SPECIAL PROTECTION, EQUALITY, AND BEYOND: WORKING LIFE AND PARENTHOOD UNDER JAPANESE LABOR LAW

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INTRODUCTION

Japan's fertility rate continues to decline, and by 1990 had reached a postwar low of 1.57, falling to 1.25 in 2005. With serious concern for drastic demographic change, the Japanese government regards the harmonization of working life and family life as one of its most urgent policy issues.

The harmonization of work and family life is a composite policy issue. From the perspective of labor law, it is initially a matter of providing individual workers with an option to control when, where, and how much they work according to their family commitments. As women are usually the ones who assume initial childcare responsibilities, the issue is also closely connected to the prohibition of sex discrimination. Japanese labor law had lagged behind other countries in this area, leaving the issue to free contracts and the prerogatives of the employer. Over the last few decades, however, against a background of increasing concern for the decreasing fertility rate and gender equality, a series of legislative measures has been introduced in Japan to provide individual workers with more options to mould working life to the demands of parenthood.

This article has two aims, the first of which is to present a picture of the law of work/life balance in Japan with a focus on parenthood. I wish to describe recent legal developments in this area as well as giving an overall picture of how the interests of working parents are treated under Japanese labor law. Second, looking at the overall picture, I would like to discuss the impact that recent legal

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developments have had on the normative structure of Japanese labor law.

The outline of this article is as follows: Section I describes the employment situation of working parents in the Japanese labor market. I also comment on the practice of long-term employment and the obstacles this system poses for working parents. Section II presents recent legal developments in the area of harmonizing work and parenthood, including protection for pregnant workers, childcare leave, and the prohibition of sex discrimination. Section III deals with the significance and limitations of these legislative measures. Through case law analysis on the validity of transfer orders, I discuss how the family interests of working parents outside the realm of special protection (such as those with older children) are treated under the general rules of employment contracts. In Section IV, I examine the basic principles that emerge from the overall picture of the law of work/life balance in order to identify normative developments in Japanese labor law. Finally, I make some concluding remarks.

I. WORKING PARENTS IN THE JAPANESE LABOR MARKET[1]

A. Social Environments around Working Parents

In 2005, the Specialist Committee on the Declining Birthrate and Gender-Equal Participation (appointed by the Prime Minister) submitted a report[2] that quantitatively indexed the social environments influencing the birthrate and female labor participation, and compared the relative scores of twenty-four OECD countries. The social environments consist of (1) the opportunity to balance work and home life, (2) support for childrearing, (3) the diversity of lifestyle choices, (4) the potential for young people to achieve autonomy, and (5) social safety and security.

According to the report, countries where the birthrate increased during 1980–2000 (i.e., the United States and the northern European countries) have high average scores in each field, although the social environments differ from country to country. In contrast, Japan scores lower than average in all fields except (5). The score is

1. The Cabinet Office's *White Paper on Gender Equality 2006* contains useful statistics and analysis on the subject. An English summary is available on the Internet at http://www.gender.go.jp/english_contents/index.html.

2. COUNS. FOR GENDER EQUAL., SPECIALIST COMMI. ON THE DECLINING BIRTHRATE & GENDER-EQUAL PARTICIPATION, INTERNATIONAL COMPARISON OF THE SOCIAL ENVIRONMENT REGARDING DECLINING BIRTHRATES AND GENDER EQUALITY (2005), http://www.gender.go.jp/english_contents/index.html.

particularly low in (1), which looks at the flexibility of work styles and reasonable work hours for both men and women, and in (3), which examines the social tolerance of diversity, flexibility in the division of roles for household work, and equality of employment opportunities.

In May, 2006, the committee submitted a proposal to the government. On the basis of the research outlined above, they suggested that while a range of factors contribute to the declining birthrate, there is an urgent need to reconsider current working styles in the Japanese labor market that offer very limited options to individuals. The government must take multilateral measures to provide more flexible working styles so that all workers, regardless of sex and age, are able to balance work, parenthood, and other personal activities as they see fit.

B. Gender Segregation in the Labor Market and in the Household

In most developed countries, mothers usually spend more time on childcare and housework, working fewer hours than fathers. However, an international comparison shows that this trend is more extreme in Japan.[3]

Japanese fathers spend very little time on childcare, and their working patterns are not affected by childbirth. Statistics show that male workers in their 30s work around 50 hours per week on average, and nearly one in four works more than 60 hours.[4] Recent research shows that a considerable number of fathers regret spending too little time with their children.[5] Childbirth and childcare responsibilities, on the other hand, have a very significant impact on the working pattern of women.

(1) **Interruption of working life.** Many women quit their jobs at childbirth and start working again when their child is older. The employment rate of Japanese women shows an M-shaped curve. According to a survey by the Ministry of Health, Labor and Welfare

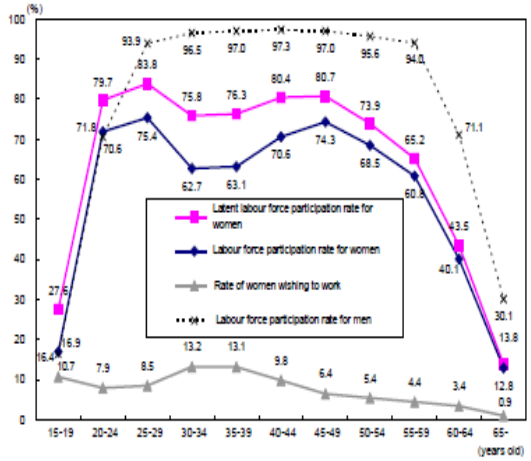
3. NAT'L WOMEN'S EDUC. CENTER, INTERNATIONAL COMPARISON OF HOME EDUCATION FY 2004/05. THE TIME BUDGET OF WORKING PARENTS (Yoshiko Nakata ed., 2003) analyze how working parents spend daily life in Japan and Sweden. *See also* WHITE PAPER ON GENDER EQUALITY 2006.

4. MINISTRY OF INTERNAL AFF. & COMM., LABOR FORCE SURVEY *(2005)*

5. According to *International Comparison of Home Education FY 2004/05* from the National Women's Education Center, 40% of Japanese fathers with children under twelve years of age consider it a problem that they spend too little time with their children.

(2003),[6] only 23% of female workers continue working before and after childbirth.

Chart 1. Women's latent labour force participation rate by age bracket



(Notes) 1. Data from Ministry of Internal Affairs and Communications, "Labour Force Survey (Detailed Tabulation)" (2005 annual)

2. Latent labour force participation rate (by age) = (labour force population (by age) + not in labour force wishing to work (by age)) / Population of 15 years old or more (by age)

Source: The Cabinet Office, *White Paper on Gender Equality 2006*

(2) **Career breaks and shorter working hours.** Female workers who continue employment before and after childbirth take maternity leave. The majority (72.3%) also take childcare leave, while only 0.5% of male workers take leave to look after children.[7]

(3) **Non-regular employment.** The majority of female workers who leave employment for childcare reenter the labor market as non-regular workers such as part-time or temporary workers. This is partly because it is difficult to find regular employment, and partly because they prefer flexible working styles to allow them to balance work and family responsibilities. According to the Ministry of Internal Affairs and Communications' Labor Force Survey, 40.6% of all

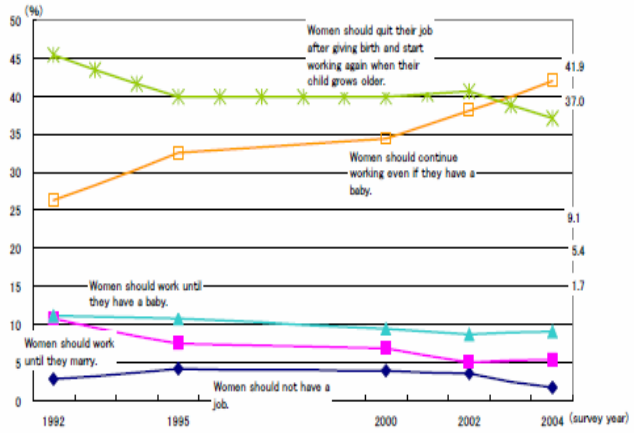
6. STATISTICS ON CHANGE IN MOTHERS' EMPLOYMENT STATUS BEFORE AND AFTER CHILDBIRTH (2003)

7. MINISTRY OF HEALTH, LAB. & WELFARE, BASIC SURVEY ON EMPLOYMENT MANAGEMENT PRACTICE FOR FEMALE WORKERS 2005 [hereinafter *Female Workers 2005*].

female workers in 2005 were part-time, while the corresponding figure for male workers was 8.6%.

(4) **Changing attitudes toward working patterns.** We can see a clear tendency that an increasing number of women prefer uninterrupted working patterns. In Chart 1, the latent labor participation rate shows that many women wish to work even during the demanding period of childcare if the conditions are appropriate. Chart 2 shows a change in attitudes to working styles in Japanese women. In 2004, those who answered that women should continue work even if they had a baby registered a larger percent (41.9%) than those who supported the reentry style of working (37.0%).

Chart 2. Attitudes to women's working patterns (female respondents)



(Notes) 1. Data from the Cabinet Office, "Opinion Survey on Gender Equality"

2. The grand total may not be 100% because the questionnaire survey includes other answer options: "I have different views" and "I am not sure."

Source: The Cabinet Office, *White Paper on Gender Equality 2006*

C Long-Term Employment Practice and its Influence

Statistics show that the employment system in Japan fails to offer individual workers a reasonable chance to balance work and family life. It is not easy for a Japanese couple to maintain a dual-income, care-sharing family in which the mother and father share economic activities and childcare equally. Whether male or female, workers have little choice other than extreme alternatives, which seems to be a

key factor in the strong gender segregation of the Japanese labor market.

To explain the situation, it is necessary to mention the long-term employment practice that lies behind it. As is widely known, this practice is characterized by regular recruitment of fresh school graduates, job security until retirement age, a wage structure based on seniority, and flexible personnel management.[8] Until the 1980s, this system was widely accepted in Japanese society as the preferred employment model for regular workers, although actual employment situations differed according to industry and company size. This long-term employment practice has also had a strong influence as the legal norm, serving as a model in court interpretations of employment contracts.[9] The government also tends to be very conservative with regard to legal intervention in the essential areas of the practice.[10]

Under the recent socio-economic changes, the practice is losing its function as a social norm, although on a legal level it still maintains considerable power. However, it continues to prevent Japanese workers from achieving a balanced combination of work and parenthood. Female workers in particular suffer from the obstacles it presents.

First, for regular workers (especially those who pursue careers as core workers), it is difficult to find enough time to take care of children. Core workers are usually expected to accept transfers involving a change of residence and daily overtime work, and it is considered necessary to maintain flexibility within the workplace (i.e., internal flexibility). Absenteeism and limited flexibility due to childcare commitments could adversely affect decisions on wages and promotions.

Second, workers are usually required to make an important choice on their future career at the time of recruitment, which in most cases is before they have family of their own. Japanese companies often adopt a separate track employment system under which employees are often recruited and placed into either a career track (for core workers) or a non-career track (for assistant workers). Though it is prohibited under the Equal Employment Opportunity Law to exclude women from the career track, female students tend to choose the non-career track due to its freedom from obligations that are incompatible with their future family responsibilities.

8. For more on the concept of long-term employment practice, see TAKASHI ARAKI, LABOR AND EMPLOYMENT LAW IN JAPAN 18 (2002).

9. *See infra* Section III.B.

10. *See infra* Section II.C.

Third, women who quit their jobs at childbirth also face difficulties when they seek reemployment. As outlined above, the majority of them reenter the labor market as non-regular workers such as part-time or temporary workers. The problem is that they earn much lower wages (part-time workers earn on average only 40% as much per hour as full-time workers) and have a lower level of job security than regular workers. Non-regular workers, who constitute over 30% of the workforce, are usually employed as cheap peripheral labor outside the long-term employment system.[11] They earn much lower wages than regular workers, even when their job responsibilities and length of service are equivalent. There is a strong argument among scholars that such unfairness is unacceptable, but a legally binding restriction of the differential in wages has not yet been introduced.[12]

II. LEGAL DEVELOPMENTS IN THE AREA OF HARMONIZING WORK AND PARENTHOOD

A. Protection of Pregnant Women and Nursing Mothers

The Labor Standards Law (LSL) of 1947 contains the following compulsory provisions to protect women during pregnancy and until one year after childbirth:

(1) A ban on harmful work such as handling heavy materials.[13]
(2) The right to 14 weeks of maternity leave, of which the six weeks after childbirth is obligatory.[14] Although this leave is unpaid, 60% of the previous level of income is paid from the Health Insurance system.
(3) The right of pregnant women to request a transfer to light duties.[15]
(4) The right of pregnant women and nursing mothers to request an exemption from overtime, rest-day, and night work.[16]
(5) The right of nursing mothers to take two unpaid breaks of 30 minutes per day.[17]

11. In the 2006 OECD *Economic Survey of Japan*, dualism in the labor market was considered a key factor in Japan's high rate of relative poverty, especially among single working parents.
12. *See infra* Section II.D.
13. Labor Standards Law, Law No. 49 of 1947, art. 64 [hereinafter LSL].
14. *Id.* at art. 65, ¶¶ 1–2.
15. *Id.* ¶ 3.
16. *Id.* at art. 66.

In addition, the Equal Employment Opportunity Law 1985 (EEOL) places a legal duty on employers to take the measures necessary to enable these workers to comply with directions based on health guidance and medical examinations.[18]

The EEOL also prohibits the dismissal of female workers on the grounds of pregnancy, childbirth, or taking maternity leave.[19] In the revised law to be introduced in April 2007, this prohibition is extended to other disadvantageous treatment on the grounds of pregnancy, childbirth, maternity leave, and other factors related to pregnancy and childbirth.[20] Moreover, any dismissal of women who are pregnant or within one year after childbirth is automatically invalid, unless the employer proves that the dismissal is not related to the pregnancy or childbirth.[21]

Under Japanese labor law, dismissal or disadvantageous treatment on the grounds of pregnancy or childbirth are not considered to constitute sex discrimination. Women before and after childbirth are treated as different employees who are endowed with special rights and protection because of their unique physical condition. The rule prohibiting disadvantageous treatment in the EEOL is thus derived not from the principle of equal treatment of men and women, but rather from protection for a special group of workers.

B. Child Care Leave and Other Support for Parents with Small Children

1. Child Care Leave

The Child Care Leave Law (1991), enacted as a measure to counter the low fertility rate, marked an important turning point in the development of legal policies to facilitate the reconciliation of work and family life. This law was new in extending its scope to male workers, and provided the right to childcare leave for both mothers and fathers. In 1995 it was revised and renamed the Child Care and Family Care Law (CCFCL), and has been revised several times to

17. *Id.* ¶ 67.

18. Equal Employment Opportunity Law, Law No. 45 of 1985, art. 22–23 [hereinafter EEOL 1985].

19. *Id.* at art. 8.

20. Equal Employment Opportunity Law, Law No. 82 of 2006, art. 9, ¶ 3 [hereinafter EEOL 2006].

21. *Id.* ¶ 4.

provide more extensive support for workers with family responsibilities.

Under the current legislation, workers who take care of children under one year old have the right to childcare leave. When it is necessary for the continued employment of the worker, the leave can be extended to one-and-a-half years.[22] According to recent research, around 10% of business establishments provide the right to childcare leave for a longer period.[23] The employer is not obliged to guarantee payment during the leave, but 40% of the previous level of earnings is paid from the Employment Insurance system. Dismissal and other disadvantageous treatment for reasons of applying for or taking childcare leave are prohibited.[24]

The employer can reject leave requests from some categories of workers,[25] including those employed for less than one year, workers whose spouses can ordinarily take care of the child, and part-time workers who work two days a week or less.[26] Although temporary workers were initially excluded from the law's coverage, a 2004 revision extended protection to temporary workers employed for a continuous period of at least one year and who are likely to still be employed after their children reach one year of age.[27]

2. Temporary Leave and Shorter Working Hours

The CCFCL provides the following measures for workers who raise children younger than elementary school age. To enjoy the protection of the law, workers must meet prerequisites similar to those necessary to qualify for the right to childcare leave.

(1) **The right to unpaid leave to take care of a child in case of injury or illness**, up to five days per year.[28]

(2) **The right to request a limitation on overtime work**.[29] When workers so request, the employer cannot extend

22. Child Care and Family Care Law, Law No. 50 of 2004, art. 5, ¶ 3 [hereinafter CCFCL 2004].

23. *Female Workers 2005*, *supra* note 7.

24. Though the law does not guarantee the right of the employee to return to the same or an equivalent position when the leave ends, the guidelines of the Ministry of Health, Labor and Welfare indicate that transfers that cannot be explained by the normal rules of personnel management in the workplace are in violation of the prohibition. *See* CCFCL 2004, *supra* note 23, at art. 10.

25. To reject such requests, the employer must conclude a written agreement with a union that organizes the majority of the workers at the establishment, or, if no such union exists, with a worker who represents the majority of the workers. *See* CCFCL 2004, *supra* note 23, at art. 6.

26. *Id.*

27. CCFCL 2004, *supra* note 22, at art. 5A.

28. CCFCL 2004, *supra* note 22, at art. 16-2.

their working hours beyond the limits of 24 hours per month and 150 hours per year. The employer can reject the request in cases where approval would impede normal business operation.

(3) **The right to request an exemption from night work**.[30] When workers so request, the employer cannot oblige them to work at nighttime (i.e., between 10 pm and 5 am). The employer can reject the request in cases where approval would impede normal business operation.

(4) **Shortening of working hours etc.** The employer shall take positive measures such as shortening working hours and allowing flexible hours for workers raising children below one year of age without taking child care leave, and for workers raising children between one and three years of age.[31] The employer's duty is not enforceable by itself, but it is considered to have some legal implications.[32] The employer is also required to endeavor to take these measures for workers raising children below school age.[33] As of 2005, 41.6% of business establishments had these supportive programs in place, and 16.3% extend them until the child enters elementary school.[34]

3. Day Care Service

The Child Welfare Law 1947 requires municipalities to provide daycare for children whose parents cannot care for them sufficiently due to work, sickness, or other acceptable reasons.[35] The law does not guarantee working parents any legal right to daycare service. In 1999, 32,000 children were on waiting lists for places in nursery schools. In response to the continued decline in the birthrate, the government implemented the New Angel Plan (1999–2005) to engage special programs (including the privatization of nursery schools) with the aim

29. *Id.* at art. 17.
30. *Id.* at art. 19.
31. *Id.* at art. 23.
32. For example, the Supreme Court held that disadvantageous treatment against an employee (on the grounds that she utilized the measure of shortening working hours adopted by the employer under the CCFCL) violated public order and was invalid. *See* In re Gakko Hojin Toho Gakuen Case, 14 RODO HANREI 862 (Sup. Crt., Dec. 4, 2003).
33. CCFCL 2004, *supra* note 23, at art. 24.
34. *Female Workers 2005*, *supra* note 7.
35. Child Welfare Law, Law No. 164 of 1947, art. 24, ¶ 1.

of reducing and eliminating such waiting lists. However, a significant number of local authorities still fail to offer enough nursery school places, especially for younger children.[36] According to recent research, the majority of working parents (70% in cases where the mother is in regular employment) leave their children in the care of nursery schools, and grandparents also play an important role in supporting working mothers.[37]

C. Prohibition of Sex Discrimination

When the EEOL was enacted in 1985, it was inadequate and unfinished as a non-discrimination law because of compromises between labor and management. Refraining from intervention in the key area of male-centered employment practice, the law did not prohibit discrimination in recruitment, hiring, job-assignment, and promotion, but only required the employer to endeavor to refrain from disadvantageous treatment against women. Since the law aimed to improve the status of female workers, it did not provide any protection from sex discrimination for their male counterparts.[38]

In 1997, the EEOL was drastically revised, and the prohibition of discrimination against women was extended to all aspects of employment. At the same time, LSL protection for women, such as the limitation of overtime work and the ban on night work, was abolished. These provisions were transformed into protection for male and female workers with family responsibilities in the CCFCL, as seen in Section II.B. In 2006, the EEOL was again revised to prohibit discrimination against men as well as women. Another important introduction is the prohibition of indirect sex discrimination.[39] The revised law will come into force in April 2007.

Through the development of the EEOL, the equal treatment of men and women has emerged as one of the guiding principles for the law of work/life balance. It has replaced the traditional principle of protection for women, with the important exception of protection for pregnancy and maternal functions.

The EEOL plays a significant role in removing obstacles to individual workers' choice in matters relating to their working life. Under the prohibition of direct discrimination, the employer must not

36. According to the Ministry of Health, Labor and Welfare, the number of children on waiting lists had decreased to 23,000 as of April 2005.

37. Satoko Uemura, *Childcare of Employees with Children below School Age*, 1 BUS. LAB. TREND 6–7 (Jan. 2004).

38. For the purpose and content of the 1985 EEOL, see ARAKI, *supra* note 8, at 108–13.

39. EEOL 2006, *supra* note 21, at 7.

exclude or treat disadvantageously individuals who deviate from the group to which they otherwise belong[40] (such as women who work as hard as their male counterparts or men who take childcare leave). Though the number of workers who actually exercise the right is small, the significance should not be underestimated, especially in a society like Japan where discriminatory practices remain common in many workplaces.

The prohibition of indirect discrimination introduced in the 2006 EEOL enables even more drastic intervention into male-centered employment practices. Though its scope is as yet unknown, the rule essentially aims to combat practices that have a detrimental effect on women (or men) as a group, protecting individuals as typical representatives of the group to which they belong.[41] For example, under the separate track employment system covered in section I.B., career track candidates are usually required to accept transfers to any branch of the company throughout the country. This hiring requirement prevents many female job seekers from choosing the career track. Although the practice has been considered legal, it would constitute indirect discrimination as prohibited under the 2006 EEOL, unless the employer can prove a substantial business necessity or other reasonable explanation for the requirement.[42]

D. Temporary and Part-time Employment

Under Japanese law, it is legal for the employer and a worker to conclude a fixed-term employment contract, though the term may not exceed three years.[43] There are no restrictions on renewal of the contract. It is also permitted to conclude employment contracts on a part-time basis. Part-time workers are usually hired under fixed-term contracts.

As discussed above, the initial problem of these workers is that they earn much lower wages and have poorer employment security than regular workers, even when their job responsibilities and length of service are equivalent.[44] Since most part-time workers are women

40. Anna Christensen, *Structural Aspects of Anti-Discriminatory Legislation and Processes of Normative Change*, in *Legal Perspectives on Equal Treatment and Non-Discrimination* 42 (Ann Numhauser-Henning ed., 2001).

41. *Id.*

42. The Ministry of Health, Labor and Welfare is currently preparing guidelines that show criteria prohibited as indirect discrimination under the revised law. Other examples of indirect discrimination given by the Ministry are (1) height, weight, and physical strength as a hiring requirement; and (2) experience of transfers as a requirement for promotion.

43. LSL, *supra* note 14, at art. 14.

44. *See supra* Section I.C.

with family responsibilities, the issue is closely related to structural gender-inequality and sex discrimination in the Japanese labor market.

As for employment security, Japanese labor law offers a reasonable level of protection to such workers, although not through concern for gender equality or work/life balance. Dismissal of part-time workers employed for an indefinite period is severely restricted by the general rule of dismissal.[45] The employer is not always free to terminate a contract even when a worker is employed on a fixed-term basis. In 1986, the Supreme Court established a rule that the employer may not refuse the renewal of a fixed-term contract without a justifiable reason where the worker has a reasonable expectation for continuation of employment.[46] While temporary workers do not enjoy as much protection as permanent (regular) workers, lower court decisions show that the closer their position in the workplace is to that of a regular worker, the more strongly they are protected.[47]

On the other hand, there is no legislation or established case law restricting wage gaps between regular and non-regular workers.[48] Refraining from intervening directly in the essential part of the long-term employment practice, the Part-time Work Law of 1993 adopts a soft law approach to the issue. The employer is required to *endeavor* to provide appropriate working conditions in consideration of providing a balance to "ordinary" workers.[49] Administrative guidelines give a basic idea of how the balance between part-time workers and regular workers should be maintained.

III. THE SIGNIFICANCE AND LIMITATIONS OF THE CURRENT LEGISLATION

A. "Ordinary" Workers and Childcare Responsibility

As seen in the previous section, Japanese labor law has made quite a marked improvement in this area over the last few decades. Legal protection for parenthood is, however, concentrated on a relatively small number of workers, i.e., pregnant women and parents raising children below one or one and one-half years of age. They

45. LSL, *supra* note 14, at art. 18, ¶ 3.

46. In re Hitachi Medico, 6 RODO HANREI 486 (Sup. Ct. Dec. 4, 1986). *See* ARAKI, *supra* note 8, at 34–36.

47. For example, see In re Sanyo Denki, 91 RODO HANREI 595 (Osaka D. Ct., Oct. 22, 1991).

48. However, in re Maruko Keihouki, discussed below in section IV.C., offers an interesting theory to restrict such wage differences.

49. Part-time Work Law, Law No. 76 of 1993, art. 3, ¶ 1 [hereinafter PWL].

belong to a special group of workers whose interests in family life are, in principle, given priority over the economic interests of the employer. When the special period elapses, working parents with small children are expected to compromise with the employer's business needs. Other than a number of rules on night work and overtime work, the law leaves the employer to decide how and to what extent workers can control their working schedules according to childcare responsibilities. When the child has reached school age (usually six years), working parents become "ordinary" workers without any statutory protection for parenthood.

Though it is reasonable to provide special protection for workers during the most demanding period, parenthood takes up a significant part of our lives. Six years after the child's birth, working parents still need time and energy for their children. How are the interests of "ordinary" workers in this respect treated under Japanese labor law?

As covered in Section I.C., the long-term employment practice has had a strong influence on the development of Japanese labor law. Labor statutes leave plenty of room for free hiring and flexible deployment of the labor force by the employer. Regulations on working time are also generous compared with European countries. As an example, the maximum amount of overtime work is not restricted by a compulsory regulation. The practice has also served as a standard model for courts in the interpretation of employment contracts. While significantly restricting employers' freedom to dismiss, the courts allow employers unilateral power to decide on personnel matters including transfers and promotions. The family interests of individual workers tend to be treated lightly when they are in conflict with the employer's need for flexible deployment of the labor force. As a striking example, we will look at how the courts decided on transfer order validity.

B. Transfer Orders for Working Parents

It is generally considered that the employer is entitled to order a transfer based on an employment contract unless there is an agreement between the parties specifying the place and type of work. The courts tend to be reluctant in recognizing the specification without an explicit agreement.[50]

50. In re Nissan Jidousha, 554 ROHAN 6 (Sup. Ct., Dec. 7, 1989). For detailed content of the case law, see ARAKI, *supra* note 8, at 134–36.

When the courts find that the right to order a transfer exists, it remains to be seen whether the employer has abused this right in the case at hand. In 1986, the Supreme Court ruled that an order to transfer is invalid if it will result in the worker's life being seriously disadvantaged.[51] Business necessity is taken into consideration in weighing the parties' different interests. The Supreme Court held that a transfer compelling a worker to live apart from his family (a wife, a two-year-old daughter, and an elderly mother) was valid, regarding the disadvantage as part of the normal inconvenience that workers are expected to endure.

So far, the courts have found abuse of the right to transfer only in extreme cases where workers are responsible for taking care of family members who are seriously ill. In a typical case, a worker shared responsibility with his wife for taking care of their young daughters who had mental problems, and the man also had to help his frail elderly parents.[52] Other than special circumstances such as this, disadvantages in private life tend to be regarded as normal inconveniences that workers must endure. Working mothers are no exception to this.[53]

Some recent judgments, however, show a little more respect for workers' family life. In one case, a worker was forced to live apart from his working wife and young children (aged seven years, four years, and seven months) because of a transfer. The court held that the disadvantage fell into the category of normal inconvenience, since the employer took measures (in the form of special payments and an offer of residence) to compensate for the economic losses caused by the separation.[54] This implies that the transfer order could have been nullified if the employer had not taken these measures.

A recent decision made by the Tokyo District Court[55] shows a more remarkable improvement. In this case, a worker refused a transfer order to Osaka because he had to take care of his children (aged three years and one years) who were suffering from serious atopic dermatitis. Since his wife was working full-time for another company and their children were receiving special acupunctural treatment in Tokyo, it was difficult for them to accompany him to Osaka. The employer had been prepared to offer considerable

51. In re Toa Paint, 1198 HANREI JIHO 149 (Sup. Ct., July 14, 1986).
52. In re Hokkaido Coca Cola Bottling, 62 RODO HANREI 723 (Sapporo D. Ct., July 23, 1997).
53. In re Kenwood, 7 RODO HANREI 774 (Sup. Ct., Jan.28, 2000).
54. In re Teikoku Zouki, 29 RODO HANREI 694 (Tokyo High Ct., May 29, 1996).
55. In re Meiji Tosho Shuppan, 69 RODO HANREI 861 (Tokyo Dist. Ct., Dec.27, 2002).

economic support if he had accepted the transfer. However, the court nullified the transfer order, pointing out that these economic measures were not enough to compensate for the disadvantages in this case. The transfer of the worker would have made it extremely difficult for his wife to continue her job because their childcare burden was unusually heavy due to the health problems of the children. The court therefore found the disadvantage was far beyond normal inconvenience.

The judgment is also important since it refers to Article 26 of the CCFCL[56] that requires the employer to consider a worker's situation when "a change in the place of work would make it difficult for the said worker to take care of his or her child or a family member." According to the court, when the employer fails to try to understand a worker's situation and examine measures to avoid these difficulties, an order contravenes Article 26 of the CCFCL, and could be regarded as an abuse of the right, depending on other factors.

Despite the recent development, however, the courts still seem to adhere to the employment contract model found in the long-term employment practice. So far, transfer orders have been nullified only when special circumstances (such as the sickness of a child) exist. In "ordinary" cases, the courts favor the business needs of employers over the interests of working parents. Workers cannot refuse transfer orders, even when they have no option but to live separately from their families unless one partner leaves employment.

IV. BASIC PRINCIPLES OF THE LAW OF WORK/LIFE BALANCE[57]

A. Work/Life Balance as a Matter of Participation

In 2003, the Next Generation Nurturing Support Measure Promotion Law (NGNSMPL) and the Basic Law on Addressing the Declining Birthrate (BLADB) were enacted as framework legislation regarding supportive measures for parenting and childcare. This expresses the basic philosophy that the government, local authorities, employers, and the citizens are all responsible for creating a social environment in which every individual can bear and raise children in

56. The article was introduced when the CCFCL was revised in 2001.

57. Much of the inspiration in this section comes from the theoretical framework presented in Anna Christensen, *Protection of the Established Position: A Basic Normative Pattern*, *in* 40 SCANDINAVIAN STUDIES IN LAW 285–324 (2000).

favorable conditions while maintaining a balance between work and parenthood.[58]

The philosophy expressed here seems to suggest an important perspective in seeing the issue of harmonizing work and parenthood as a matter of participation. The notion of "participation" in this context refers to individuals being able to work and make a contribution in the workplace according to their personal circumstances and ability in exchange for a reasonable income.[59] The ultimate goal of the public policy is, from this viewpoint, to enable every individual, regardless of sex, to fully participate in the workplace, while maintaining a balance between work and parenthood.[60]

This perspective is important, since it extends the scope of the work/life balance policy to every parent (or even to every individual), beyond the limit of current labor legislation. It sets a new task for labor law to remove obstacles and give positive support to individual workers, enabling them to fully participate in the workplace with the option of designing their working style in harmony with family life during the long process of parenthood.

B. Special Protection and Equality

The recent legal development has had a remarkable impact on the normative structure of labor law. From the overall picture presented in the previous sections, we see two basic principles that have emerged and established themselves to bring about the modification of legal rules in this area previously governed by free contracts and the prerogatives of employers. One such principle is protection for pregnant workers and working parents during the first few years after childbirth (the Special Protection Principle), while the other involves non-discrimination and equal treatment of men and women (the Equality Principle).

The Special Protection Principle lies behind the labor statute guaranteeing an individual worker's right to maternity leave, childcare leave, and the other measures outlined in Sections II.A–B. The initial function of these legislative measures is to protect such workers from

58. *See* The Next Generation Nurturing Support Measure Promotion Law, Law No. 120 of 2003, arts. 1, 3–6; Basic Law on Addressing the Declining Birthrate, Law No. 133 of 2003, arts. 2–5, 10.

59. For an insight into "participation" in this context, see Catherine Barnard, *The Future of Equality Law: Equality and Beyond*, *in* THE FUTURE OF LABOUR LAW. LIBER AMICORUM SIR BOB HEPPLE QC 224–27 (Catherine Barnard et al. eds., 2004).

60. *Id.* at 224.

losing their position in the workplace during the most demanding period of parenthood. Being a strong protective measure that precludes the flexible accommodation of business needs, however, its application is limited to only the most demanding period of parenthood.

While protection for a limited number of special workers does not necessarily conflict directly with traditional practices, the non-discrimination law derived from the Equality Principle intervenes in the core of the male-centered employment structure to remove obstacles toward the full participation of women in the workplace. Despite its significance, however, the non-discrimination law does not always provide effective relief for working parents who are prevented from full workplace participation. While the Equality Principle basically aims to provide equal opportunities and treatment in equal cases, workers who assume the initial child-care responsibility are often substantially "different" (e.g., more absent or non-regularly employed) from others even after the period of special protection, although there are of course exceptions to this. The prohibition of indirect discrimination introduced in the 2006 EEOC is an important step forward in this respect. However, in some cases workers cannot claim indirect sex discrimination even when they suffer serious disadvantages as a result of practices or criteria adopted by the employer.[61]

C. The Balancing Principle

Though the Special Protection Principle and the Equality Principle are both important, they are limited in their scope to remove obstacles that prevent working parents from full participation in the workplace. There is arguably a need to supplement them with another principle aimed at a balanced (but not necessarily equal) treatment of workers according to their differences by reasonably accommodating the opposing interests of the worker and the employer, which I will refer to as the *Balancing Principle*. It differs from the other two principles in its flexible nature, providing more scope to cover work/life balance for all workers who wish to spend more time on personal/social activities.

61. In small companies, for example, it is difficult to prove a detrimental effect of the criterion. *See* Karin Lundström, *Indirect Sex Discrimination in the European Court of Justice's Version*, *in* Numhauser-Henning, *supra* note 41, at 143–60. For a more general view, see SANDRA FREDMAN, WOMEN AND THE LAW (1998).

The essence of the Balancing Principle lies in its positive attitude toward the differences between individual workers. Encouraging positive measures to provide workers with the option to control their working patterns, it also aims to remove obstacles toward flexible choice for workers. The basic idea is that a practice or treatment should be modified (as long as it would not place an unreasonably heavy burden on the employer) if it disadvantages workers to the extent that they are deprived of a substantial opportunity to fully participate in the workplace while maintaining a balance between work and parenthood. The present legal rules on transfer,[62] for example, could be reconsidered from this perspective.

Though still in the embryonic stages of development, the Balancing Principle appears in some legal rules, although many of them remain as soft law with no legally binding effect. Some of the provisions in the CCFCL and the Part-time Work Law outlined in Section II are examples of this.[63] The Balancing Principle also emerges in some cases, an example being the case law on termination of a fixed-term contract outlined in Section II.D. The most interesting example, however, is found in a judgment from a Nagano district court in 1996.[64] In this case, temporary female workers demanded wages equal to those of regular workers (also female) as they were engaged in the same job with the same responsibilities and experience. The court held that the employer does not have an obligation to pay equal wages since there is no such legal rule. The court did state, however, that behind the current non-discrimination laws lays *the principle of balancing treatment,* and that this constituted part of public order (Article 90 of the Civil Code). It would contravene the principle and therefore be illegal to pay wages that were significantly lower (less than 80% of regular workers' wages in this case) to temporary workers, even if they perform equal work as regular workers.

The Balancing Principle has not yet established itself as a legal principle in Japanese labor law. With the inherent ambiguity of the concept of "balance," it would not be easy to adopt it as a legally binding principle. However, it could perform an important function in supplementing the other two principles to influence the social structure and the legal rules that prevent workers from a better balance between work and parenthood.

62. *See supra* Section III.B.

63. CCFCL 2004, *supra* note 22, at art. 23, 24, 26; PWL, *supra* note 50, at art. 3.

64. In re Maruko Keihouki, 32 RODO HANREI 690 (Ueda Div. Nagano Dist. Ct., Mar. 15, 1996).

CONCLUDING REMARKS

In this article, I have tried to present an overall picture of the law of work/life balance in Japan with a focus on parenthood. This picture has shown three different principles: the Special Protection Principle, the Equality Principle, and the Balancing Principle. The latter is not yet established in Japanese labor law, but has started to emerge in some legislation and cases. They function, if not always effectively, to bring about the modification of traditional practices and legal rules that stand as obstacles for individual workers to balance work and parenthood as they desire.

The new framework legislation regarding childcare support suggests that the harmonization of work and parenthood could also be considered as a matter of participation. From this viewpoint, the ultimate goal of public policy is to enable every individual to participate in the workplace, maintaining a balance between work and childcare. To achieve this goal, it is necessary to develop each principle further in Japanese labor law, which may bring some conflict between the principles. It also implies an increased juridification of the employment relationship and legal intervention into employment practices. Addressing the task fully would potentially lead to a drastic change in the normative structure of Japanese labor law.