Different Cultures, Different Conflicts: Sex Discrimination Law and the United States and Japan

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Recommended Citation
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Articles about the state of the Japanese labor market show up regularly in Western periodicals such as the *New York Times*, *Business Week*, and *Time Magazine*. The stories they tell are frequently quite similar. The competitive reality of the global market is destroying the foundational principle of the twentieth-century, Japanese workplace: the promise of lifetime employment. According to this story, the new, hypercompetitive, global economic environment has forced Japanese businesses to abandon this supposedly antiquated business practice that favors seniority over ability, harmony over efficiency, and hierarchy over individual initiative.  

Not having access to Japanese language sources, it is difficult for me to know whether this story is accurate or, even if it is accurate, whether it is as wide-spread a phenomenon as Western newspaper editors think it is. Regardless, the condescending *schadenfreude* that is evident in these articles is off-putting. American journalists and business leaders are cheering the fact that Japanese businesses are finally adopting some of the most brutal and least worker-friendly aspects of Western employment relations: "at will" employment, prejudice against older workers, the cruel, short-term thinking of indiscriminate downsizing. How fortunate the Japanese are to finally recognize the great benefits of these employment practices!

There has been one thing, however, that has been missing for much of this coverage. Even in its heyday, there was one enormous sector of the

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*Professor, University of California, Hastings College of Law. This article is based on a talk I delivered at the Nihon University College of Law in June, 2011. My thanks to Dean Minoru Sugimoto and all the faculty and staff at Nihon for their kind hospitality. I am particularly grateful to Professor Yasuo Fukuda for making all the arrangements for my visit and acting as my host. Finally, I would like to thank Professor Rikiya Sakamoto who acted as both a gracious host and a talented translator during my visit.

Japanese workforce that lifetime employment never applied to: women. Like other advanced industrial economies, Japanese women entered the workforce in large numbers in the years following World War II. However, their path through the workforce has been different from that of men. After high school or college they would work until they got married. Then they would leave the job market while they had children and raised them. Finally, after their children had grown old enough to relieve them of some of the responsibility of child rearing, women would reenter the workforce. Because they would enter, leave, and reenter the workforce, lifetime employment security was not a benefit they were entitled to. Instead, women generally worked in lower skilled, frequently part-time jobs.2)

There is nothing unusual about this gendered system of work. A version of it exists in the United States as well. Indeed, one could look at it as a simple division of labor. Working in the business world to earn money for a family, and working in the home to nurture and raise children can both be deeply satisfying and each is a profoundly important activity that is crucial for the functioning of society. However, a problem emerges when this division of labor is forced upon people, rather than chosen by them. If women in managerial positions are given less responsibility, are encouraged to retire when they have children, and are discriminated against if they refuse to do so, then there is a problem with the way that labor markets are functioning.

It is difficult for a person who does not read Japanese to get a complete picture of how Japanese women are treated in the workforce and how they feel about that treatment. However, descriptions of the lives of two very different Japanese women that are available in English do provide some insight into these issues.

The first is a woman named Mariko Tanaka, the subject of Elisabeth Bumiller’s wonderful book, The Secrets of Mariko.3) Mariko was the pseudonym given to a middle-class, Japanese woman who was the subject of a biography written by Bumiller, an American journalist, in 1995. Bumiller spent a year living in Tokyo, interviewing Mariko on a weekly basis and chronicling her life. As told by Bumiller, Mariko’s work life was

typical of a Japanese woman in her early 40s. After graduating from high school, Mariko took a job as a clerk with the Japan Travel Bureau. She worked in that job full time until she got married and became pregnant. She then left work to raise her children. When her youngest child turned nine, Mariko returned to the work force. She worked one day a month for the Japan Travel Bureau, and sixteen half-days a month reading water meters for the metropolitan water department. Markio got immense satisfaction from her part-time work. She earned some money, got some exercise, and had a chance to interact with the public. However, when Bumiller asked Mariko about whether she regretted not having a career, as her husband did, Mariko emphatically said that she did not. Raising her children was a pleasure and a duty, she believed. It would simply be wrong to allow someone else to raise your children. Besides, Mariko had trouble believing that her husband’s life, which involved working punishingly long hours as an electrical engineer for a small construction firm, was something that she would want to emulate.

The second woman is different from Mariko in almost every way. First of all, she is a fictional character — Masako Katori, the main character in Natsuo Kirino’s novel Out. Out follows the lives four women who work on the night shift at a bento factory in an industrial suburb of Tokyo. All four are in desperate financial shape, and after one of them murders her no-good husband in a fit of anger, the four of them dispose of his body and collect his life insurance money. They soon realize that they can earn good money by disposing of bodies for gangsters. Masako Katori is the ring-leader of this group, but she hides from them a secret about her work life. Unlike the other three women, who do not have the education or skills to do anything more than work in the bento factory, Masako had worked for twenty-two years at a bank in Tokyo. Her employer expected her to retire after having her first child, and when she did not, she found herself suddenly excluded from both the bank’s social activities and from challenging work assignments. Increasingly frustrated by the fact that she was never promoted, and that she was paid less than men with considerably less experience and seniority, she finally complained about her pay and about the company’s refusal to place her in a management position. The next day her co-workers begin harassing her. Ultimately, after being hit by her incompetent supervisor, she was given the choice of quitting or being transferred to another office, far away from her husband and children. At that point she quit and took the job at the bento factory.

It is difficult not to read *Out* as an indictment of the way women are treated in the Japanese workplace. Kirino drives this point home with the maudlin joke that underlies the entire book: women's opportunities in the Japanese work force are so bad and so degrading that they do better, both in terms of finances and in terms of responsibility, if they become murderers for hire.

*Out* is obviously a polemic, and it uses a particularly extreme situation to make both its dramatic and its political points. That said, the status of women in the Japanese workforce is striking—a fact that is illustrated by both Masako and Mariko's stories. Fewer Japanese women stay in the workforce after having children than in any other industrial democracy except South Korea. The fact that Japanese women are segregated in low prestige, low paying jobs is also remarkable. Nowhere in the world do women's wages equal that of men, but, again, Japanese women's wages lag behind those of women in most other industrial democracies. All these indicators have been improving in the last two decades, but they seem to indicate that many Japanese women are not able to choose their own career path because of sex discrimination. Mariko's feelings about work may be more typical than Masako's, but Kirino's book suggests that there are some women who do not wish to make the choices that Mariko did, and for them, life in the workplace can be difficult.

Masako and Mariko's stories illustrates a simple fact: it is a fundamental principle of human rights that women should have the autonomy to choose whether they enter the workforce as Mariko did, as a supplement for a satisfying life that is focused on the home, or as Masako wished to, as a person who seeks the rewards of a successful career in business. Law and public policy should facilitate this choice, and Japanese law does not seem to be up to the task.

On the surface, Japanese and American sex discrimination laws are quite different. In the United States, sex discrimination has been illegal since 1964. This is true of both intentional discrimination and "indirect" dis-

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7) See Article 23 of the Universal Declaration of Human Rights: "(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work."

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crimination — sex-neutral employment policies that disproportionately disadvantage women.\(^9\) Additionally, American laws prohibit discrimination against pregnant women\(^10\) and require that men and women get equal pay for equal work.\(^11\) Sexual harassment is illegal in the United States.\(^12\) Even if the harassment does not result in an adverse employment action, it is illegal to create a hostile work environment for women.\(^13\)

American sex discrimination law is enforced primarily through the courts, though plaintiffs must first file their claims with either the federal Equal Employment Opportunity Commission or with a similar state agency.\(^14\) These agencies then decide whether they will act on the case. If they decline to, the plaintiff can pursue her claim in court. Women who are discriminated against can sue their employers for lost pay and emotional damage. Many sex discrimination law suits are brought as class action suits, where, in addition to damages, the court can order companies to change their employment practices more generally. Finally, sex discrimination laws also provide for attorneys fees, so that there is no lack of lawyers to bring these cases.\(^15\) Consequently, there are a large number of claims brought — each year 25 to 30 thousand claims are filed with the EEOC for sex discrimination and another 12 -15 thousand for sexual harassment.\(^16\) This figure doesn’t even count cases filed first with state agencies.

This legal regime contrasts dramatically with how sex discrimination is treated in Japan. In Japan, sex discrimination in employment was not prohibited until 1986.\(^17\) Even then, the Equal Employment Opportunity Law did not apply to recruitment and hiring, and it did not contain enforcement provisions. The 1997 amendments to the law strengthened it considerably, expanding the requirement of non-discrimination to all aspects of the em-

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13) Id.
ployment relationship. It also created an administrative regime for enforcing these prohibitions, though women still have no direct cause of action in courts for discrimination. More recent legislation has prohibited sexual harassment, and there have been a scattering of successful law suits in courts based on claims of sexual harassment.

It is tempting, particularly for an American lawyer, to look at the comparison between these two legal regimes and believe that the cause of the disparity between women’s experiences in the United States and Japan is obvious – Japan simply needs sex discrimination laws with teeth. This perception, however, if not exactly incorrect, is certainly incomplete. To understand why, it is necessary to briefly examine the history of sex discrimination legislation in the United States.

The original draft of Title VII of the Civil Rights Act of 1964, the federal statute that prohibited employment discrimination, did not include a prohibition of sex discrimination. The statute focused entirely on the most salient form of discrimination at the time – race-based discrimination. However, politicians who wished to defeat the law amended the proposed legislation to include a prohibition against sex discrimination. They did so not because they believed in gender equality. To the contrary, they thought that including sex discrimination in the statute would prevent its passage. What could be more absurd, they thought, than a statute that prohibited an “uncontroversial” type of discrimination? As it turned out, these politicians misjudged. The desire to end race discrimination was strong enough that supporters of the legislation “tolerated” the inclusion of sex discrimination in it.

Not surprisingly, because there was no political movement behind the inclusion of sex discrimination in Title VII, this provision of the statute was underutilized during the first decade after the statute passed. Indeed, during that first decade the EEOC essentially refused to enforce the Act’s sex discrimination provisions. Only in the 1970s did the number of sex discrimination claims brought under Title VII become substantial. The

21) Id.
EEOC did not issue guidelines forbidding sexual harassment until 1980. 22) The reason for this increase in sex discrimination litigation had nothing to do with the law. Instead, it reflected the increasing power of feminism in the United States. American feminists did not fight to include the sex discrimination prohibition in Title VII, because feminism was not politically powerful enough to do so in 1964. Instead, as feminism flourished in the United States in the 1970s, women found, almost by happenstance, that a legal regime existed to help them with their struggle. 23)

This history of sex discrimination legislation in the United States suggests that the status of women in the Japanese workplace is less a product of the country’s laws and more a product of the nature of feminism in Japan, which is a much less politically powerful movement than it is in the United States. 24) Without a strong political movement that seeks to further a version of feminism that promotes the ability of women to make choices about how they wish to participate in the workforce, employment discrimination laws are not going to be particularly successful, regardless of how strong they are on paper. 25)

The other problem with thinking that tough sex discrimination laws are a panacea for the problems that Japanese women experience in the labor market is that it assumes that the experience of American women is a goal worth aspiring to. It is true that American women remain in the workforce after having children at a higher rate than Japanese women do. It is also true that they earn more money and have had more success at breaking into traditionally male jobs in management than have Japanese women. However, even as they have entered and stayed in the workforce in larger numbers, American women have not done appreciably less work in their homes. 26) They are still responsible for the majority of the domestic duties of their family, including childcare. American men have not been taking up

their share of domestic duties as women have moved into the workforce. Thus, American women have not really been given the choice between working out side of the home or focusing their energies on their families. Instead, they have been given the choice of staying at home with their children, or working outside of the home and taking care of their children. Indeed, for many women, they do not even have this choice. Economic necessity forces them to work and to care for their children the best they can.

Both the history of American sex discrimination legislation and the results of its use in the United States suggest that the issue of sex discrimination in employment is primarily a cultural one, not a legal one. In both the United States and Japan, there is a strong presumption that raising children is primarily the role of women. In Japan this has meant that women who wish to enter the workforce full time have encountered resistance. In the United States, women encounter less resistance, but only because it is assumed that even if they work full time, they will still be the primary caregivers for their children. In the short run, no employment discrimination law, no matter how powerful, is going to change this cultural norm.

What then is the role of law in addressing this cultural issue? The answer to this question returns to the basic theme of this article: giving women a choice as they make decisions about how to balance their work life with their home life. An important step towards changing both American and Japanese culture to allow women this choice is using the law to increase the number of women who have had the opportunity to choose a non-traditional career path – to create role models. Until a few women deviate from their traditional role, most people will not believe that it is possible to do so on a routine basis. A properly constructed legal regime can make it easier for these role models to break down barriers. The breaking down of these barriers will, in turn, make it easier for people to follow the role models. Eventually, the cultural norm is changed.

Thus, the function that law should play is to make it easier for women to be role models in the workplace. One reason to have robust, legal prohibitions of sex discrimination and sexual harassment is to ensure that women, even if it is only a few women, can freely choose between working in the home and working outside of the home – of choosing Mariko’s life or the life that Masako wished she had had. It is unclear to an American observer what percentage of Japanese women desire full-time careers. However, those women should be able to pursue that goal without being discriminated against or harassed. They must be allowed to be the role models that will eventually shift cultural norms with respect to women in the work force.

These laws against sex discrimination should also include a prohibition
of what in America is called "family responsibility discrimination." They pointed to the way women and men who choose to take an active role in raising their children should not be discriminated against in the workplace. Sociologists have discovered that when workers, regardless of their gender, inform their employer that they will be actively involved in raising their children, they are discriminated against. They are given less challenging assignments, they have fewer opportunities for promotion, and they earn less money. This is true even when the employee has not reduced the hours they work because of their childcare responsibilities. Prohibiting such discrimination is crucial to ensure both that women can participate in the workforce in the same manner as men do, and to ensure that men may more actively participate in the raising of their children if they wish to.

Additionally, to truly allow women free choice in deciding whether they wish to enter the labor force and on what terms, the government must provide some form of childcare, either directly, or through some kind of a subsidy. The United States has no such program and economists have calculated that the absence of inexpensive, high-quality childcare facilities is a significant reason why women do not enter the workforce. It may be true that few Japanese families will be willing to avail themselves of such a program. Mariko told Bumiller that using a baby-sitter, even for a night out, might cause her neighbors to believe that she neglected her children. But, again, simply providing the opportunity for the few families that might wish to avail themselves of it would give women the chance to make freer choices about entering the workforce.

Finally, the law must address an issue of workplace equity that is rarely raised, even in the United States. Recall that one of the reasons that Mariko gave for declining to enter the workforce full time was how unhappy her husband was with the brutal work schedule that his job required. Mariko makes an excellent point. Sex discrimination law has had as its goal giving women the same employment opportunities as men. Yet men's employment opportunities, even if they are financially rewarding, may not be a goal that is entirely desirable. Perhaps a better goal would be to make traditionally male jobs more conducive to a sane balance between work

29) For a compelling argument that the demands of modern workplaces, shaped by assumptions about male work patterns, are damaging to men, women, and children, see Joan Williams, Unbending Gender: Why Family and Work Conflict, and What to Do About It (2001).
and family. Both men and women deserve an opportunity to participate in both work life and family life. The primary goal of employment discrimination law, and of labor and employment law more generally, should be to allow men and women to participate in both of these activities. This goal will not only give women more freedom to enter the workplace, it will also give men the freedom to engage in one of life’s most pleasurable and rewarding activities: the raising and nurturing of children.