development of EU law on gender equality, it is also rightfully contended that "the essence of the principle of gender equality lies in the complex balance between human rights and market oriented concerns"[369]. Moreover, the constitutional doctrines[370] of the European Court have been pointed out as a key factor in the development of its gender-friendly case law. By comparison, Japanese courts do not see in the Constitution a source of individual rights to be enforced in private disputes such as those against one's employer[371]. Nevertheless, they have been proactive in developing an important doctrine under Article 90 of the Japanese Civil Code, the public order doctrine, which they have put at the service of certain gender discrimination cases, and specifically those with job security at stake[372]. This was concomitant to the enactment of the major piece of legislation on gender equality, the 1985 Equal Employment Opportunity Law. However, whilst the act and its subsequent amendments were meant to prohibit other employment practices such as discriminatory categorisations in the hiring and promotion

cit. 53-80; Y. Namie, *Long Working Hours, Happiness, and Quality of Democracy With the Case Studies of Japan and Denmark* (San Francisco: University of San Francisco, 2016)].

[369] J. Bain and A. Masselot, "Gender Equality," *op. cit*. 103.

[370] J. H. H. Weiler, "The Transformation of Europe" *Yale Law J.* 100:8 (1991).

[371] H. Nakakubo, *op. cit*. 10 (see also: M. D. Helweg, *op. cit*. 297).

[372] Precisely, Japanese courts demonstrated judicial activism in securing women's job, setting aside the common practice consisting in requiring female workers to quit their job upon marriage or childbirth.

process, Japanese courts showed much more reluctance in these areas[373] and have not necessarily constructed any systematic interpretation of the EEOL, as they still rely much on the public order doctrine. By comparison, the ECJ has had to directly rely on the TFEU and did so in order to develop an extensive case law on gender equality. In fact, it ended up giving an unexpected scope of application to Article 157 of the TFEU, which triggered the enactment of the then Gender Equality Directive and its subsequent amendments[374]. Interestingly, while the ECJ envisages gender equality as a system based on a permanent and universal principle to which it attaches exceptions, Japanese courts tend to adopt a sociological approach for determining what it means to be equal according to society at a given time without substantiating the equality principle with any permanent nature.

When it comes to indirect discrimination, the differences between the case law of the ECJ and of the Japanese courts are even more striking. The ECJ initiated a shift toward a substantive understanding of equality by recognising the unlawfulness of indirect forms of discrimination[375]. By comparison, it has been argued that Japanese courts did not demonstrate a similar level of judicial activism in the field. The starting point of the comparison lies in the distinction between the European and Japanese legislative approach to indirect discrimination. Whilst the 2006 Directive on gender equality provides for a generic definition of indirect discrimination whose interpretation is entirely left to the European Court, the Japanese EEOL and its ordinance expressly enunciates the criteria susceptible to trigger indirect discrimination, which perfectly illustrates the cautious and gradual approach the Japanese legislature adopts with regard to social and labour issues[376]. Furthermore, Japanese courts are given the possibility to introduce additional criteria as relevant factors indirectly leading to discrimination. If they have not formally done so, it has been pointed out that courts have partially evinced an important discriminatory practice, that is, the dual track hiring system. As a matter of fact, it is said that this rigid job categorisation is at the origin of strong sex segregation in the workplace[377]. Whilst job categories are formally open to all candidates, women have often been discarded from the management track as they are usually not able nor willing to abide by the required conditions (regional transfer, long working hours, etc.). Interestingly, courts have had to deal with this issue before the enactment of the EEOL, and they have usually set aside this practice when it consisted in a blatant attempt from the employer to discriminate female workers. Most importantly,

[373] Tokyo D. Ct., Dec. 4, 1986, *The Japan Iron and Steel Federation* case, 37-6 *Rōdō Kankei Minji Saibanreishū* 512, *translated in* C. J. Milhaupt et al., *op. cit.* 587 ("the failure of an employer to grant an equal opportunity in recruitment and hiring [is] not a violation of public order").

[374] A. van der Vleuten, *op. cit.* 9.

[375] M.H.S. Gijzen, *op. cit.* 69.

[376] K. Kamio Knapp, "Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism", *Colum. J. Gender & L.* 8 (1999).

[377] M. L. Starich, *op. cit.* 558 (see also: G. T. Shimoda, *op. cit.* 224; K. Sugeno, *op. cit.* 132; K. Kamio Knapp, "Still Office Flowers," *op. cit.* 123).

it can be argued that they have preserved such case law – even after the introduction of the notion of indirect discrimination in the EEOL – by focusing on the intent of the employer[378]. Thereby, Japanese courts pursue the first objective of indirect discrimination, that is, striking down the attempts of employers to circumvent the prohibition of direct discrimination through seemingly neutral job criteria. Unlike the Court of Justice[379], the Japanese judiciary does not seem to consider itself as entrusted with the second objective of purpose of indirect discrimination, that is, promoting social change by tackling the social roles and structures of the labour market[380]. This is reflected in the strategies adopted by Japanese courts, and more specifically in the public order doctrine whose key feature is the social consensus. The different approaches of the Japanese and European judiciaries might reflect the fact that they tend to focus on a different understanding of the social norm. This latter is multi-faceted, in that its structural and normative nature is understood both as triggering a sense of belonging in society and as a threat to individual choice and freedom. One could argue that whilst the European case law on gender equality reflects a clear focus on the latter, Japanese courts tend to tip the balance in favour of the former in borderline cases.

The ECJ has had the opportunity to directly foster a far-reaching enforcement of the gender equality principle within national courts[381]. This was made possible by the constitutional doctrines by which the Court proclaimed the supremacy over national law[382] and direct effect of Article 157 TFEU[383]. The relatively (and arguably)[384] harmonised European case law on gender equality contrasts with that of Japanese courts. In fact, rather than being driven by the implementation of equality rights *per se*, Japanese courts only seem to seek to protect women's employment in order to secure the traditional life-long employment system[385], from which resulted a somewhat distorted case law on gender equality.

By way of explanation for the reluctance of Japanese courts pertaining to gender equality, different arguments have been put forward and discussed. Most importantly, the role of the General Secretariat of the Supreme Court should be highlighted. As a matter of fact,

[378] K. T. Geraghty, *op. cit.* 519.

[379] R. Holtmaat and C. Tobler "CEDAW and the EU's Policy in the Field of Combatting Gender Discrimination" *Maastricht J. Eur. & Comp. L* 12 (2005) 411.

[380] P. R. Luney, "The Judiciary," *op. cit.* 162.

[381] D. Ghailani, "Gender Equality, from the Treaty of Rome to the Quota Debate: between Myth and Reality" *Social Development in the European Union* (2013) 168.

[382] The ECJ has held that EU law prevails over national law: case 6/64 *Costa v Enel* [1964] ECR 1141 (see: N. Fennelly "The European Court of Justice and the Doctrine of Supremacy: Van Gend en Loos; Costa v ENEL; Simmethal" in Miguel P Maduro, and Loic Azoulai (eds.) *The Past and Future of EU Law* (Oxford: Hart Publishing, 2010) 39-46; A. Stone Sweet and T. L. Brunell, "The European Court of Justice, State Noncompliance, and the Politics of Override" *The American Political Science Review* 106:1 (2012) 66-97).

[383] Case 43/75 *Defrenne v Sabena SA* [1976] ECR 00455, 24.

[384] C. Barnard, B. Hepple, "Indirect discrimination," *op. cit.* 409 (see also: K. Hervey, "EC Law on Justification," *op. cit.* 122).

[385] For details on the impact of such system on women's employment, see: D. H. Foote, *op. cit.* 651-654.

it holds tight control over most controversial issues, over the bureaucratic career path of judges and over their training[386], by which it is said to promote a conservative judicial course of action. Thereby the Japanese judiciary does not seem to have become an instrument of social change, but rather protects "basic civil liberties guaranteed by the Constitution and recognised by the Diet and a majority of the Japanese population"[387]. Interestingly, judicial restraint is the strategy by which courts preserve their legitimacy, as it is a proof of independence in the eyes of the Japanese public. Similarly, it is contended that the ECJ always seeks to strike a balance between its objectives and the interests of Member States in order to preserve a necessary degree of legitimacy[388].

Most importantly, it has been observed that the conceptual framework that the judiciaries adopt to preserve the coherence of their case law is also an important factor that frames their decision in gender equality cases. In the EU, this has been illustrated in the ECJ case law on positive action. The Court allows for positive discrimination as an exception to equality as it embraced a liberal conception of the principle of equality of opportunity. By doing so the Court sought to preserve the coherence of its conceptual framework with regard to equality, although, as some may argue, only in appearance. Concerning Japan, Confucian precepts are the underlying values on which the judiciary bases its case law, as the career structure of judges is itself imbued with this logic[389]. Just like most Japanese employees to their employers, Japanese judges abide to a duty of obedience to the General Secretariat of the Supreme Court, as they can generally expect a lifelong career policy from the latter[390]. This Confucian conception of work is still part of the so-called social consensus that courts have sought to safeguard in their case law, even though the judiciary starts to challenge such logic in certain areas such as overtime. This observation might still explain why Japanese courts do not enforce gender equality with the same proactivity as that of the ECJ, as it would fundamentally contradict the very logic they have purported to protect in their case law. Therefore, as long as courts strictly protect lifelong employment, gender equality, that is, equal opportunities in hiring, training and promotion, can only be enforced by way of exception. The promotion of gender equality should preferably be addressed in the broader context of the amelioration of working conditions in Japan, as *both* men and women suffer from a serious lack of freedom of choice in the professional world. To conclude, while it can be argued that the European Union's commitment to gender equality has functioned as a trigger for the amelioration of all European workers' working

[386] M. Setsuo, "Administrative Control," *op. cit.* 55; K. Minamino, *op. cit.* 73.

[387] P. R. Luney, "The Judiciary," *op. cit.* 162 (for an opposite view, see: F. K. Upham, "Stealth Activism," *op. cit.* 1498-1502).

[388] S. Pager, *op. cit.* 555.

[389] K. Minamino, *ibidem* 73.

[390] D. H. Foote, *ibidem* 693.

conditions[391], conversely, in Japan a broader legal and judicial undertaking in favour of the advancement of all workers' social and labour rights may be the necessary approach for Japanese labour law to coherently and effectively embrace female workers' interests.

[391] See for example: A. Sørensen, "Economic Relations between Women and Men: New Realities and the Re-Interpretation of Dependance" in J.Z. Giele and E. Holst (eds.) *Changing Life Patterns in Western Industrial Societies* (Oxford: Elsevier, 2004).