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The Principle of Equal Pay for Work of Equal Value and Female Part-Time Workers in Japan

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Summary

The gender pay gap is wide and pervasive in Japan. This is especially manifest when comparing wages of female part-time workers and male full-time workers.

However, the principle of equal remuneration for work of equal value between men and women as enshrined in the Equal Remuneration Convention of the International Labour Organization, 1951 (No.100), has not been fully incorporated into Japanese laws, although Japan ratified the Convention in 1967.

This thesis aims to address the pay gap between female part-time workers and male full-time workers in Japan in light of international human rights law. To achieve this end, this thesis analyses double disadvantages of female part-time workers due to sex and the employment type.

First, this thesis focuses on the social structure which creates systemic inequality, namely, labor practices based on a male breadwinner model and the different pay determination system between part-time and full-time regular workers. Also, there will be a description of stakeholder's perceptions on non-regular employment in Japan.

Second, this thesis clarifies the contents of the principle of equal remuneration for work of equal value between men and women in international human rights law and the equal treatment in the Part-Time Work Convention of the International Labour Organization, 1994 (No.175), in relation to the application to female part-time workers.

Third, this thesis examines current Japanese laws and their compliance with international human rights law. The analysis shows that a failure of establishing the principle of non-discrimination and the lack of the concept of "value" result in reinforcing structural inequality against female part-time workers.

Finally, this thesis presents recommendations for a legislative framework clearly establishing the principle of equal remuneration for work of equal value between men and women in Japan from the perspective of international human rights law.

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Lastly, I wish to thank my family, who always encourages my decisions.

Abbreviations

International Sources

CXXX or RXXX	ILO Convention or Recommendation No. XXX
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of Discrimination Against Women
CEDAW GR	Convention on the Elimination of Discrimination Against Women General Recommendation
CESCR	Committee on Economic Social and Cultural Rights
CESCR GC	Committee on Economic Social and Cultural Rights General Comment
ICESCR	International Covenant on Economic Social and Cultural Rights
ILO	International Labour Organization
ILO CEACR	Committee of Experts on the Application of Conventions and Recommendations of ILO
ILO Constitution	Constitution of the International Labour Organization
Japan- CEACR, Observation, YYYY, CXXX	Committee of Experts on the Application of Conventions and Recommendations, Observations concerning Japan on CXXX adopted in YYYY
Japan-CEACR, Direct Request, YYYY, CXXX	Committee of Experts on the Application of Conventions and Recommendations, Direct Request concerning Japan on CXXX adopted in YYYY
UN	United Nations

Regional Sources

ECJ	European Court of Justice
EU	European Union

National Sources

Act on Promotion of Women's Participation	Act on Promotion of Women's Participation and Advancement in the Workplace, Act No.64 of 2015
Equal Employment Opportunity Act	Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment Act No. 113 of July 1, 1972
JILPT	the Japan Institute for Labour Policy and Training
Part-Time Workers Act	Act on Improvement, etc. of Employment Management for Part-Time Workers Act No. 76 of June 18, 1993
MHLW	Ministry of Health Labour, and Welfare of Japan

1 Introduction

1.1 Background

> "Worldwide, women only make 77 cents for every dollar earned by men. As a result, there's a lifetime of income inequality between men and women and more women are retiring into poverty. This stubborn inequality in the average wages between men and women persists in all countries and across all sectors, because women's work is under-valued and women tend to be concentrated in different jobs than men." (UN Women)[1]

The gender pay gap in Japan is wide and persistent, 27 % in 2016, which the Government of Japan pronounced as the lowest gap since 1986.[2] Compared with the 41.2% pay gap in 1986, which was one year after the ratification of Convention on the Elimination of Discrimination Against Women (CEDAW) by Japan, the gender pay gap has been declining.[3] However, progress has been extremely slow.

Notably, 27 % is the gap between full-time female and male workers. Between "part-time" female workers and full-time male workers, the pay gap is much wider. The pay gap measured on hourly basis between female part-time workers and male full-time workers was 49.2% in 2015.[4]

Japan ratified the Equal Remuneration Convention of the International Labour Organization (ILO) (C100) in 1967. However, the Government continuously states that "as long as the payroll system does not allow any discrimination in wages between men and women only by reason of the worker being a woman, it is considered to meet the requirements of the Convention."[5] The ILO Committee of Expert of Application of Conventions and Recommendations (ILO CEACR) has pointed out that Japanese legislation does not fully reflect the principle of equal pay for work of equal value between men and women (hereinafter "the equal pay principle"). [6] The opinion of the ILO CEACR is that Member States must incorporate the concept of "work of equal value," which enables a broader

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[1] UN Women "Equal pay for work of equal value"
< http://www.unwomen.org/en/news/in-focus/csw61/equal-pay >accessed 18 April 2018
Data is from ILO, Women at Work: Trends 2016(Geneva 2016).

[2] The pay gap is based on scheduled cash earnings, by monthly basis.
Ministry of Health Labour, and Welfare of Japan (MHLW), Heisei 28 nen Chingin Kihon Kouzou Toukei Chousa (Basic Survey on Wage Structure in 2016) < http://www.mhlw.go.jp/toukei/itiran/roudou/chingin/kouzou/z2016/index.html >English Data Basic Survey on Wage Structure, Ordinary Workers Data < http://www.mhlw.go.jp/english/database/db-l/ordinary.html >accessed 19 February 2018

[3] ibid

[4] Gender Equality Bureau, Cabinet Office Government of Japan, Women and Men in Japan 2017 (Gender Equality Bureau, Women and Men in Japan 2017)9 "Average Hourly Wage for Workers". The data is based on " Basic Survey on Wage Structure."<http://www.gender.go.jp/english_contents/pr_act/pub/pamphlet/women-and-men17/index.html >accessed 15 February 2018

[5] ILO CEACR, Observations concerning Japan on the Equal Remuneration Convention (No. 100), 1951 (104th Conference Session Geneva, 2015) ILC.104/III(1A)263(*Japan*- CEACR, Observation, 2014, C100)

[6] ibid

comparison beyond "the same" or "similar" work.[7] Although the meaning of "value" is not defined in C100, the ILO CEACR has issued the interpretation of "work of equal value." The concept of "value" "refers to the worth of a job for the purpose of computing remuneration,"[8] which should be used for comparison between different types of jobs. However, the Government of Japan argues that objective job evaluation as a method of evaluation for "value" of work not be considered to fit the wage system in Japan. In 2014, after a number of observations, the ILO CEACR strongly urged "the Government to take immediate and concrete measures to ensure that there is a legislative framework clearly establishing" the equal pay principle.[9]

In spite of the observation in 2014, the Government of Japan has not revised domestic laws on pay discrimination based on sex to incorporate the concept of "value." Instead, in 2016 the Government started to advocate the "equal pay for equal work" between "regular" and "non-regular" workers whose aim is to address the widening pay gap due to employment types. The Government published the Action Plan for the Realization of Work Style Reform in March 2017 (hereinafter "the 2017 Action Plan") which pronounced the implementation of "equal pay for equal work" between "regular" and "non-regular" workers.[10] Following the direction in the 2017 Action Plan, the cabinet of Japan submitted the Work Style Reform Bills to the Diet in April 2018. The bills include revisions of the Part-Time Workers Act and the Labor Contracts Act which aim to extend the prohibition of pay discrimination between regular workers and part-time workers to fixed-term workers.[11]

Considering the over-representation of women in non-regular employment, the Japanese version of "equal pay for equal work" may work to reduce the gender pay gap. However, the current reform announced in the 2017 Action Plan lacks the perspective of gender equality based on human rights. The Government of Japan is of the opinion that the issue of treatment of non-regular workers is not directly related to the application of C100.[12]

The ILO CEACR issued another observation in 2017 and again urged "the Government to take immediate and concrete action to ensure the existence of a legislative framework clearly establishing the right to equal remuneration for men and women for work of equal value."[13] The recurrence of the ILO CEACR

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[7] ILO CEACR, "General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008" (101st Conference Session Geneva, 2012) (General Survey 2012) para 672 673, *Japan*- CEACR, Observation, 2014, C100

[8] ibid para 673 674

[9] *Japan*- CEACR, Observation, 2014, C100

[10] Council for the Realization of Work Style Reform of Japan, The Action Plan for the Realization of Work Style Reform (Provisional English Translation) (28 March 2017) (The 2017 Action Plan)< http://www.kantei.go.jp/jp/singi/hatarakikata/>accessed 18 April 2018

[11] The Cabinet of Japan, Hatarakikata kaikaku wo suishin suru tame no kankei houritsu no seibi ni kansuru houritsu an (The Work Style Reform Bills) (Japanese Only) (6 April 2018) <http://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000148322.html> accessed 8 May 2018

[12] ILO Director-General, Report of the Committee set up to examine the representation alleging non-observance by Japan of the Equal Remuneration Convention, 1951(No.100), made under article 24 of the ILO Constitution by the Zensekiyu Showa-Shell Labor Union (312th Governing Body Session, Geneva, November 2011) GB.312/INS/15/3 (Director-General, GB.312/INS/15/3) para41

[13] ILO CEACR, Observations concerning Japan on the Equal Remuneration Convention (No. 100), 1951 (107th Conference Session Geneva, 2018) ILC.107/III(A)381 (*Japan*-CEACR, Observation, 2017, C100)

observations is because the opinion of the Government of Japan about the equal pay principle has not fundamentally changed since the adoption of the observation in 2014.

The argument regarding the equal pay principle in Japan illustrates how difficult it is to incorporate international human rights law into the domestic context when the government believes the local society has a different system from which the principles in international law are based upon. This thesis hopes to contribute to the further implementation of the equal pay principle in Japan as well as to discussions on the incorporation of international human rights law into a domestic context.

1.2 Purpose of Thesis

One of the main reasons for the persistently wide gender pay gap in Japan is the over-representation of female workers within non-regular low-paid jobs. The aim of this thesis is to address the double disadvantages of female non-regular workers due to their sex and their employment type. While non-regular employment includes a variety of workers, the largest volume of female non-regular workers holds part-time jobs. In order to achieve the aims as set out above, using part-time female workers as a proxy, this thesis clarifies the contents of international human rights law and analyzes the current Japanese law in light of international human rights law. It also provides recommendations for further implementation of the equal pay principle in Japan.

1.3 Research Questions

The research questions for this thesis are as follows:

1. How can the equal pay principle, the principle of non-discrimination and the equal treatment in ILO Part-Time Work Convention(C175) be used to address the low pay of female part-time workers?
2. What is the gap between current Japanese legislation and principles of international human rights law listed in question 1 in relation to female part-time workers?
3. How can the equal pay principle and principle of non-discrimination in international human rights law further drive change into Japanese legislation in order to address the low pay of female part-time workers?

1.4 Limitations

The object of study in this thesis is female part-time workers in the private sector in Japan. The situation of fixed-term workers will be assessed to the extent that is necessary to clarify the interpretation of relevant laws. Other types of non-regular workers, such as dispatched workers are not directly discussed since the applicable laws are different. However, the reasoning of the thesis can apply to other types of female non-regular workers because they share similar challenges arising out of the gap between international standards and Japanese law concerning part-time workers.

The reason for limiting this study to the private sector is because greater challenges lie in this sector. International law imposes stronger obligations on the States to ensure the application of the equal pay principle when the States are the

employers.[14] In addition, in Japan, applicable laws concerning the equal treatment of part-time workers are divided between public and private sectors. The division of applicable laws itself is problematic since it leaves part-time workers in the public sector outside the protection which workers in the private sector can claim.

The aim of the thesis is to clarify the reach of the equal pay principle and the significance of the notion of "equal pay for work with equal value" in addressing the double disadvantage of female part-time workers. Therefore, this thesis focuses on laws directly regulating pay discrimination based on sex and laws regarding the equal treatments between employment types in terms of pay. The focus is not eliminating the root cause of over-representation of female workers among non-regular employment. There are multi-dimensional factors at play, such as family responsibilities placed on women to fulfil a traditional gender-based role as primary caregiver, which forces many women to consciously or unconsciously choose "non-regular" employment. The practice of long working hours of "regular" workers discourages women from choosing full-time jobs and deprives many men of time to spend for housework and childcare. The tax and social insurance systems based on the "male breadwinner model" in Japan tacitly encourage housewives to work part-time with low wage to get benefit from remaining as dependent family members of their husbands. The improvement of legal, tax, welfare and social system to support workers with family responsibilities is necessary to address over-representation of female workers among non-regular employment.[15] However, this is outside the direct scope of this thesis. Those socio-economic dimensions are discussed to the extent that is necessary to analyze the current structure of laws concerning pay discrimination against female part-time workers.

This thesis will explore how wages are set by employers, which often results in discrimination against female part-time workers. This thesis does not discuss other relevant issues of equal treatments affecting wages. Other relevant issues for female part-time workers include, equal accessibility for employment opportunities, vocational training, and opportunities for promotion.[16] Also, enabling smoother conversion from non-regular employment to regular employment is another point to address the pay gap between non-regular workers and regular workers.

The thesis focuses on the pay gap between female part-time workers and male full-time workers, although mindful of the gender pay gap remaining between male and female full-time workers as well as between male and female part-time workers. The pay gap between female part-time workers and male full-time workers is much wider than the gender pay gap within the same employment types. The reason for the focus being placed on female part-time workers is that their situation has been discussed less frequently than that of female regular workers. However, analysis of sex discrimination in this thesis is applicable to female regular workers in general. In addition, the comparison between female part-time workers and male full-time workers is necessary to assess whether the Japanese version of "equal pay for equal work" advocated by the 2017 Action Plan addresses the low pay of female part-time workers, since the 2017 Action Plan concerns the pay gap due to employment types, such as the pay gap between full-time and part-time workers.

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[14] C100 art2(1), ILO Equal Remuneration Recommendation, 1951(No.90) (R90) para 1, General Survey 2012 (n7) para 670

[15] R90 para 6(c)

[16] C111 art.1(3), R90 paras 6 (a)(b)(d), ILO Recommendation concerning Part-Time Work, 1994, (No. 182) (R182) para 15

1.5 Method

To address the low pay of female part-time workers, this thesis clarifies the contents of international law and analyzes the current Japanese law in light of international law. The primary concern is the current state of the law as well as a comparison between international law and Japanese law. Therefore, this thesis is mainly based on the legal analysis, using two methods, legal dogmatic method and legal comparative method.

This thesis applies Fredman's equality theory when conducting legal analysis.[17] The thesis analyzes how the equal pay principle enshrined in international human rights law addresses the shortcomings of formal equality in relation to the application to female part-time workers and clarifies the gap between international law and Japanese law in light of substantive equality.

The understanding of formal equality and substantive equality in this thesis is as follows. Formal equality is summarized as "equality as consistency," and "likes should be treated alike."[18] The equal pay principle is primarily the expression of the formal equality.[19] However, formal equality creates "powerful conformist pressures" by requiring a comparator.[20] It "entrenches antecedent inequalities" by reproducing historically structured disadvantage of women.[21]

In contrast, "substantive equality" is a multi-dimensional approach to overcome the shortcomings of formal equality, which focuses "structural inequality" and requires a "positive duty" on states to bring structural changes.[22] "Structural inequality" between men and women, and between employers and employees is taken into consideration when assessing the equal pay for female part-time workers.[23]

From the perspective of substantive equality, this thesis firstly examines the influence of the fact that the employment type is not recognized as a prohibited ground of discrimination in relation to wage disparity. The ILO Part-Time Work Convention (C175) and the Part-Time Workers Act of Japan are analyzed for comparison since these laws directly deal with the equal treatment between full-time workers and part-time workers. Next, the focus is on the concept of the "value" as a tool to overcome the shortcomings from "conformist pressures." This thesis analyzes what a "gender neutral" job evaluation is and how it should apply to female part-time workers in Japan. Thirdly, this thesis analyzes the role of the concept of "indirect discrimination" to overcome the limitation of "formal equality," since the pay differential between female part-time workers and male full-time workers are usually at face value gender neutral.[24] Finally, this thesis refers to the importance of a "positive duty" required from "substantive equality" to achieve structural

[17] Sandra Fredman *Discrimination Law* (2nd edn OUP 2011)
[18] ibid 158 167
[19] ibid
[20] ibid 168
[21] Sandra Fredman, "Substantive Equality Revisited" [2016]14(3) International Journal of Constitutional Law,712, 720
[22] Fredman *Discrimination Law* (n17) 25
[23] Sandra Fredman "WOMEN AND POVERTY-A HUMAN RIGHTS APPROACH" [2016] 24(4) African Journal of International and Comparative Law, 494, 499
[24] Fredman *Discrimination Law* (n17) 177

change.[25] This perspective clarifies the limitation of "the complaints-led model" of equal pay legislation.[26]

1.6 Structure

The structure of the thesis is as follows.

Chapter 1 sets out the background, the purpose of the thesis, the research questions, limitations, and the method and structure.

Chapter 2 provides the terminology and the background information on the pay gap between female part-time workers and male full-time workers in Japan based on a legal and socio-economic analysis. The cause of the pay gap due to sex and employment type will be analyzed primarily based on statistical data. In addition, the perceptions of stakeholders on non-regular employment will be discussed. The assessment underlies the analysis and recommendations in the following chapters.

Chapter 3, based on the legal dogmatic method, clarifies the contents of the principle of "equal pay for work with equal value" in international law and the equal treatment in C175. C100, the ILO Convention concerning Discrimination in Respect of Employment and Occupation, 1958 (No.111) (C111), CEDAW, International Covenant on Economic Social and Cultural Rights (ICESCR) and relevant ILO recommendations are primarily examined. The relevant comments from supervisory bodies are also reviewed to provide a greater understanding of the terms of the conventions and how they are to be applied at the national level. Although Japan has not ratified C111 and C175, those conventions are included in the assessment in order to clarify the level of international standards.

In chapter 4, using the legal comparative method, Japanese laws (mainly the Labor Standards Act, the Equal Employment Opportunity Act, the Labor Contracts Act and the Part-Time Workers Act, and the Work Style Reform Bills) are reviewed. Recommendations for Japan provided by the ILO CEACR, the Committee on Economic Social and Cultural Rights (CESCR), and the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) are referred to for the analysis. The adequacy of enforcement of these laws is also addressed.

In chapter 5, Japanese laws reviewed in chapter 4 are analyzed in light of their compliance with international standards in chapter 3. This chapter analyzes how the lack of acceptance of the fundamental principle of non-discrimination and the failure to recognize the concept of "value" serve to reinforce structural inequality against female part-time workers.

In chapter 6, recommendations will be made for a legislative framework clearly establishing the principle of equal pay for work of equal value between men and women in a way that will address the issue of the low pay of female part-time workers.

[25] ibid 230 299

[26] Sandra Fredman, "Reforming Equal Pay Laws" [2008]37(3) Industrial Law Journal,193, 206, 211

2 The Pay Gap of Female Part-Time Workers in Japan

2.1 Terminology

2.1.1 "Regular and Non-Regular Employment"

"Regular employment" typically means the full-time and indefinite-term employment with a direct employment relationship with an employer.[27] It corresponds to the "standard employment relationship," which is "understood as work that is full time, indefinite, as well as part of a subordinate relationship between an employee and an employer."[28]

In contrast, the term "non-regular employment" usually indicates employment types which lack one or more components of "regular employment," which mainly includes part-time, fixed-term and dispatched work (temporary agency work).

In Japan, the division between "regular" and "non-regular" employment has a significant impact on pay rate as well as other working conditions because the regular employment offers higher employment security and a higher pay compared with non-regular employment in Japan.[29] Nevertheless the term "non-regular employment" has no unified legal definition, with different definitions being used within statistics or enterprises in Japan.[30]

However, it is clear that "part-time" workers are mostly recognized as "non-regular workers." The 2017 Action Plan referred to "non-regular workers" as "limited term workers, part-time workers, dispatched workers."[31] According to the definition of the Labour Force Survey of Japan, the word "non-regular employee" is the generic term for "part-time worker," "temporary worker," "dispatched worker," "contract employee," "entrusted employee," and other types of non-regular workers which employers classified as "non-regular."[32] The ILO CEACR

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[27] The Japan Institute for Labour Policy and Training(JILPT) Report No.10, Non-Regular Employment- Issues and Challenges Common to Major Developed Countries (May 2011)1 <http://www.jil.go.jp/english/reports/jilpt_02.html >accessed 18 February 2018

[28] ILO, NON-STANDARD EMPLOYMENT AROUND THE WORLD Understanding challenges, Shaping prospects (Geneva 2016)

[29] Koshi Endo, "The "Equal Pay" Principle Should be Developed to Raise Pay Rates of Nonregular Employees in Japan"(the 6th Reward Management Conference Brussels 7-8 December 2017)2

[30] ibid. According to the definition of the Basic Survey on Wage Structure (n2), Part-time workers refers to workers hired regular-basis (which excludes temporary workers), whose scheduled working hours a day or a week are less than those of ordinary workers (full-time workers) in establishments. MHLW, Basic Survey on Wage Structure, Outline of Survey< http://www.mhlw.go.jp/english/database/db-l/wage-structure.html >accessed 18 February 2018

[31] The 2017 Action Plan (n10) 6

[32] The Ministry of Internal Affairs and Communication, Labour Force Survey, Results (Basic Tabulation), 2017 Yearly Average Results, Statistical Tables and database (Whole Japan) <http://www.stat.go.jp/english/data/roudou/index.html >accessed 19 April 2018 (Labour Force Survey 2017)
The distinction between regular and non-regular and the classification of employment types are based on the classification by the establishments..

referred the term "non-regular employment" as "part-time work" and "fixed-term work" in supervisory comments on Japan.[33]

In this thesis, following the terminology in the 2017 Action Plan, "non-regular employment" is referred to as "part-time," "fixed-term" including "temporary workers" and "entrusted workers," and "dispatched workers" (temporary agency workers) unless otherwise noted.

2.1.2 Definitions of "Part-Time Worker"

C175 defines "part-time worker" as an employed person whose normal hours of work are less than those of comparable full-time workers.

In the Part-Time Workers Act of Japan, "part-time worker" means a worker whose prescribed weekly working hours are shorter than those of "ordinary workers" employed at the same place of business. [34] A part-time worker can have either indefinite or fixed-term labor contract. "Fixed-term worker" simply means a worker with a fixed-term labor contract.[35]

The minimum or maximum working hour of part-time workers is not fixed both in C175 and the Part-Time Workers Act.

In this thesis, a part-time worker is defined as an employed person whose normal hours of work are less than those of comparable full-time workers unless otherwise noted.

2.1.3 Wage

This thesis primarily concerns wage differences between female part-time workers and male regular workers by hourly basis.

Wage means basic wage in this thesis unless otherwise noted. However, it should be noted that the term wage or "wages" has different definitions in domestic laws in Japan.

It should also be noted that in Japan, regular salary is composed not only of basic wages but also of various type of allowances or benefits.[36] In this regard, Basic Survey on Wage Structure of Japan calculates the pay gap by monthly or hourly basis based on "scheduled cash earnings," which include basic wages and various type of allowances regularly paid in cash, such as family, commuting, housing and regional allowances, and allowances for positions and high attendance rate.[37] "Scheduled cash earnings" do not include overtime pay, bonuses, other special pay or retirement pay.

This thesis uses the word "pay" when referring to a broader payment including basic wages, benefits, allowances, bonuses, and retirement pay because difference in pay between female part-time workers and male regular workers lies not only in basic wages but also in these additional payments.

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[33] *Japan*- CEACR, Observation, 2014, C100

[34] Act on Improvement, etc. of Employment Management for Part-Time Workers, Act No. 76 of June 18, 1993(Part-Time Workers Act) art 2

[35] Labor Contracts Act, Act No. 128 of December 5, 2007

[36] Tadashi A. Hanami, Fumito Komiya, *Labour Law in Japan* (Kluwer Law International, Alphen aan den Rijn 2011) 109

[37] This is the unadjusted pay gap. MHLW, Basic Survey on Wage Structure in 2016 (n2).

2.2 Pay Gap

2.2.1 Over-Representation of Female Workers among Non-Regular Employment

Increasing number of workers are working as “non-regular workers” in Japan. While both male and female non-regular workers are increasing, non-regular employment is female-dominated. The 2017 Action Plan states that “non-regular workers account for 40% of all workers in Japan.”[38] According to the Labour Force Survey in 2017, 37.2% are “non-regular workers” among all workers, and around 68 % of non-regular workers are women.[39] While the female labor force is increasing, the rate of female regular workers declined to less than half of the female labor force from 67.9% in 1985 to 44.1% in 2016.[40]

Female domination among part-time work is clear. 43.9% of all female employees are part-time (including temporary workers) in 2016.[41] Since 2005, the rate of part-time workers among all female workers has been more than 40%.[42] In 2016, 67.9 % of part-time workers (who work less than 35 hours per week) was women.[43]

The rate of non-regular employment is increasing among male workers. However, the rate is still much lower than women. The proportion of regular workers of the male labor force was 77.8 % in 2016.[44] The rate of part-time workers (including temporary workers) was 11.1 % of all male workers in 2016.[45]

2.2.2 Pay Gap of Part-Time Workers

As chapter 1.1 has shown, the gender pay gap between full-time female and male workers was 27 % by monthly basis in 2016.[46]

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[38] The 2017 Action Plan (n10)5

The rate of "Other than full-time employees" was 40.6% according to 2016 Economic Census for business activity. In the English translation of Economic Census, "other than full-time employees, full-time staff" corresponds to "non-regular employees" in the Japanese original version. This includes workers who are called "contract employees", "non-regular members of staff", "part-timers," and similar, excluding workers generally referred to as "full-time employees" or "full-time staff" among regular employees.

Ministry of Internal Affairs and Communication and Ministry of Economy, Trade and Industry, Economic Census for Business Activity (Preliminary Report (Outline of the Census)) (31 May 2017) Figure 9: Composition ratio of “Full-time employees” and “Other than full-time employees” by industrial division < http://www.stat.go.jp/english/data/e-census/2012/index.html >accessed 18 February 2018

[39] Labour Force Survey 2017(n32)

[40] Gender Equality Bureau, Women and Men in Japan 2017(n4) 9, “Employee Composition Ratio by Employment Status excluding Company Executives”. The data is based on Labour Force Survey. "Regular staff" includes fixed-term workers.

[41] ibid

[42] ibid

[43] MHLW, “Hataraku Jyosei no jitsujyou heisei 28 nen ban” (Report of Female Workers 2016) (Japanese only)33<http://www.mhlw.go.jp/bunya/koyoukintou/josei-jitsujo/16.html >accessed 5 May 2018. The data is based on Labour Force Survey.

[44] Gender Equality Bureau, Women and Men in Japan 2017(n4)

[45] ibid

[46] MHLW Basic Survey on Wage Structure in 2016 (n2)

The statistics show female part-time workers have double disadvantages from sex and employment type in Japan. The pay gap by hourly basis between female part-time workers and male full-time workers was 49.2% in 2015, while the pay gap between male part-time and male full-time workers was 44.2%.[47] This means that the pay gap between female part-time workers and male full-time workers is much wider than the pay gap between female and male part-time workers.

Among full-time workers, regardless of sex, the pay gap due to employment type is wide. The pay gap between full-time regular and non-regular workers (including both male and female) was 34.2% in 2016.[48] Further, among full-time workers, the gender pay gap exists. Female non-regular workers earn least. The gap between female non-regular workers and male regular workers was 46%, the gap between female non-regular workers and female regular workers was 28%, the gap between female non-regular workers and male non-regular workers was 20% in 2016.[49]

Although a wage penalty for part-time work is prevalent in most countries, [50] the pay gap between full-time workers and part-time workers is wider in Japan than in Europe. While the pay gap was around from 14% to 28% in Europe, the pay gap was 42% in Japan in 2016.[51] The ILO CEACR pointed out that the lower level of wage for part-time workers has an adverse impact on the overall wage gap between men and women in Japan.[52]

2.3 Causes of Pay Gap of Part-Time Workers

2.3.1 Male Breadwinner Model

Traditional characteristics which unfavorably affected women's pay in Japan were lifetime employment, seniority wage system, and enterprise unionism. [53] These systems had been maintained under the male breadwinner model, where men were supposed to work as primary income earners while women were expected to be primary caregivers in families.

Under lifetime employment, the job description of a worker was not specified because the worker was supposed to accept future changes in job descriptions and

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[47] Gender Equality Bureau, Women and Men in Japan 2017(n4)9 "Average Hourly Wage for Workers". The data is based on " Basic Survey on Wage Structure".

[48] MHLW Basic Survey on Wage Structure in 2016 (n2)
According to the definition of the Basic Survey on Wage Structure (n2), the distinction of employment types between regular and non-regular is based on the classification by the establishments.

[49] MHLW, Basic Survey on Wage Structure in 2016(n2)

[50] Colette Fagan and others "In search of good quality part-time employment" ILO Conditions of Work and Employment Series No. 43 (Geneva 13 March 2014) 32

[51] JILPT, Databook of International Labour Statistics 2017, "5. Wages and Labour Costs", Table 5-5: Earnings gap between full-time and part-time workers< http://www.jil.go.jp/english/estatis/databook/2017/05.html >accessed 19 February 2018
Japanese Data is based on Basic Survey on Wage Structure in 2016.

[52] ILO CEACR, Observations concerning Japan on the Equal Remuneration Convention (No. 100), 1951 (91st Conference Session Geneva, 2003) Report III (Part1A) 396 (*Japan*- CEACR, Observation, 2002, C100)

[53] Nobuko Takahashi "Women's Wages in Japan and the Questions of Equal Pay" [1975]111(1) International Labour Review 51, 54.

assignments by becoming a member of a company. Under the seniority wage system, a level of basic wage was mainly determined on the basis of length of service. The seniority wage system coupled with the lifetime employment has loosened the tie between the rate of wage and the content of job that a worker is currently performing. Under the enterprise unionism, collective bargaining has been conducted between the individual enterprise and the enterprise union.[54] The enterprise unionism brought diverse pay settings of each enterprise. Also, under the male breadwinner model, unions primarily had focused on securing the living wage of "male" "regular" workers. As a result, the participation level of unions is lower among non-regular workers than regular employees.[55]

While this traditional model in Japan offered strong employment protection for "male regular" workers, women were supposed to work as subordinate regular workers in a second career track or as "non-regular" workers, typically, part-time workers, to ensure they could maintain their roles within families as primary caregivers.

The reason why part-time workers' pay was set lower than regular worker was that the typical image of part-time work was a housewife's job or a second income to supplement the male breadwinner's primary income.[56] Tax and social security systems have worked to confine women as low-income earners by benefitting those who stayed as dependent family members of husbands.[57]

The low pay rate setting for female non-regular workers remains despite the expansion of non-regular workers in labor market.

2.3.2 Different Employment Types Justify Different Pay Systems

In most cases, non-regular employees receive less wage than regular employees even when the non-regular employees are performing the same duties as regular employees in Japan. Employment types have been accepted as justification for the different pay systems between regular workers and non-regular workers and the significant wage gap. According to a survey conducted in 2010(hereinafter "the JILPT Survey 2010"), more than 80% of establishments use different wage settings for part-time workers.[58] In addition to the above, it was found that 25.5 % of establishments set a pay scale for part-time workers at 80% of regular employees'

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[54] ibid 54, 55

[55] JILPT, The English summary of JILPT Research Report No. 132, "Research Report on Non-Regular Employment: Focusing on Trends, Equal Treatment, and the Transition to Regular Employment" (April 2011)8 < http://www.jil.go.jp/english/reports/jilpt_01.html#y2011 >accessed 18 February 2018.

The survey was "JILTP's survey on the Current Conditions of Employment of Workers with Diverse Employment Types" in 2010. The full report is from JILPT, JILPT Report No. 86 (n58) The survey included 11,010 members of staff from business establishments with 10 or more employees. The terminology of non-regular employment of this thesis corresponds to classification from JILPT Research Report No.132, 3

[56] Fagan and others (n50) 13

[57] ibid, 14

[58] JILPT, Tayou na shugyou-keitai ni kansuru jittai-chousa (JILTP's survey on the Current Conditions of Employment of Workers with Diverse Employment Types" JILPT Report No. 86) (Japanese Only)(July 2011)54 (JILPT, JILPT Report No. 86)< http://www.jil.go.jp/institute/research/2011/086.html >accessed on 18 February 2018

wage, and 38.9% of establishments set a pay scale at 70% or less of regular employees' wage at an hourly basis. [59]

The underlying notion is that the rate of wage is not entirely decided by the contents of job which a worker is currently performing. This notion comes from the traditional lifetime employment and seniority wage system. While these traditional practices have been changing over time, still long-term employment is maintained for regular-workers. Factors in deciding basic wage for typical regular-worker include not only contents of jobs, but also age, length of service, the individual ability to perform the job (shokuno pay), role to be expected to perform the job (yakuwari pay), achievement and other factors.[60] Besides basic wage, they usually get allowances, bonuses, and a retirement package. The basic wage regularly increases overtime.

In contrast, when deciding wage of part-time workers, the level of wage in the local labor market is mostly considered rather than the level of the wage of regular workers who are performing same or similar jobs.[61] Moreover, there is a significant difference in the eligibility for a regular increase of wage, allowances (housing, family, attached to post and so on), bonuses and retirement pay between regular workers and non-regular workers.[62] Trade unions pointed out that the increase of wage of non-regular workers according to the length of service or age is lower than regular workers.[63]

2.3.3 Horizontal/Vertical Job Segregation

In the international context, as the ILO has pointed out, the horizontal segregation and undervaluation of "female job" are perceived as the primary sources of wage disparity between sexes. The disproportionate concentration of part-time workers in "routine service and intermediate clerical positions" is seen many countries.[64]

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[59] JILPT Report No.10(n27) 16, Figure 7 Standard Pay Scale to Regular Employees with the Same Job Duties (hourly basis). The data is based on "JILTP's survey on the Current Conditions of Employment of Workers with Diverse Employment Types."(n60)

[60] Koshi Endo, "Pay System Reform in Japan since 1991" [2016] 63(3,4) Business Review, Meiji University, 29

[61] JILPT, JILPT Report No. 86(n58)55

[62] MHLW, *Paat taimu roudousya sougou jittai tyousa no gaikyou* (Overview of the General Survey on Part-time Workers 2016) (Japanese only) (19 September 2016)12, Table 9. Percentage of business establishments by type of workers, implementation status of allowances, various systems and utilization of welfare facilities, etc. (hyou9, roudousya no syurui, teate tou, kakusyu seido no jissi jyoukyou oyobi hukuri kousei shisetsu no riyou jyoukyou-betsu jigyousyo wariai) <http://www.mhlw.go.jp/toukei/itiran/roudou/koyou/keitai/16/index.html >accessed 22 February 2018

[63] *Japan*- CEACR, Observation, 2014, C100

[64] Fagan and others (n50)30

The horizontal job segregation exists in Japan as well. The high proportion of non-regular employment is overlapped with female-dominated jobs.[65]Among full-time workers, the gender pay gap varies depending on the industry concerned.[66]

However, the influence of horizontal segregation on the gender wage gap has not been thoroughly analyzed in Japan. Based on an analysis of full-time workers, the Government of Japan concluded that major factors affecting the wage disparity were the difference in managerial posts and the length of service and that horizontal sex segregation by industry had no negative effect on wage disparity.[67] This sentiment underlies "The Guidelines for Support for Initiatives taken by Employers and Employees to Solve the Wage Disparity between Men and Women" to make gender wage gap "visible" issued by the Ministry of Health Labour, and Welfare of Japan (MHLW) in August 2010.[68]

Thus, regarding full-time workers, the vertical segregation has been considered the primary cause of gender wage disparity in Japan.

2.4 Perspectives on Non-Regular Employment

2.4.1 Workers' Perspective

It is common in many countries that more women choose part-time employment because of family responsibility.[69] Japan is no exception to this commonality. According to the JILPT Survey 2010, the most common reason for choosing part-time work was that they wanted to work at times that suited them.[70] The second most common reason was that they could not choose regular employment due to family responsibilities.[71] For other types of non-regular employment, such as dispatched workers and contracted workers, the most common reason was that they

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[65] Especially in hospitality, food services industry, living-related and personal services and amusement services, education, learning support, and wholesale and retail trade industries.
Ministry of Internal Affairs and Communication and Ministry of Economy, Trade and Industry, 2014 Economic Census for Business Frame, Summary of Results; Establishments(31 May 2016) Figure 3: Proportions of persons engaged by industrial divisions and by genders, Figure 4: Proportions of full-time employees or full-time staff, and employees other than full-time employees or full-time staff, by industrial divisions (privately owned establishments) <http://www.stat.go.jp/english/data/e-census/index.html >accessed 22 February 2018

[66] MHLW, Basic Survey on Wage Structure in 2016 (n2)

[67] This analysis was presented in a report by the Study Group on Wage Disparity between Men and Women under Changing Salary and Employment Systems. The report by the Study Group (Henka suru chingin koyou seido no moto ni okeru danjyokann chingin-kakusa ni kansuru kennkyuukai, Houkokusyo) (Japanese only)(19 April 2010) <http://www.mhlw.go.jp/stf/houdou/2r985200000057do.html > accessed 26 March 2018.
The Report was mentioned in *Japan*- CEACR, Observation, 2017, C100.

[68] MHLW, "Danjokan chingin kakusa kaisyou ni muketa rousi no torikumi sien no tameno gaidolain" (The Guidelines for Support for Initiatives taken by Employers and Employees to Solve the Wage Disparity between Men and Women) (Japanese only) (revised August 2014)< http://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou_roudou/koyoukintou/seisaku09/index.html> accessed 16 May 2018.

[69] Fagan and others (n50)3

[70] JILPT, The English summary of JILPT Research Report No. 132(n55)6,7

[71] JILPT, JILPT Report No. 86(n58)85

could not find regular employment.[72] Many workers choose non-regular employment involuntarily.

Non-regular workers have less satisfaction with wages, employment security, welfare, education, training, and skills development than regular workers.[73]

In a 2016 report to the ILO, a trade union indicated that current revisions of non-regular employment laws "do not take into account the gender discrimination dimension, nor are they aimed at tackling the structural gender inequalities created through the different treatment and non-regular employment."[74] The union also notes that "the new equal pay legislation only guides policy and does not ensure any rights of workers, nor does it provide for appraisals of the value of jobs."[75]

2.4.2 Employers' Perspective

The most common reason why employers use "non-regular" employment is to reduce labor costs.[76]

Many employers believe higher wage rate of regular workers is justifiable. In the JILPT Survey 2010, employers answered that that wage disparity between regular workers and non-regular workers lays in the level of responsibility, "expectations of the role over the mid-to-long term" and the quality of work that regular workers were required to do.[77] In the same survey, 31.2% of companies surveyed considered there were no different treatment between regular and non-regular workers needs to be addressed.[78]

In addition, employers believed several key factors were determinative in justifying the wage gap between regular workers and part-time workers performing the same job. For instance, the adaptability to variable working hours such as overtime work, the adaptability to working places such as acceptance of relocation, the mobility of the range of change of job description, and the change of career path in the future.[79]

The results of the survey show that it is unlikely that employers would take voluntary initiatives to reduce the wage gap.

2.4.3 The Government's Perspective

Demographic pressure underlies the introduction of the Japanese version of the "equal pay for equal work" initiative in 2017. Japan is experiencing a decline in population due to an aging society and low birth late.[80] Therefore, more women in

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[72] ibid

[73] JILPT, The English summary of JILPT Research Report No. 132(n55)7

[74] *Japan*-CEACR, Observation, 2017, C100

[75] *Japan*-CEACR, Observation, 2017, C100

[76] JILPT Report No.10(n27) 9,10, Figure 3

[77] JILPT, The English summary of JILPT Research Report No. 132(n55)4,5, 8 Figure 1

[78] JILPT, JILPT Report No. 86(n58) 59

[79] The survey was conducted upon setting the Guidelines for Job Evaluation through the Grading Method by Element for part-time workers. MHLW, "Paat-taimu rodosha no nattokudo wo takame noryoku hakki wo sokushin suru tame ni-yoso betsu tensu ho niyoru shokumu hyoka no jisshi gaidolain)" (Guidelines for Job Evaluation through the Grading Method by Element 2012) (Japanese only) (revised June 2015) 20 < https://part-tanjikan.mhlw.go.jp/estimation/ >accessed 26 March 2018 (The 2012 Guidelines for Part-Time Work Job Evaluation)

[80] The 2017 Action Plan(n10) 1

labor force is required. In addition, the low income decreases the marriage rate of "male" non-regular workers.

The Government aims to improve "labor productivity" by introducing the Japanese version of the "equal pay for equal work." [81]From the Government's perspective, the "irrational gaps" between regular and non-regular workers discourage non-regular workers "to do better." Therefore, it is important to "eliminate" "the irrational gaps" to give non-regular workers "a feeling of convincing" to incentivize them to improve labor productivity.[82] The focus is on a very subjective influence, namely, "a feeling of convincing" which means a feeling of satisfaction. The Government lacks insight into the view that "irrational gaps" could show that non-regular workers receive wages less than the amount they should receive. Eliminating irrational gaps cannot be the ground to force non-regular workers to improve performance more.

The 2017 Action Plan recognizes that many women choose non-regular employment because of the responsibility to their family.[83] It also admits that the level of the wages of non-regular workers in Japan is lower than those in EU countries.[84] The 2017 Action Plan emphasizes the importance of improvement of working conditions for non-regular workers by "resolving the poverty issue of single mothers or unmarried women, who are more likely to work as non-regular workers."[85] However, the revision of sex-discrimination laws was not a part of the 2017 Action Plan.

The 2017 Action Plan never mentions "work of equal value" and completely ignores C100, CEDAW and ICESCR. Moreover, the 2017 Action Plan intends to differentiate the Japanese version of "equal pay for work" from the system in the EU. The 2017 Action Plan refers to the EU practice as follows; "the idea of equal pay for equal work is said to be more widely accepted."[86] It is misleading because EU law adopts the equal pay for "work of equal value."

The Japanese version of "equal pay for equal work" is the norm to prohibit "unreasonably" different treatment between regular and non-regular workers. The 2017 Action Plan does not aim to ensure "equal" treatment, but only to "eliminate" "irrational" gaps.

2.4.4 Women's Rights Groups' Perspective

Women's rights groups have been advocating for the promotion of gender equality in Japan.

They pointed out the inadequacy of Japanese laws in compliance with C100 and CEDAW, and the deficiency of judicial decisions in Japan in light of the equal pay principle.[87] Working Women's Network indicates the limited definition of indirect discrimination in Japan and pointed out still Japan has no legal provision on the equal pay principle.[88]

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[81] The 2017 Action Plan(n10) 2
[82] The 2017 Action Plan (n10)2, 6
[83] The 2017 Action Plan (n10)4
[84] The 2017 Action Plan (n10) 6
[85] The 2017 Action Plan (n10) 5
[86] The 2017 Action Plan (n10) 6
[87] Japan Federation of Women's Organizations, REPORT TO CEDAW (7 December 2015)
[88] Working Women's Network, The Shadow Report of Working Women's Network on the Situation of Working Women (4 January 2016)

They repeatedly pointed out that women are over-represented among non-regular workers and that many of them are receiving low pay.[89] The Japan Federation of Women's Organizations pointed out that Japan has not ratified C111 and C175, and that the Part-Time Workers Act cannot eliminate discrimination because the Act allows employers to treat workers differently based on the systems of human resources in companies and worker's contributions to companies.[90]

[89] ibid
[90] Japan Federation of Women's Organizations, REPORT TO CEDAW (7 December 2015)

3 The Equal Pay Principle in International Law

3.1 Overview of Chapter 3

This chapter clarifies the ambit of the principle of "equal pay for work with equal value" in international law and the equal treatment as reflected in C175 as it applies to "female part-time workers."

To achieve this end, this chapter looks at international law on the equal pay principle enshrined in C100, CEDAW and ICESCR, and the principle of non-discrimination enshrined in C111 and CEDAW and ICESCR. Also, there will be a discussion of the equal treatment enshrined in C175, and analysis of the equal pay principle in light of substantive equality.

3.2 The Equal Pay Principle

3.2.1 Overview

The recognition of the principle of equal remuneration for work of equal value dates back to the ILO Constitution in 1919. Since then, the principle of equal pay for work of equal value between men and women (the equal pay principle) was adopted in C100 in 1951, article 7 (a) (i) of ICESCR in 1966, and article 11 (1) (d) of CEDAW in 1979. Article 7 (a) (i) of ICESCR and article 11 (1) (d) of CEDAW guarantee individual rights to equal remuneration for men and women. All of three conventions explicitly use the words "work of equal value." [91]C100 and ICESCR apply to all workers while CEDAW guarantees the right of women. All of these conventions include part-time workers.[92]

Japan has ratified all three conventions. In the following sections, this thesis will hone in on the contents of C100 since it is more detailed, while the other two conventions are referred to the extent that it is necessary.

[91] ICESCR art 7 (a) (i) states "women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work." However, the General Comment No.23 of the CESCR notes that "not only should workers receive equal remuneration when they perform the same or similar jobs, but their remuneration should also be equal even when their work is completely different but nonetheless of equal value when assessed by objective criteria," and that "Therefore, in the specific situation in which a man and a woman perform the same or similar functions, both workers must receive the same pay, but this should not detract from the requirement to take immediate steps towards the broader obligation of achieving equal remuneration for men and women for work of equal value."
CESCR, "General Comment No.23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)" (27 April 2016) UN Doc E/C.12/GC23 (CESCR GC23) para11

[92] C100 art 2 (1), General Survey 2012(n7) para658

3.2.2 State Obligations

First, article 2 (1) of C100 requires the Member States to "promote" and "in so far as is consistent with such methods," to "ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value." C100 confers greater flexibility in terms of means of application to the private sector on the States than to the public sector. However, the State must not try to elude their obligations to protect the right from the violation by the private sector, even though the remuneration is primarily fixed through a contract between an employee and an employer.[93] Article 2 (2) of C100 reads that the equal pay principle may be applied by means of (a) national laws or regulations; (b) legally established or recognized machinery for wage determination; (c) collective agreements between employers and workers; or (d) a combination of these various means. When a State adopts national laws or regulations by means of application of the equal pay principle, those laws or regulations must fully incorporate the contents of the principle because C100 requires the States to pursue the objective of the Convention without compromise.[94] This means legislation must capture the concept of "work of equal value."[95]

Next, when there is specific legislation relating to equality and non-discrimination with respect to remuneration, a State must repeal "any existing legislative provision which violates" the equal pay principle "so as to comply with" C100.[96]

Third, to fulfill the right, the States must take "positive action" to promote the application of the principle under article 2 (1) and to "co-operate with the employers' and workers' organizations concerned for the purpose of giving effect to the provisions" under article 4 of C100.[97]

To recognize the right to equal remuneration for men and women, articles 3 and 7 (a) of ICESCR require the State party to identify and eliminate the underlying causes of pay differentials, such as gender-biased job evaluation or the perception that productivity differences between men and women exist.[98] Furthermore, the State party should monitor compliance by the private sector with national legislation on working conditions through an effectively functioning labor inspectorate.[99] Article 11 (1) (d) of CEDAW also requires States Parties to take all appropriate measures to ensure the right to equal remuneration.

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[93] ILO CEACR, "General Survey of the Reports on the Equal Remuneration Convention (No. 100) and Recommendation (No. 90), 1951" (72nd Conference Session Geneva, 1986) (General Survey 1986), para29, 216 General Survey 2012(n7) para659

[94] R90 para3(1), General Survey 1986(n93) para29, 30, General Survey 2012 (n7) para660

[95] General Survey 2012(n7) para676

[96] General Survey 1986(n93) para25, 28, General Survey 2012(n7) para670

[97] General survey 1986(n93) para29

[98] CESCR, General Comment No. 16 The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3)", 11 August 2005, E/C.12/2005/4 (CESCR GC 16) para 24

[99] CESCR GC16 para 24

3.2.3 Definition of Remuneration

The interpretation of "remuneration" in article 1 (a) of C100 includes "any additional emoluments whatsoever."[100] The term "remuneration" in article 7 (a) (i) of ICESCR has a similar interpretation, not limited to "wage" or "salary," but including "additional direct or indirect allowances in cash or in kind paid by the employer to the employee."[101]

3.2.4 Comparable workers

To prove pay discrimination based on sex, a female worker needs to compare wages with a "male" worker. Under C100, the comparison is not limited to employees in the same establishment or enterprise. The comparison can be made "between jobs performed by men and women in different places or enterprises, or between different employers." [102] If the scope of comparison is narrow, the influence of the equal pay principle would be smaller for the correction of wage gap due to horizontal segregation and undervaluation of female job.

Actually, it is difficult to find a male comparator hired by the same employer in a female-dominated job. The ILO CEACR has suggested a using hypothetical comparator when the comparison is limited to the same employer.[103]

3.2.5 "Work of Equal Value"

The concept of "work of equal value" is the cornerstone of C100 and the equal pay principle in international human rights law, which enables comparisons between jobs with a different nature. [104] This means that the comparison is possible even if no comparable male worker is doing "same," "similar" or "substantially similar" job. [105] As a result, "value" reveals undervaluation of a female job.

If the "value" of the work of men and women is the same, the rates of remuneration shall be the same unless a justification is provided.[106] When the value is different, the difference in the rate of remuneration should be proportionate to the difference in the work's value.[107]

"Value" is "the worth of a job for computing remuneration" in C100, which is not personal merit.[108] Adoption of value means that "something other than market forces" should be used to ensure the application of the equal pay principle since market forces may be "inherently gender-biased."[109]

"Value" mitigates the "conformist pressure" because it works as criteria for a comparison which applies to jobs undertaken by both male and female workers. If

[100] General Survey 2012(n7) para 686
[101] CESCR GC23 para 7
[102] General Survey 2012(n7) para 697
[103] ibid para 699, General Survey 1986 (n93) para 69
[104] General Survey 2012 (n7) para 672
[105] ibid para 677
[106] C100 arts1(b) 2(1) 3(3)
[107] Martin Oelz, Shauna Olney, Manuela Tomei, *Equal Pay, An introductory guide* (ILO 2013)25
[108] General Survey 2012(n7) para 674
[109] ibid para 674

the direct comparison with two jobs without common criteria is conducted, only female workers who are "alike" to male workers can claim equal pay.

3.2.6 Objective Job Evaluation

While C100 does not specify any method for evaluation of "value," article 3 (1) suggests the use of objective job evaluation "where appropriate."[110] Objective job evaluation is the evaluation of contents of work. This is different from performance appraisal, which is evaluating the performance of an individual worker.[111]

The objective job evaluation aims to reveal any "unexplained residual gap between the average wages of women and men" which "reflects wage discrimination based on sex," thereby contributes to the reduction of the gender wage gap.[112] To achieve this end, the objective evaluation of the work must be free from "gender bias." It must not turn out to be an approach that requires a female worker to conform with the characteristics typically associated with a male job.

In this regard, it should be noted that article 11 (1) (d) of CEDAW recognizes that the right to "equality of treatment in the evaluation of the equality of work." The CEDAW Committee recommends that States parties "should consider the study, development and adoption of job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently predominate."[113]

Regarding the methods of the objective job evaluation, the ILO advocates "analytical methods of job evaluation."[114] By breaking down "value" into factors, the analytical job evaluation determines "the numerical value" of two different jobs.[115] The analytical job evaluation methods break down "value" into four factors, namely, skill(qualifications), effort, responsibilities and working conditions. It is essential to use all four factors to evaluate each job because those four factors are designed to be able to cover all tasks in different economic sectors. [116] Sub-factors should be chosen to be able to evaluate characteristics of both "female" and "male" work. For example, responsibilities should include responsibility not only for money, but for people, effort should include physical, mental and psychosocial, and working conditions should cover both physical and psychological aspects.[117] It is necessary to develop scales for numerical evaluation, which classifies certain layers of levels to each sub-factor. After the development of scales, scoring to each factor is conducted, which decides the level of each sub-factors for each job.

At every stage, from setting factors and subfactors, development of scales to sub-factors, and to scoring, there is a risk of reflecting "historical discrimination

[110] R90 Para 5, General Survey 2012(n7) para 695
[111] General Survey 2012 (n7) para 696
[112] Marie-Thérèse Chicha, *Promoting equity: Gender-neutral job evaluation for equal pay: A step-by-step guide* (ILO, 2008) 1,2
[113] CEDAW Committee 'General Recommendation No 13' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9(Vol II) 325 (CEDAW GR13) para 2
[114] General Survey 2012(n7) para 700
[115] Oelz(n107) 39
[116] Chicha (n112) 27
[117] Oelz(n107)39, 40

that exists in labor market."[118] Factors characterized as female in nature, like interpersonal skill and effort for providing emotional support, may be ignored, or ranked low scores. These have tended to be misunderstood as not requiring particular effort to attain.[119] When conducting the objective job evaluation, it is vital to ensure the participation of workers.[120] It reduces the risk of gender bias.

Therefore, a carefully designed analytical job evaluation enables the evaluation of the "value" of a female job without "conformist pressure."

3.2.7 Justification for Differences in Remuneration

When the value of the work is same, the remuneration can be different provided the difference is based on objective criteria, not based on sex.[121]

In a direct discrimination case, when a female worker proves that the distinction is based on sex, the presumption of the direct discrimination is established, then the burden of proof is shifts to the employer. The employer cannot maintain the pay disparity, unless they are able to prove the disparity in pay corresponds to an objective job evaluation, or the distinction is not based on sex. For example, disparity between individual employees performing the same job is permissible based on performance.[122]

3.2.8 Proactive Model

The ILO emphasizes the importance of C100 lies in assessing value, not in proving discrimination. [123] In contrast to complaints-led model which relies on individual lawsuits to address pay discrimination retroactively, proactive model imposes positive duties on employers to implement the equal pay principle.[124] The ILO praises proactive legislation to promote the evaluation of value. Since the 1980s, a number of countries have started to enact proactive laws.[125]

In general, proactive legislation imposes positive duties on all employers who meet certain criteria, to carry out certain actions to address the wage gap. Examples of the duties include monitoring the pay gap, conducting a survey on pay differences including assessment of the causes of pay disparity, and developing a plan to achieve pay equity. [126] For example, in Finland, developing equality plans is mandatory for both public and private undertakings with more than 30 workers. The equality plans must include information "that enables workers and employers to monitor the equality situation in the enterprise concerned, i.e. details concerning the employment of men and women in different jobs and a survey of the grade of jobs performed by men and women, the remuneration for those jobs and differences

[118] General Survey 1986 (n93) para145,255,256
[119] Oelz (n107) 40
[120] Chicha (n112) 8,9,13,15
[121] C100 art 3(3)
[122] Oelz(n107)25
[123] ibid 38
[124] Sandra Fredman, "Reforming Equal Pay Laws" (n26)
[125] Chicha(n112) 3
[126] General Survey 2012 (n7) para 723,725

in pay," and "must set out measures to achieve pay equality and a review of the impact of measures previously taken to this end." [127]

The positive duties should be carried out collectively through cooperation with workers' organizations.[128] Considering the structural inequality between men and women, and employers and employees, collective dimension enabling participation of female workers is crucial.[129]

The proactive model is intended to exempt burden on workers to file individual lawsuits to claim equal pay. Also, the positive measure applies to all workers hired by an employer, unlike an individual judgement which gives remedy only to the worker who claimed the equal pay at court. Workers can use both proactive framework and individual lawsuits.

The proactive model gives benefits to employers as well. It is effective "to improve human resource management and increase the efficiency of the pay system within an organization."[130] Also, it reduces the risk of employers being subject to individual lawsuits.[131] These merits should be used to persuade government and employers to move from the complaints-led model to proactive model.

3.3 Non-Discrimination in International Law

3.3.1 Overview

Non-discrimination is one of the fundamental principles of international human rights law. To achieve equality is a primary objective of this principle. The Declaration of Philadelphia affirmed that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity" in 1944.[132] The Universal Declaration of Human Rights declared "All human beings are born free and equal in dignity and rights" in 1948.[133] Equality is the basis of a number of international Conventions, including CEDAW and ICESCR.[134]

In relation to prohibition of discrimination and promotion of equality in respect of employment and occupation, the ILO Discrimination (Employment and Occupation) Convention (C111) provides most specificity. Further, article 2 of the ILO 1998 Declaration on Fundamental Principles and Rights at Work recognized the elimination of discrimination in respect of employment or occupation as "the principles concerning the fundamental rights." Member States of the ILO have an

[127] ILO CEACR Observations concerning Finland on the Equal Remuneration Convention (No. 100), 1951 (96th Conference Session Geneva, 2007) Report III (Part 1A)286
[128] Chicha(n112) 3
[129] Fredman "Reforming Equal Pay Laws" (n26) 213, Jill Rubery, Damian Grimshaw, "The 40-year pursuit of equal pay: a case of constantly moving goalposts" [2015] 39 Cambridge Journal of Economics 319,339
[130] Chicha(n112) 3
[131] Fredman "Reforming Equal Pay Laws" (n26)212
[132] ILO Constitution 1919 (adopted 1 April 1919, entered into force 28 June 1919) including Annex the Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia) (4 May 1944) latest amendment entered into force on the 1 November 1974, Declaration of Philadelphia, para II (a)
[133] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res217A(III) art 1
[134] CEDAW preamble, arts 1, 11, ICESCR preamble, arts 2(2) 3,7

obligation to respect, promote and fulfil fundamental rights even if they have not ratified the convention, based on the very fact of membership in the ILO.[135]

Although Japan has been a member of the ILO from 1919 to 1940 and since 26 November 1951, Japan is one of only 12 member states which have not ratified C111.[136]

The equal pay principle cannot be achieved without being tied with the principle of non-discrimination and equality in all areas of employment.[137] C100 and C111 have an indispensable connection.[138] For the promotion of gender equality in employment area, the ILO Workers with Family Responsibility Convention (C156) is also important, which requires Member States to have a national policy to promote equality of opportunity and treatment of workers with family responsibility.[139]

3.3.2 Definition of Discrimination

Article 1 (1) (a) of C111 defines "discrimination" as "any distinction, exclusion or preference made on the basis of" prohibited ground of discrimination, "which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation." This definition covers all discrimination "in law or in practice, direct or indirect" by referring to the "effect" of a distinction, exclusion or preference.[140]Article 1 (3) of C111 states that "employment or occupation" includes "terms and conditions of employment," which includes the equal remuneration for work of equal value.[141]

However, not all distinctions are deemed to be discrimination under C111. Exceptions are as follows; measures based on the inherent requirements of a particular job; measures warranted by the protection of the security of the State; and special measures designed for protection and assistance.[142]

The definition of "discrimination against women" in article 1 of CEDAW also includes indirect discrimination through the reference to the "effect" of distinction, exclusion or restriction. Article 3 of ICECSR, which guarantees the equal right of men and women on rights in the Covenant, is also interpreted as including indirect discrimination.[143]

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[135] ILO Declaration on Fundamental Principles and Rights at Work (86th Conference Session Geneva June 1988) art 2 (d)

[136] As of April 2018 ILO NORMLEX, Ratification of C111 < http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312256:NO > accessed 8 May 2018

[137] General Survey 2012(n7) para 650 657, General Survey 1986(n93) para 100, 101, 250 to 254

[138] ILO CEACR "General Survey of the Reports on the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958" (75th Conference Session Geneva, 1988) Report III (Part4B) (General Survey 1988) para118

[139] ILO Convention C156: Workers with Family Responsibility Convention (67th Conference Session Geneva 23 June 1981) (C156) art 3

[140] General Survey 2012(n7) para 743 745

[141] General Survey 1988(n138) para107

[142] C111 arts 1(2), 4, 5, General Survey 2012(n7) para 826

[143] CESCR GC16 para 18

3.3.3 State Obligations

First, "the primary obligation" under article 2 of C111 is to declare and pursue a national policy which covers equal opportunity and treatment in respect of employment and occupation as a whole. Under the comprehensive policy, Member States are required to enact appropriate legislation and adopt other measures.[144] C111, like C100, gives "flexibility" to the States "regarding the adoption of the most appropriate methods from the point of view of their nature and timing," however, requires the policy "to be effective."[145] Article 2 of CEDAW also obligates States Parties to pursue comprehensive policies which endeavor to eliminating discrimination against women.[146]

Next, article 3 (c) of C111 requires that Member States to repealing "any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy."[147] Article 2 (f) of CEDAW also requires to modify or abolish existing laws which constitute discrimination against women. Articles 2 and 3 of ICESCR requires to amend laws that do not conform with the right protected by these articles.[148] Article 3 of ICESCR also requires that the States parties must "take into account the effect of apparently gender-neutral laws, policies and programs and to consider whether they could result in a negative impact on the ability of men and women to enjoy their human rights on a basis of equality" when assessing the compliance of legislation with article 3.[149]

Third, Member States are required to "enact such legislation" to "secure the acceptance and observance of the policy" under article 3 (b) of C111. The ILO CEACR pointed out that the comprehensive anti-discrimination legislation is necessary to ensure the effective application of C111 "in most cases."[150] Examples of effective legislation suggested by the ILO CEACR include "providing a clear definition of direct and indirect discrimination," "prohibiting discrimination at all stages of the employment process" and "shifting or reversing the burden of proof."[151] Article 2 of CEDAW requires States parties to take appropriate measures to protect women from discrimination by private actors in employment area.[152] Articles 2 and 3 of ICESCR also require the States parties to adopt legislation to protect individuals from discrimination by private actors.[153]

Fourth, articles 2 (e) (f) and 5 (a) of CEDAW require States parties to a wide variety of measures to eliminate discrimination based on gender bias or a stereotyped role of men and women and to ensure that women and men enjoy equal

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[144] General Survey 2012(n7) para 841
[145] ibid para 734, 844
[146] CEDAW Committee, "General Recommendation No 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" (16 December 2010) UN Doc CEDAW/C/GC/28 (CEDAW GR 28) para 24,25
[147] C111 art 3(c), CEDAW GR 28 para 9
[148] CESCR GC 16 para 18, CESCR, "General Comment No.20 Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of ICESCR)" (2 July 2009) UN Doc E/C.12/GC20 (CESCR GC20) para 37
[149] CESCR GC 16 para18
[150] ILO CEACR "General Report and observations concerning particular countries" (98th Conference Session Geneva, 2009) Report III (Part1A) (General Report 2009) para109
[151] ibid
[152] CEDAW GR 28 para9,13
[153] CESCR GC 16 para 19, CESCR GC20 para 11

rights.[154] This obligation corresponds to the obligation "to seek the cooperation of employers' and workers' organizations" and "to promote educational programmes" "in promoting the acceptance and observance of policy" under article 3 (a) and (b) of C111. The ILO CEACR recommends that Member States should adopt not only legislation but also proactive measures since legislation is not sufficient to address "the underlying causes of discrimination" and structural inequalities "resulting from deeply entrenched in traditional and societal values."[155]

3.3.4 Prohibited Grounds of Discrimination

3.3.4.1 Interpretation of Sex

The violation of the principle of non-discrimination is established in cases where one is able to prove that a distinction is based on prohibited grounds of discrimination.

Traditionally, prohibited grounds of discrimination were conceived as "inherent characteristics" which a person cannot choose or leave.[156] As prohibited grounds have expanded, socially constructed distinctions which are not always "inherent" have been incorporated into prohibited grounds of discrimination. If a distinction on one ground is perceived as socially unacceptable in relation to the distinction concerned, the ground gains approval as a prohibited ground of discrimination.

This approach has led the wider interpretation of "sex" as a ground of discrimination in C111 and CEDAW. "Sex" is interpreted as including not only biological characteristics but also "unequal treatment arising from socially constructed roles and responsibilities assigned to a particular sex."[157] "Workers with family responsibility" can be included as a prohibited ground of discrimination.[158] The reason is that roles as caregivers are often assigned to women in families because of stereotyped role model, which gives disadvantages to women in employment area.

3.3.4.2 Employment Types

An employment type, such as part-time employment, has not gained approval as a prohibited ground of discrimination in relation to pay discrimination.

While C100 and CEDAW deal with discrimination based on "sex," the explicit reference to "without distinction of any kind" in article 7 of ICESCR prohibits discrimination on wider grounds including sex. The "other status," as prohibited grounds of discrimination in article 2 (2) of ICESCR, indicates that the list in article 2 (2) is not exhaustive. [159] Since the "other status" is interpreted as including "economic and social situation," [160] it might encompass employment types. However, General Comment No. 23 of the CESCR classifies a distinction between

[154] CEDAW GR 28, para5, 9
[155] General Survey 2012(n7) para856, General Report 2009 (n150) para 114
[156] Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran, International Human Rights Law (2nd edn OUP 2014)163
[157] General Survey 2012(n7) para 782, CEDAW GR28 para5
[158] General Survey 2012 (n7) para 785
[159] CESCR GC20 para 15
[160] CESCR GC20 para 35

full-time and part-time on eligibility for a bonus as indirect "sex" discrimination, not as direct discrimination based on "economic and social situation."[161]

C111 extends the equal pay principle in C100 to other prohibited grounds of discrimination, such as race, color, religion, political opinion, national extraction or social origin, or any other ground as decided at the national level.[162] However, C100 and C111 are interpreted as not rendering direct protection against discrimination due to non-regular employment.[163] Protection for "female part-time workers" is recognized as an issue of indirect sex discrimination.

Therefore, pay discrimination due to employment type needs to be attributed to one of those established prohibited grounds of discrimination in treaties. In situations concerning female part-time workers, sex would be the ground in most cases. The thesis focuses on the application of the principle of equal remuneration between men and women.

3.3.5 The Exception: "The Inherent Requirement"

Article 1 (2) of C111 stipulates that any distinction, exclusion or preference in respect of "a particular job" based on "the inherent requirements" shall not be deemed to be discrimination even when the distinction is based on prohibited grounds, such as sex.

Since "the inherent requirements" are exceptions for the principle of non-discrimination, they "must be interpreted restrictively."[164] The concept of "a particular job" must be a "specific and definable job, function or tasks."[165] This means that a distinction must be scrutinized whether it has a clear necessity in relation to "a particular job"; generalization is not allowed. There should be concrete and objective criteria to decide whether it is inherent requirements or not, in relation to the particular job.[166] The burden of proof lies with employers.[167]

3.3.6 Indirect Discrimination

3.3.6.1 Understanding of Indirect Discrimination

As chapter 2.3.2 has shown, pay difference between regular workers and part-time workers lies not only in basic wage, but also eligibility for a regular increase of basic wage, allowances, bonus, and retirement pay in Japan. Most of those distinctions are at face value gender neutral, which trigger the question of indirect discrimination.

Indirect discrimination is covered in the definition of discrimination in article 1 of C111 through the reference to the "effect" of a distinction, exclusion or preference. The ILO CESCR clarified that indirect discrimination means "apparently neutral situations, regulations or practices which in fact result in

[161] CESCR GC23 para 11,13
[162] C111 art 1(a) (b), General Survey 2012(n7) para 759, ILO Recommendation R111: Discrimination (Recommendation concerning Discrimination in Respect of Employment and Occupation) (42th Conference Session Geneva 25 June 1958) (R111) para 2 (b) (v)
[163] ILO, NON-STANDARD EMPLOYMENT AROUND THE WORLD (n28) 251
[164] General Survey 2012(n7) para827
[165] ibid para828, General Survey 1988(n138) para 126
[166] General Survey 2012 (n7) para831
[167] General Survey 1988(n138) para 129, 132

unequal treatment of persons with certain characteristics," which "occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race, color, sex or religion, and is not closely related to the inherent requirements of the job."[168]

The CEDAW Committee and the CESCR note indirect discrimination can exacerbate "structural inequality" if "the apparently neutral measure" fails to "recognize structural and historical patterns of discrimination and unequal power relationships between women and men."[169]

3.3.6.2 Interpretation under C100

While C100 has no detailed definition of discrimination in its text, the concept of indirect discrimination is incorporated into the equal pay principle. The ILO CEACR defined the indirect discrimination under C100 as "apparently neutral situations, regulations or practices which result in unequal treatment with regard to remuneration of men and women performing work of equal value." They elaborated further that it "occurs when the same condition, treatment or criterion is applied equally to men and women, but results in a disproportionately adverse impact on persons of one sex, and is not based on an objective job-related justification."[170]

When part-time workers are paid lower rates of remuneration than regular workers performing work of equal value, and part-time workers are dominated by one sex (in this case women), indirect discrimination is established unless an objective justification is provided.[171]

The analytical job evaluation discussed in chapter 3.2.6 addresses wage differences apparently attributed to different employment types. By breaking down the "value" of work performed by a female part-time worker and a male regular worker into factors, the evaluation reveals the numerical value of both jobs. The comparison between the numerical value and the wage gap triggers the question of indirect discrimination.

However, to establish indirect sex discrimination in relation to a distinction based on employment types, the domination of women among part-time employment is another requirement. C100 does not provide a clear threshold or a way of quantifying domination. While a group-based comparison is necessary to prove domination, defining a comparable male group is a difficult question.[172] Also, if no statistical threshold is set in legislation or such statistical data for relevant time is not available, it is not easy to establish indirect discrimination, *prima facie*, at court.[173]

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[168] ILO CEACR, "Special Survey on Equality in Employment and Occupation in respect of Convention No. 111" (83rd Conference Session Geneva, 1996) Report III (Part4B) (Special Survey 1996) para 26

[169] CEDAW GR28 para 16, CESCR GC16 para 13

[170] ILO CEACR, Observations concerning Japan on the Equal Remuneration Convention (No. 100), 1951 (93rd Conference Session Geneva, 2005) Report III (Part1A)270 (*Japan*-CEACR, Observation, 2004, C100)

[171] ibid

[172] Fredman *Discrimination Law* (n17)183 184 185

[173] ibid 178 179

3.3.6.3 Objective Justification

C100 allows "objective justification" in indirect discrimination. The ILO CEACR describes it as "objectively justifiable, job-related reason for such differential treatment."[174]

In an indirect discrimination case, when a female worker proves that a distinction is not apparently based on sex but has a discriminatory effect on one sex, then the presumption of indirect discrimination is established. The burden of proof is passed to the employer. If an objective justification is succeeded, the distinction can be maintained. The justification should not be based on sex.

It is not clear what kind of standards are applied to decide "objectiveness" of justification under C100. However, discrimination theory applies the "proportionality" test to decide justification.[175] Treaty bodies have supported this approach. The CESCR explains the proportionality test as follows: the "legitimate" aim of the measure and "a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures" and "the effects."[176] In a similar vein, EU law defines objective justification in indirect discrimination, which reads that provision, criterion or practice which is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.[177] In Bilka case, the ECJ set high a standard for justification, concluding that "measures chosen by the employer correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end."[178]

Also, it is not clear what kind of factors can be allowed as "legitimate" in C100. In this regard, the exception for indirect discrimination under C111 is "closely related to "inherent requirement of the job."[179] To harmonize the interpretation of C100 and C111 in relation to the equal pay principle, factors for justification must be scrutinized whether it has a clear necessity in relation to a particular job.

Under EU law or other domestic law cases, "business necessity" can be claimed, which includes various factors and is subject to the proportionality test.[180] Under EU law, distinctions based on "length of service," "mobility" and "training" can be acceptable as justifications for different treatment in additional pay.[181]

Those factors can be discriminatory towards women because of structural inequality. Regarding the distinction based on "prior earnings" based on "market value," the ILO CEACR refers to a domestic judgement which rejected the "market value" as justification when "market rate is itself a reflection of historical discrimination."[182] Because of the burden of family responsibility on women, the average women's length of service is shorter. Similarly, if "mobility" means "adaptability to hours and places of work," "it could disadvantage woman" because

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[174] *Japan*-CEACR, Observation, 2004, C100
[175] Moeckli (n156)167
[176] CESCR GC 20 para13
[177] Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23, art 2(1)(b)
[178] Paul Craig, Grainne de Búrca, EU Law: Texts, Cases and Material (5th edn OUP 2011) 907, Fredman *Discrimination Law* (n17)193
[179] Special Survey 1996(n168) para 26
[180] Fredman *Discrimination Law* (n17)192 193
[181] Craig (n178) 908, 909
[182] General Survey 1986(n93) para 130

of their family commitments.[183] In this regard, Member States should take measures to eliminate unfair burden of family responsibility on women under C156.[184] The ILO Workers with Family Responsibilities Recommendation(R165) recommends measures should be taken to prevent direct or indirect discrimination on the basis of marital status or family responsibilities.[185] Where these measures are not sufficient, allowing justification based on factors which give disadvantages to female workers with family responsibility should be rejected as justification based on sex as socially constructed roles. This applies to Japanese situation as well. As chapter 2 has shown, employers consider the average wage in the local labor market and "mobility" when determining the wages of part-time workers.

The application of the proportionality test is ultimately made on a case by case basis by the courts. It is not always easy to predict the result. Therefore, proving indirect discrimination can be an extra burden on women.[186] It is crucial to ensure strict scrutiny of the structural inequality when examining the legitimate aim of an employer by placing a spotlight on a clear relationship between the aim and the result achieved by a distinction.

3.4 C175: Part-time Convention

3.4.1 Overview

C175 was adopted in 1994 and has been ratified by 17 states as of March 2018.[187] Japan has not ratified C175. C175 adopts an approach to give protection based on employment type, namely, part-time work. C175 applies to "all part-time workers" whose standard hours of work are less than those of comparable full-time workers. However, Member States can exclude particular categories of workers.[188]

Part-time workers are entitled to the same protection that are accorded to comparable full-time workers in respect of discrimination in employment and occupation under article 4 (c) of C175.[189] Article 5 of C175 requires Member States to take appropriate measures in national law and practice to ensure that part-time workers do not receive less basic wage than comparable full-time workers "solely because they work part-time." This can address wage disparity which cannot be attributed to sex discrimination.

It should be noted that article 2 states C175 does not affect more favorable provisions applicable to part-time workers under other international labor standards. As the following sections clarify, C175 gives narrower protection with respect to wage discrimination in comparison to C100.

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[183] Craig (n178) 908

[184] General Survey 2012 (n7) para 714

[185] ILO Recommendation R165: Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (67th Conference Session Geneva 23 June 1981) (R165) para6

[186] Fredman, "Reforming Equal Pay Laws" (n26) 203

[187] ILO NORMLEX "Ratifications of C175 Part-Time Work Convention, 1994 (No.175) <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312320 >accessed 8 May 2018

[188] C175 arts 1 (a), 3

[189] International Labour Conference, Provisional Record 81st Session Geneva 1994 para255

3.4.2 Basic Wage in C175

Article 5 of C175 only refers to "basic wage". Article 5 stipulates that the basic wage of part-time workers, which is calculated on hourly, performance-related, or piece-rate basis, should be proportionate to the basic wage of comparable full-time workers.[190]

During the preparatory work, an amendment submitted by Workers' members to add "financial compensation additional to basic wages" in the Convention was opposed by Employers' and Governments members.[191] The provision was placed in the ILO Recommendation concerning Part-Time Work(R182). R182 states that "part-time workers should benefit on an equitable basis from financial compensation, additional to basic wages, which is received by comparable full-time workers."[192] The expression "under equivalent conditions" is broader than the concept of proportionality.[193]

3.4.3 "Comparable Full-Time Worker" in C175

In C175, the comparison of basic wages should be made between a part-time worker and a full-time worker. C175 has a narrower reach of comparison than C100.

Article 1 (c) (i) defines "comparable full-time worker" as a worker who has the same type of employment relationship. During the preparatory work, it was clarified that "employment relationship" was determined by "the duration of the period of employment," which means indefinite-term workers and fixed-term workers are classified into different employment relationships.[194] Although national legislation ultimately determines, the phrase "same type of employment relationship" could exclude temporary agency workers who are sent to work in an establishment by an agency which has an employment relationship with them.[195]

Article1 (c) (iii) of C175 includes a comparable full-time worker not only in "the same establishment" but also "in the same enterprise" or "in the same branch of activity" as a comparable worker.

3.4.4 "Same or a Similar Type of Work or Occupation" in C175

Article1 (c) (ii) of C175 defines "comparable full-time worker" as a worker who is engaged in the same or a similar type of work or occupation. The "same or similar type of work or occupation" is narrower than "work of equal value" in C100.

The attempt to add "value" to article 1 (c) (ii) of C175 was rejected by employers and states during preparatory works.[196] Workers' members insisted that

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[190] ibid para 226, Fagan and others (n50) 20

[191] International Labour Conference, Provisional Record 81st Session Geneva 1994, para 70,71,72

[192] ILO Recommendation R182: Part-Time Work Recommendation (81st, Conference Session Geneva 24 June 1994) (R182) para10

[193] International Labour Conference, Provisional Record 81st Session Geneva 1994, para 228

[194] ibid para38, Leah F. Vosko, Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment (OUP 2009) 101

[195] International Labour Conference, Provisional Record 81st Session Geneva 1994 para 48 to 50

[196] International Labour Conference, Provisional Record 80th Session Geneva 1993 para 136 to 139, International Labour Conference, Provisional Record 81st Session Geneva 1994 para 39 -41

in case where some work was performed only by part-time workers, there were no comparable full-time workers.[197] However, Employers' and Government members opposed on the ground that C175 dealt with discrimination because of numbers of hours worked, not because of the work performed, so the concept of "value" was irrelevant.[198]

"Occupation" means "the trade exercised by an individual," which broadens the scope of comparison within the same establishment since sometimes workers in a same occupation can perform different work.[199]

The words "engaged in" were inserted to make sure that "the point of comparison between part-time and full-time workers should focus on the work actually being carried out."[200]

While the word "occupation" may broaden the reach of comparison, C175 lacks the concept of "value." Therefore, C175 has been criticized on the grounds that "it has little direct impact on building equal treatment between full- and part-timers employed in different occupations or with different job titles." [201] C175 "set a lower standard than" the equal pay principle.[202]

3.4.5 Justifications for Differences in Wage in C175

Article 5 of C175 requires Member States to ensure that part-time workers do not, "solely because they work part time," receive a lower basic wage than comparable full-time workers. The word "solely" was inserted based on an amendment from Employers' members to "express the possibility that there might be valid reasons for differential treatment." [203] This means C175 allows justifications for differences in basic wages based on reasons other than part-time work status.[204]

The relationship between C100 and C175 is similar to the one in the regulation of sex discrimination and the Part-Time Work Directive under EU Law. Article 4 of the EU Part-Time Work Directive has similar provisions to C175 regarding equal treatment between part-time workers and comparable full-time workers, which allows justifications on objective grounds.[205] The "business needs of an employer" may be allowed as one such justification.[206] The maximum level of protection for female part-time workers is "to equal treatment with male full-timers on a pro-rata basis" since the treatment female part-time workers must not be sex discrimination under EU law.[207]

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[197] International Labour Conference, Provisional Record 81st Session Geneva 1994 para 39
[198] ibid para41
[199] ibid para 44
[200] ibid para 43,45
[201] Fagan and others(n50) vi
[202] Jill Murray "Social Justice for Women? The ILO's Convention on Part-time Work" [1999] 15/1 The International Journal of Comparative Labour Law and Industrial Relations 3, 11
[203] International Labour Conference, Provisional Record 81st Session Geneva 1994, para 68
[204] Murray (n202) 12
[205] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work [1998] OJ L 14/9
[206] Fagan and others(n50)21
[207] ibid

3.5 Analysis of the Equal Pay Principle in Light of Substantive Equality

This section analyses how the equal pay principle, the principle of non-discrimination and the equal treatment in C175 can address the double disadvantages of sex and employment type for female part-time workers.

The gender pay gap is still persistent worldwide. The main causes are the perception that women workers do not need a living wage to support their family under male breadwinner model, the lack of representation of female workers, and the horizontal and vertical segregation.[208]

In most countries, part-time work incurs a wage penalty.[209] Part-time work is concentrated in low-paid and female-dominated jobs in most countries. Many women choose part-time work due to family responsibilities.[210]

The gender pay gap is not shaped by "supply-side deficiencies," namely deficiencies in female workers, such as lack of length of service, training, education, mobility and so on.[211] Even if women attained these qualifications, such as education or training, the pay gap persists.[212]It is important to adopt a "demand-side approach" in order to close the gender pay gap because it is "demand-side" such as the work environment, the general wage structure, job and workplace characteristics, that shapes gender pay inequality.[213]

The "demand-side approach" corresponds to a human rights approach based on "the insights of substantive equality" to address underlying causes of structural inequality.[214] The perspective of substantive equality address disadvantage by focusing on social structures instead of requiring women to conform to male norms. Also, it aims to eliminate "stereotyping" and emphasizes "women's agency and voice."[215] This perspective applies to the implementation of the equal pay principle.

The equal pay principle has an indispensable connection with the principle of non-discrimination and equality. The perspective of substantive equality is essential at every level in implementation of the equal pay principle because the equal pay principle inherently has a "conformist pressure" by requiring a comparable worker.[216] In other words, if the equal pay for female part-time workers is understood as the mere expression of "formal equality," which requires female part-time workers to conform with the working style of male full-time workers to claim equal pay.

The concept of "equal value" is paramount to overcome the shortcomings from "conformist pressures." However, the evaluation of value can be easily gender-biased. It is necessary to understand the "structural inequality" based on the non-

[208] Jill Rubery, Working Paper: Pay equity, minimum wage and equality at work: theoretical framework and empirical evidence (ILO November 2003)5, 7, 8
[209] Fagan and others(n50) 30 32
[210] ibid 19
[211] Jill Rubery, Damian Grimshaw, Hugo Figueiredo, "How to close the gender wage gap in Europe: towards the gender mainstreaming of pay policy" [2005] 36:3 Industrial Relations Journal 184, 185
[212] ibid 207
[213] ibid 185, 208
[214] Fredman "WOMEN AND POVERTY-A HUMAN RIGHTS APPROACH" (n23) 505
[215] ibid 505 506
[216] Fredman *Discrimination Law* (n17) 168

discrimination principle to eliminate "gender bias" from the evaluation of value. In this regard, the expanded understanding of "sex" as socially constructed rolls, is important to dispel gender-based stereotypes.

Because employment type is not treated as prohibited ground of discrimination in relation to remuneration, pay discrimination of part-time employment does not directly violate the right to equal remuneration. It should be based on an attributed ground, in this instance sex. This increases the importance of the concept of indirect discrimination to address pay discrimination against part-time workers.

Although "indirect discrimination" is important to address apparently gender-neutral distinctions between part-time workers and full-time workers, "the objective justification" can reinforce structural inequality. Considering the restricted interpretation of the inherent requirement under C111, the interpretation of "the objective justification" should be narrowed down to be able to find whether a justification factor has a clear necessity in relation to a specific job. Each factor should be scrutinized whether it disadvantages women based on generalizations or stereotypes, or whether it reinforces structural inequality which states should address.

In contrast, C175 addresses the wage gap due to part-time work directly. This exempts the burden of proving indirect sex discrimination. However, the lack of the concept of value, as well as the narrow definition of "basic wage" and "a comparable full-time worker," are significant deficiencies. The requirement of "the same or a similar type of work or occupation" does not address the wage gap when occupational segregation is severe. C175 also allows justifications. Therefore, the influence of C175 to address structural inequality regarding of part-time work in relation to wages is limited.

Regarding wage discrimination, both C100 and C175 requires proportionate remedy. C100 requires proportionality corresponding to the difference in the value of work. C175 requires that basic wages of part-time workers should be proportionate to basic wages of comparable full-time workers unless justification provided.

Thus, the equal pay principle based on the substantive equality has many challenges if it is to implemented justly.

The challenge for effective implementation at the national level also comes from the flexibility of international human rights law in choosing methods of application. The proactive model, especially, requires action from governments and other actors.

4 Japanese Law and the Equal Pay Principle

4.1 Overview of Chapter 4

This chapter reviews current Japanese laws concerning non-discrimination, sex discrimination in employment and non-regular employment, and clarifies the gap between Japanese laws and the standards of international human rights law analyzed in chapter 3.

Before delving into analysis, the hierarchical structure of Japanese laws should be mentioned. The Constitution of Japan is superior to other laws. Ratified treaties are situated below the Constitution, but are superior to domestic acts. Acts are enacted by Diet. Acts authorize administrative bodies, such as the MHLW, to issue ordinances concerning the interpretation and implementation of Acts. Besides these laws, the MHLW also issues public notices, circular notices and voluntary guidelines concerning employment to clarify its interpretation of laws to subordinate administrative bodies or to encourage certain voluntary acts by private actors.

4.2 Status of International Law in Japan

Japan is a country that takes a monism approach to the incorporation of international law. Article 98 (2) of the Constitution of Japan states that "treaties concluded by Japan …shall be faithfully observed." Ratified treaties have a legal effect as part of domestic law.

However, the Government of Japan interprets provisions of international treaties, especially those on economic and social rights, as not directly conferring individual rights, or being self-executing. [217]

This attitude is reflected in the Japanese courts.[218] Many domestic courts have stated that the equal pay principle stipulated by C100, ICESCR and CEDAW are not self-executing,[219] and that the equal pay principle is not established as a legal norm in the Japanese legal system.[220] In addition, in 1998, a council of judges of the Supreme Court of Japan concluded that there was no existing domestic law

[217] CESCR Concluding observations on the third periodic report of Japan (10 June 2013) UN Doc E/C.12/JPN/CO/3, para7(CESCR Concluding observations, Japan, 2013)

[218] CESCR Concluding observations of the Committee on Economic, Social and Cultural Rights: Japan (24 September 2001) UN Doc E/C.12/1/Add.67, para10

[219] Osaka High Court, 16 July 2009, Rodo Hanrei No,1001, p77(Kyoto Women's Center case), CEDAW Committee, Concluding observations on the combined seventh and eighth periodic reports of Japan (10 March 2016) UN Doc CEDAW/C/JPN/CO/7-8, para 8(CEDAW Committee, Concluding observations, Japan, 2016)

[220] For example, Nagano District Court, Ueda Branch, March 15, 1996, Rodo Hanrei No. 690 p. 32 (Maruko Alarm case); Osaka District Court 22 May 2002, Rodo Hanrei No. 830 (Nihon Yubin Teiso case); Kyoto Women's Center case(n219); Tokyo District Court, 23 March 2017, Rodo Hanrei Journal No.62(Metro Commerce case); Yoko Hayashi **"**Implementation of the Convention on the Elimination of All Forms of Discrimination against Women in Japan" [2013]6 Journal of East Asia and International Law, 341 348,

"requiring observation of the principle of equal pay for equal work," and that setting different wages between regular and temporary workers was not void unless the wage gap violated the public order under article 90 of the Civil Code of Japan. [221]

4.3 Non-Discrimination in Japanese Law

4.3.1 Lack of a Comprehensive Act

Regarding non-discrimination, article 14 of the Constitution of Japan stipulates that "all of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin."

However, there is no comprehensive non-discrimination act in Japan.[222] No act has a comprehensive definition of discrimination against women, although the Labor Standards Act and the Equal Employment Opportunity Act deal with sex discrimination in employment.[223]

However, Japan does have a policy for gender equality. For example, the Fourth Basic Plan for Gender Equality (hereinafter "the Fourth Basic Plan") issued in 2015 states that it is important to reevaluate male-centered labor practices to further promote women's participation in the labor market.[224] It also mentions C100 in relation to the gender wage disparity and the concept of "equal pay for work of equal value" in relation to the equal treatment under the Part-Time Workers Act.[225] However, as the previous chapters discussed, the 2017 Action Plan does not mention "work of equal value." This means there is a discrepancy between the Fourth Basic Plan, and the 2017 Action Plan and Japanese laws which lacks the concept of "value."

Further, the contents of the Fourth Basic Plan are not effective enough. As indicated in chapter 3.5, it is important to adopt a "demand-side approach" instead of focusing on "supply-side deficiencies" in order to close the gender pay gap.[226] However, the recommendations from the Fourth Basic Plan focus on work-life balance, such as reducing long working hours, more men taking parental leave, and men taking on more household chores. Improving work-life balance does not directly address the low pay of female part-time workers. The Fourth Basic Plan does not suggest a revision of the wage system, which works against many female non-regular workers, nor does it recommend the adoption of a comprehensive anti-discrimination law. Also, the Fourth Basic Plan is a plan made by the Government to set policy targets in gender equality area. The plan does not directly give any individual rights.

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[221] Mutsuko Asakura, "Should Wages for Regular and Part-time Workers be Based on the Principle of "Equal Pay for Work of Equal Value"?" [2002] JAPAN LABOR BULLETIN 8,9
Civil Code Act No. 89 of April 27, 1896, art 90. A violation of art 90 entails tort liability.

[222] CESCR Concluding observations, Japan, 2013 (n217) para 11

[223] CEDAW Committee, Concluding observations, Japan, 2016 (n219) para10

[224] The Government of Japan, "Dai yoji danjyo kyoudou sankaku kihon keikaku"(The Fourth Basic Plan for Gender Equality) (25 December 2015)(Japanese only) (The Fourth Basic Plan) <http://www.gender.go.jp/about_danjo/basic_plans/4th/index.html >accessed 4 May 2018

[225] ibid 31, 34,35

[226] Rubery "How to close the gender wage gap in Europe: towards the gender mainstreaming of pay policy" (n211) 185

Therefore, the current policy on gender equality is not sufficiently effective to promote the equal pay principle.

4.3.2 Act on Promotion of Women's Participation

In 2016, the Act on Promotion of Women's Participation and Advancement in the Workplace (Act on Promotion of Women's Participation) was enforced, which imposed positive duties on employers hiring more than 300 full-time employees.[227] The Act mainly addresses vertical segregation of regular workers based on sex. The Government explains that this initiative would increase the ratio of female employees in management positions and diminish the gap in length of service between the sexes, thereby reducing the gender wage gap.[228] As chapter 2.3.3 mentioned, the Government's rationale for this is based on the analyses showing the main causes of the gender pay gap are the gender gap in managerial positions and in length of service of employees.[229]

However, the Act does not confer any additional rights regarding non-discrimination or equality to female workers.

Moreover, the content of positive duties in the Act is weak. Article 8 obliges employers to set and disclose an action plan, including goals, which the employers aim to achieve in promoting women's participation, based on analyses that the employers conduct on the situation surrounding women's participation in the workplace. Employers must include information on the female ratio of newly employed workers, the gender gap in the average length of workers' service, hours of overwork, and the female ratio of workers in managerial positions, when they conduct the analysis to set their action plan.[230] However, a survey on gender wage gap is optional.[231]

Also, the Act has no guarantee for the participation of trade unions or workers in setting the action plans. Article 8 (4) of the Act only sets the duty of employers to disseminate the action plans to workers.

Further, in the action plan, employers can set goals at their discretion. There are no maximum or minimum standards. There are no sanctions when employers fail to meet the goals set in the action plan. Instead, article 20 of the Act gives favorable treatments in public procurement towards employers who have good practices according to the Act. This approach is in line with paragraph 3 (b) (ii) of ILO Recommendation concerning Discrimination in Respect of Employment and Occupation (R111). However, the ILO CEACR notes that the Act does not encourage employers to "address the pay scales of women and men based on the principle of equal remuneration for work of equal value."[232]

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[227] Act on Promotion of Women's Participation and Advancement in the Workplace, Act No.64 of 2015 (Act on Promotion of Women's Participation) art8

[228] *Japan*-CEACR, Observation, 2017, C100

[229] The Government of Japan, the Replies of the Japan to the list of issues in relation to the seventh and eighth periodic reports of Japan (1 February 2016) UN Doc CEDAW/C/JPN/Q/7-8/Add.1 para 86

[230] Ministerial Ordinance for Action Plans by General Employers based on Act on Promotion of Women's Participation and Advancement in the Workplace, Ministerial Ordinance of the Ministry of Health, Labour and Welfare No.162 of 2015, art 2

[231] ibid

[232] *Japan*-CEACR, Observation, 2017, C100

4.4 Pay System in Japan

4.4.1 Domestic Laws

This section explains the pay system in Japan. This will provide some background before starting to discuss domestic laws on sex-based discrimination and the equal treatment of non-regular workers in terms of pay in chapters 4.5 and 4.6.

In principle, remuneration is determined by a labor contract between the employer and employee.[233] Because of the power imbalance between employer and employee, however, there is legislation to provide some protection for workers.

The Minimum Wage Act sets the minimum wage per hour and invalidates provisions of a labor contract which "stipulate wages less than the minimum wages rate."[234] Under the Minimum Wage Act, the MHLW or the director of the prefectural labor bureau must set the regional minimum wage applicable to all industries based on the opinion of the Central Minimum Wage Council or the Local Minimum Wage Council.[235] However, trade unions have pointed out that the current minimum wage levels are so low that they are insufficient in covering the needs of the workers and their families.[236] This means the minimum wage does not contribute to increasing wages for part-time workers in order to reduce the wage gap.

The Trade Union Act provides that a labor contract which contravenes the standard of working conditions established by the collective agreement shall be void.[237] As chapter 2.3.1 indicated, due to the enterprise unionism, conducting industry-wide collective agreements are not common. The organization rate of non-regular workers is low. Therefore, collective agreements have not played a significant role in reducing pay gap of female part-time workers.

4.4.2 "Employment Management Category"

To understand pay system in Japan, the concept of "employment management category" in labor practice is important. Employment management category refers to "the category of workers by job type, qualification, contract status, employment status, etc. that has been established with the intention of implementing the management of the employment of workers who belong to different categories separately from each other."[238]

Under the practice of long-term employment, most "regular" workers are hired "without specific job duties" and are expected to attain "work experiences through relocation of personnel within the same company."[239] Under this system, working conditions including wage are determined based on "employment management

[233] Civil Code Act No. 89 of April 27, 1896, arts 623, 624
[234] Minimum Wage Act Act No. 137 of April 15, 1959 arts 3, 4
[235] Minimum Wage Act art 10
[236] ILO CEACR, Observations concerning Japan on the Minimum Wage Fixing Convention (No. 131), 1971 (102nd Conference Session Geneva, 2013) ILC.102/III(1A)685(*Japan*-CEACR, Observation, 2012, C131)
[237] Trade Union Act Act No. 184 of June 1, 1949 art 16
[238] Public Notice of the Ministry of Health, Labor, and Welfare No.614 of 2006
[239] Director-General, GB.312/INS/15/3(n12) para35

category" rather than "job duties at a specific time."[240] Since part-time work is one of the employment statuses, part-time workers and full-time or regular workers are likely to be classified into different employment management categories, which allows for the justification of differences in pay setting system.

4.4.3 Two Different Pay Systems

As chapter 2.3.2 indicated, deciding basic wages for typical regular workers are not only formulated by the job description, but also age, length of service, the individual's ability to perform the job (shokuno pay), role expected to be fulfilled through the job (yakuwari pay), achievement, among others.[241] Usually multiple factors are used in deciding basic wages.

The widely used wage system for regular workers among large-scale companies in the private sector is based on "the individual's ability to perform the job" (shokuno pay).[242] This is not a performance appraisal, which evaluates a worker's actual performance. "The individual's ability to perform the job" is a general "vocational qualification" on which a worker is ranked according to the level of ability to perform jobs.[243] Individuals' abilities are evaluated in staff evaluations under the "ability ranking system." Wages are raised according to the criteria of that system. Usually, the rank of ability is raised according to length of service. Therefore, wages among regular workers usually increase with length of service.

However, this system runs the risk of being affected by gender bias, because the criteria for "the ability to perform the job" can be very ambiguous and subjective since the ability has no anchor tied to the specific job.[244] For example, in the Showa-Shell Sekiyu (Nozaki) case, the court admitted the gender discriminatory implementation of "ability ranking system" under the wage system based on the individual's ability to perform the job (shokuno pay). Female workers were ranked low compared with male workers with the same age and same educational backgrounds without reasonable reasons. This resulted in a significant gender wage gap.[245]

In contrast, for part-time or other non-regular workers, "job-based pay" is generally used.[246] Under job-based pay, wages are not regularly raised according to the length of service unless the content of the job changes. This makes the wage

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[240] ibid

[241] Endo, "Pay System Reform in Japan since 1991" (n60) 6

[242] ILO CEACR, Direct Request concerning Japan on the Equal Remuneration Convention (No. 100), 1951 (104th Conference Session Geneva, 2015) (*Japan*-CEACR, Direct Request, 2014, C100) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3174109 >accessed 29 March 2018, Keidanren, 2014 Jinji roumu ni kansuru top management chousa kekka (The Result of Survey on Management of Human Resources 2014) (January 2015) (Japanese only) < http://www.keidanren.or.jp/policy/2015/020.html?v=s > accessed 5 May 2018

[243] Director-General, GB.312/INS/15/3(n12) para35

[244] *Japan*-CEACR, Direct Request, 2014, C100, Masumi Mori, *Nihon no sei sabetsu chingin-doitsu kachi rodo doitsu chingin gensoku no kanosei* (*Gender discrimination in wages and pay equity in Japan)* (Japanese only) (Yuhikaku 2005) 93 to 99

[245] Tokyo High Court, 28 June 2007, Rodo Hanrei No.946, p76(Showa-Shell Sekiyu(Nozaki) case)

[246] MHLW, "Paat-taimu rodosha no nattokudo wo takame noryoku hakki wo sokushin suru tame ni-yoso betsu tensu ho niyoru shokumu hyoka no jisshi gaidolain)" (Guidelines for Job Evaluation through the Grading Method by Element 2012) (Japanese Only) (revised June 2015) < https://part-tanjikan.mhlw.go.jp/estimation/ > accessed 26 March 2018, 27 (The 2012 Guidelines for Part-Time Work Job Evaluation)

gap between regular workers and non-regular workers wider as the length of service grows longer. In addition, as was pointed out in chapter 2, the difference in pay between non-regular and regular workers lies not only in basic wages but also in bonuses, retirement pay, and allowances, such as family and housing allowances.[247]

4.5 Domestic Laws on Sex Discrimination in Employment Area

4.5.1 Labor Standards Act

4.5.1.1 Prohibition of Pay Discrimination

Article 4 of the Labor Standards Act is the legal basis for prohibiting wage discrimination based on sex. The Act is not an anti-discrimination law but sets minimum standards for labor conditions overall. Article 4 prohibits discriminatory treatment against women with respect to "wages" by reason of the worker being a woman. Violation of article 4 entails criminal sanctions under article 119 (1) of the Act.

"By reason of the worker being a woman" is interpreted as wage discrimination on the grounds that the worker is a woman, that the woman worker is generally less efficient, with shorter length of service, or is not the head of household, etc. based on stereotypes in a circular notice.[248] However, examples of violations in the circular notice are limited to instances of direct sex discrimination, such as a sex-segregated salary system, or a sex-based distinction regarding eligibility for family allowances.[249] Trade unions point out that this interpretation "does not help address the indirect discrimination, for example based on job classifications, that constitutes a substantial cause of the gender pay gap."[250]

Also, article 3 of the Labor Standards Act prohibits discriminatory treatment based on nationality, creed or social status with respect to wages, working hours or other working conditions. Article 3 does not include sex as a prohibited ground of discrimination because the Labor Standards Act had protection clauses for women when it was enacted in 1947.[251] Further, since "social status" is interpreted as a status which an individual cannot abandon based on his or her will, being a "non-regular worker" is not considered a "social status" under article 3 of the Labor Standards Act.[252]

The ILO CEACR pointed out that article 4 of the Labor Standards Act does not fully reflect the equal pay principle.[253] Trade unions have urged the Government to add "sex" as a ground of discrimination in article 3 of the Act.[254]

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[247] MHLW, Overview of the General Survey on Part-time Workers 2016(n62)
[248] Circular Notice for the Labor Standards Act-related Interpretation, Circular Notice of Ministry of Labour, Kihatsu No. 150/Fuhatsu No. 47 14 March 1988
[249] ibid
[250] *Japan*- CEACR, Observation, 2017, C100
[251] Yuji Iwasawa *International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law* (OUP 1998) 213
[252] Nihon Yubin Teiso case(n220), Fagan and others(n50)23
[253] *Japan*-CEACR, Observation, 2014, C100
[254] *Japan*-CEACR, Observation, 2014, C100

4.5.1.2 The Definition of ”Wages”

Article 4 of the Labor Standards Act prohibits different treatment in terms of “wages” based on sex. Article 11 of the Act defines wages as “the wage, salary, allowance, bonus and all other kind of payment made from an employer to worker as remuneration for labor, regardless of the name which such payment is given.” This definition complies with the definition of remuneration in C100.

4.5.2 Equal Employment Opportunity Act

The Equal Employment Opportunity Act was first enacted in 1985 upon ratification of CEDAW by Japan, and amended substantially in 1997 and 2006, respectively. The purpose of the Act is to promote equal opportunity and treatment between men and women in employment and to protect the health of female workers during pregnancy and after childbirth.[255]

However, the Equal Employment Opportunity Act has no explicit provisions on direct or indirect wage discrimination between men and women. Article 5 of the Act states that with regard to the recruitment and employment of workers, employers shall provide equal opportunities for all persons regardless of sex. Article 6 of the Act prohibits discrimination based on sex with regard to (i) assignment, promotion, and training; (ii) fringe benefits; (iii) changes in job type and status of employment; and (iv) retirement, dismissal and renewal of labor contracts. Article 7 of the Act prohibits indirect discrimination. However, it limits the scope of measures corresponding to articles 5 and 6, those concerning the recruitment and employment of workers and other matters listed in article 6. Therefore, “wages” are not included.

4.5.3 Comparable Workers

4.5.3.1 Labor Standards Act

Article 4 of the Labor Standards Act obliges employers not to engage in wage discrimination based on sex. Article 4 has no definition of a “comparable worker.” When direct discrimination is obvious, such as a different wage setting based on sex, a comparison of the actual work performed by a female and a male worker is not required to confirm the violation. However, when it is not clear if differential treatment in wages is based on sex, a comparison between female and male workers is necessary to determine the wage gap is based on sex. Judgements regarding article 4 of the Act were exclusively about the pay gap between female and male workers hired by the same employer.[256] Therefore, the scope of comparison in practice is narrower than the equal pay principle in C100.

[255] Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment Act No. 113 of July 1, 1972 (Equal Employment Opportunity Act) art 1

[256] For example, Tokyo District Court 27 August 1992 Rodo Hanrei No.611 p10 (Nisso-Tosho case), Tokyo High Court 31 January 2008 Rodo Hanrei No.959, p85(Kanematsu case), Showa-Shell Sekiyu(Nozaki) case (n245)

4.5.3.2 Equal Employment Opportunity Act

According to a public notice based on article 10 of the Equal Employment Opportunity Act (hereinafter "the EEOA Guidelines"), discrimination under the Act is decided based on employment management categories.[257] Therefore, the employment management category bars comparisons between workers who belong to different employment management categories under the same employer.

The EEOA Guidelines note that setting employment management categories based on sex is illegal discrimination. Also, it stipulates that there should be "objective and reasonable difference" based on the actual situation, in terms of the content of the duties, range, and frequency of personnel changes including job relocations, etc. between one employment management category and another.[258] However, employers can justify different treatment of different workers based on employment categories, which at face value appear to be gender neutral, by relying on the EEOA Guidelines.

4.5.3.3 The Career-Tracking System

The practice of career-tracking system exemplifies this. The career track is one of the types of employment management category. The system is one of the causes of low pay for female regular workers because it limits opportunity of women for promotion and employment.

Prior to the enactment of the Equal Employment Opportunity Act, recruitment and employment practices that differed according to by sex were widespread in Japan. Female jobs were openly considered subordinate to "male jobs," and paid less than the latter.

After the enactment of the Act in 1985, many large-scale companies replaced sex-based employment categories with the "career-tracking system," which had two tracks: "the main track" (integrated or management track, or so-called sogo-shoku) and the other track (standard or clerical track, or so-called ippan-shoku). The two tracks were classified into different employment management categories.

The eligibility for both tracks is now gender neutral at face value. However, today, women are still underrepresented in the main career track and overrepresented in the other, where workers were expected to perform "supplementary routine work."[259]

The career-tracking system hid gender wage discrimination. For example, in the Kanematsu case, the company tried to justify its gender wage disparity on the grounds that career tracks were classified by job content, and that female workers in the subordinate track only engaged in clerical and auxiliary jobs. However, the court looked at the actual job content and found that the job content and their difficulty were not clearly distinguishable from each other because the workers' jobs were similar, and also because they repeatedly took over each other's jobs, at least for a limited period.[260] The court found the violation of article 4 of the Labor Standards Act had taken place after 1985.[261]

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[257] Public Notice of the Ministry of Health, Labor and Welfare No.614 of 2006
[258] ibid
[259] Director-General, GB.312/INS/15/3(n12) para41, Iwasawa (n251) 223
[260] Kanematsu case(n256)
[261] ibid, Director-General, GB.312/INS/15/3(n12) para14

In addition to the EEOA Guidelines, the MHLW issued a public notice for the better management of career-tracking system in 2013.[262] However, trade unions criticize that measures taken by the Government "only encourage the gender pay gap" because they do not provide objective job evaluations across career tracks.[263]

4.5.4 Lack of the Concept of "Work of Equal Value"

The Labor Standards Act and the Equal Employment Opportunity Act lack the concept of "value" in their texts. The framework for deciding wage discrimination between workers performing different jobs or working in different employment categories is not clear from the Labor Standards Act.

Employers have no duty to consider the "value" of a job or to conduct objective job evaluations when determining wages, although the Act does not prohibit them from doing so. Similarly, courts are not obliged to adopt the concept of "value" nor to conduct or adopt objective job evaluation when deciding wage discrimination, although they are not banned from doing so. Some cases showed the possibility of interpreting article 4 of the Labor Standards Act in a way that the strict sameness of work between a female worker and a comparable male worker is not required to prove gender wage discrimination.[264]

However, there are many deficiencies due to the absence of a unified acceptance of the concept of "value." When the courts find that the content or the difficulty of jobs similar between male and female workers, but the two parties receive disparate wages, the courts approve wage discrimination. In contrast, when the courts find the jobs to be different, they do not scrutinize whether the wage gap is proportionate to the difference in the value of the jobs due to lack of consistent practice of applying the concept of value. [265] This means that it is increasingly more difficult to establish sex wage discrimination between female non-regular workers and male regular workers because they are usually doing different jobs.

In only one case, the Kyo-gas case, the court not only mentioned "value" but also used common factors applicable to both the plaintiff (female regular worker) and a comparable male worker in order to evaluate the value of the jobs.[266] The main reason the court considered this issue was that a researcher, who has advocated the equal pay principle, submitted the objective job evaluation comparing the plaintiff and a male worker performing different jobs within the same company. The court recognized the value of the work performed by two workers as the same and thus found a violation of article 4 of the Labor Standards Act.[267]

In contrast, in the Maruko Alarm case, the court stated that the equal pay principle was not a legally binding norm and did not compare the value of work between plaintiffs (female fixed-term part-time workers) and male regular workers who were engaging in jobs that were different from those of the plaintiffs. Instead, the court compared wages of plaintiffs and female regular workers who were

[262] Public Notice of the Ministry of Health, Labor and Welfare No.384 of 2013
[263] *Japan*-CEACR, Observation 2017, C100
[264] For example, Nisso-Tosho case(n256)
[265] Kanematsu case(n256)
[266] Masumi Mori, Mutsuko Asakura, *Doitsu kachi rodo doitsu chingin gensoku no jisshi shisutemu (Building a system for implementing the principle of equal pay for work of equal value in Japan) (Japanese Only)* (Yuhikaku 2010) 304
[267] Kyoto District Court 20 September 2001 Roudou Hanrei No. 873, p87 (Kyo-gas case)

engaged in the same jobs. The court concluded that it would find a violation of article 90 of the Civil Code only when the wages of plaintiffs reached less than 80% of female regular workers who were performing same job duties with same length of service.[268]

4.5.5 Lack of Objective Job Evaluation

The Government of Japan interprets articles 2 (1) and 3 (1) of C100 as giving discretion to Member States about introducing objective job evaluations.[269] The Government of Japan repeatedly states that the objective job evaluation is not compatible with the wage system in Japan.[270]

Therefore, the method of the objective job evaluation is not established in Japanese laws. For example, about the Showa-Shell Sekiyu(Nozaki) case, the company's trade union criticized that the court underestimated the skills necessary for a particular "female job," namely Japanese typing. [271] The court saw Japanese typing as being of little difficulty once the technique was acquired, and cited the low wages of typists in the labor market as justification for the plaintiff's low wages.[272]

However, the Government recognizes the gender pay gap is an issue that must be addressed. It also admits that the wage system based on "the individual ability to perform the job" (shokuno pay) system and the employment management category system run the risk of being operated on gender stereotypes.[273]

Therefore, as a practical measure to address the gender wage gap, the MHLW issued "The Guidelines for Support for Initiatives taken by Employers and Employees to Solve the Wage Disparity between Men and Women" in August 2010 (hereinafter "the 2010 Guidelines on Sex Wage Disparity, or the 2010 Guidelines") in order to make gender wage gap "visible." [274]

The purpose of the 2010 Guidelines is to encourage employers and workers to review pay and employment management systems, to review the operation of those systems, and to promote positive actions including vocational training, education, and affirmative measures for women regarding promotions.[275] The 2010 Guidelines recommend employers to conduct surveys on some of the factors affecting gender wage disparities, such as the percentage of female workers in managerial positions, gender gaps in average length of service, and factors related to work-life balance.

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[268] Maruko Alarm case(n220)

[269] Director-General, GB.312/INS/15/3 (n12) para34

[270] *Japan*- CEACR, Direct Request, 2014, ILO CEACR, Direct Request concerning Japan on the Equal Remuneration Convention (No. 100), 1951 (107th Conference Session Geneva, 2018) (*Japan*-CEACR, Direct Request, 2017, C100) < http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3342962 >accessed 12 April 2018

[271] Director-General, GB.312/INS/15/3(n12) para 13

[272] Showa-Shell Sekiyu(Nozaki) case(n245)

[273] *Japan*- CEACR, Direct Request, 2014, *Japan*- CEACR, Direct Request, 2017

[274] MHLW, The Guidelines for Support for Initiatives taken by Employers and Employees to Solve the Wage Disparity between Men and Women(n68)

[275] The Government of Japan, Seventh and eight periodic reports of States parties due in 2014 under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women (16 September 2014) UN Doc CEDAW/C/JPN/7-8, para317(The Government of Japan, Periodic reports to CEDAW Committee, 2014)

However, the 2010 Guidelines are not a powerful enough tool to address the wage gap between male regular workers and female part-time workers. First, the 2010 Guidelines are not about objective job evaluation methods, nor do they provide a methodology for numerical evaluation of different jobs. Next, the 2010 Guidelines are based on a study of wage disparities between full-time male and female workers conducted in 2010.[276] Therefore, the subject of the 2010 Guidelines is full-time workers. Third, the 2010 Guidelines recommend employers to survey gender wage disparities according to workers' length of service within each employment management category. Forth, the 2010 Guidelines have no legally binding effect on employers.

4.5.6 Indirect Discrimination

4.5.6.1 Labor Standards Act

Article 4 of the Labor Standards Act has no definition of indirect discrimination.[277] In the Act, there is no clear rule about the shift of the burden of proof from employees to employers when a worker proves, *prima facie*, that different treatment based on gender neutral reasons but affecting female workers predominantly.

Therefore, it is difficult for a female non-regular worker to prove a violation of article 4 of the Labor Standards Act on the grounds that a different treatment due to employment types amounts to "indirect sex discrimination," because of the predominance of women among non-regular workers. For example, in the Maruko Alarm case, the court stated that the wage disparity between plaintiffs (female fixed-term part-time workers) and regular workers was not a matter of gender discrimination, but rather a matter of the legality of unequal treatment between different employment types, in spite of female domination among fixed-term part-time workers in the defendant company.[278] In the Kyoto Women's Centre Case, a plaintiff claimed indirect discrimination pursuant to article 4, on the grounds that female domination among non-regular workers and their lower wage than regular workers. However, the court dismissed it on the ground that recruitment and wage setting were not based on sex and did not admit the female-domination in a low-paid employment type triggered a question of indirect discrimination.[279]

4.5.6.2 Equal Employment Opportunity Act

The Equal Employment Opportunity Act has no general definition for indirect discrimination. As chapter 4.5.2 explains, article 7 of the Act prohibits indirect discrimination. However, measures in relation to "wage" is not included.

Furthermore, article 7 limits illegal indirect discrimination by ordinance. Under the ordinance that was revised in 2013(hereinafter "the EEOA Ordinance"), indirect discrimination is prohibited only when it concerns the following three categories: (i) recruitment or employment which apply criteria concerning workers' height, weight or physical strength; (ii) the workers' ability to receive reassignment that

[276] Study Group on Wage Disparity between Men and Women under Changing Salary and Employment Systems, The Report(n67)
[277] Fagan and others(n50)23
[278] Maruko Alarm case(n220)
[279] Kyoto Women's Center case (n219)

results in the relocation of the worker's residence in relation to recruitment, employment, promotion, and change in job type; and (iii) making past workplace transfers a condition for promotions.[280]

Interestingly, the public notice based on article 10 of the Equal Employment Opportunity Act (the EEOA Guidelines) includes a general definition of indirect gender discrimination. The EEOA Guidelines define indirect gender discrimination in employment as measures concerning factors other than sex, which puts one sex at a considerable disadvantage without legitimate reasons.[281]

The Government explains the reason why the general definition is not included in the Act or the EEOA Ordinance is as follows: "indirect discrimination is considered to be a broad concept that could be used in almost all cases."[282] According to the Government, measures defined in the EEOA Ordinance show a consensus reached by the Government, employers, and employees.[283]

One peculiarity of Japan, that explains why the progress in gender pay equity has been so slow, is seen in the explanation by the Government on the lack of a general definition of indirect discrimination in the Act. The Government commonly uses a lack of social consensus or social awareness among the public as an excuse for not taking a progressive approach, instead of taking actual steps to build "consensus" or raise "awareness."[284]

The Government's attitude runs contrary to state obligations under human rights treaties. Regardless of social consensus, States parties have the obligation to protect rights and raise awareness under ratified treaties. As chapter 3 indicated, a broad definition of indirect discrimination is encompassed by C100, C111, CEDAW and ICESCR. However, this is not fully observed by the Government of Japan. As a result, a case concerning indirect gender discrimination in wages is dealt with on a case-by-case basis in the courts.

4.5.7 Justification for Differences in Wages

Article 4 of the Labor Standards Act has no mention to justification for difference in wages in direct and indirect gender discrimination. As a practice in gender wage discrimination cases at the courts, when female workers have proved the wage disparity between sexes, the courts consider the justifying factors claimed by employer as a consideration of reasonableness of the wage disparity between sexes. If there is no reasonable cause, the gap is attributed to sex. Thereby sex wage discrimination is established.

The ILO CEACR notes that "in many cases recognition of the element of reasonableness" in article 4 of the Labor Standards Act "have provided employers with broad discretion in setting salary rates which affect women and men differently."[285]

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[280] Ordinance for Enforcement of the Act on Ensuring Equal Opportunities for and Treatment of Men and Women in Employment, Ordinance of the Ministry of Labour No. 2 of January 27, 1986, Amendment of Ordinance of the Ministry of Health, Labour and Welfare No. 133 of 2013 (the EEOA Ordinance) art 2

[281] Public Notice of the Ministry of Health, Labor and Welfare No.614 of 2006

[282] *Japan*-CEACR, Direct Request, 2017, C100

[283] *Japan*-CEACR, Observation, 2017, C100

[284] Cf. The Government of Japan, Periodic reports to CEDAW Committee, 2014(n275) para 384

[285] *Japan*-CEACR, Direct Request, 2017, C100

The EEOA Guidelines define justification for indirect gender discrimination as "a legitimate reason."[286] The "legitimate reason" includes cases not only where measures are specifically required in relation to the nature of the job, but also where measures are specifically required for the purpose of employment management in light of the circumstances of the employer's business.[287] The EEOA Guidelines allow a broad business necessity as justifications.

4.5.8 Remedy for Gender Pay Discrimination

As chapter 3.2.5 has shown, under C100 if the "value" of the work of men and women is the same, the rates of remuneration shall be the same unless a justification can be provided. When the value is different, the difference in remuneration should be proportionate to the difference in the work's value. However, this is not always the case in Japan.

Whether article 13 of the Labor Standards Act gives a female worker the right to demand the difference in wages between herself and a comparable male worker resulting from a violation of article 4 of the Act is in dispute.[288] Article 13 invalidates provisions of a labor contract which contradict the Act and replaces the provisions with standards set by the Act. However, wage-setting standards are not set in the Act itself, and the standard of wages that applies to the worker without sex discrimination is not always quantifiable within a company. Therefore, the standards that article 13 should adopt to replace the provisions are not always clear.

Instead, many courts rely on tort liability to determine the damage a female worker suffers from wage discrimination. In other words, the plaintiff bears the burden of proving the damage she has suffered because of the wage discrimination.

Japanese courts do not always grant proportionate damages even when courts find a plaintiff's case proven in a wage discrimination suit. For example, in Kyo-gas case, the court determined that the value of job performed by the plaintiff was the same as a comparable male worker. However, it only granted 85% of the total amount of salary (basic wage and bonus) of the comparable male worker on the ground that wage was influenced by personal merit and other factors and the plaintiff did not prove as quantifiable loss.[289]

4.6 Domestic Laws on "Non-Regular Employment"

4.6.1 Overview

This section focuses on two acts, namely the Part-Time Workers Act and the Labor Contracts Act. The Japanese version of equal pay for equal work between regular and non-regular workers, which the 2017 Action Plan advocates for,

[286] Public Notice of the Ministry of Health, Labor and Welfare No.614 of 2006

[287] ibid. The definition of a legitimate aim is the same as the one in art 7 of the Equal Employment Opportunity Act.

[288] Hanami (n36) 143

[289] Director-General, GB.312/INS/15/3 (n12) para15, Kyo-gas case (n267) In the case, the actual pay gap (basic wage and bonus) between the plaintiff and the comparable male worker was around 25.5%.

concerns the revision of these two Acts. Therefore, it is necessary to examine how these two acts address the low pay of female part-time workers. Like C175, these acts directly deal with different treatments in pay between non-regular and regular workers. There are two levels of norms. One is the prohibition of "unreasonable" differences in treatment between part-time/fixed-term workers and ordinary/indefinite-term workers. The other is the prohibition of discrimination in cases in which a part-time worker is "equivalent to" an ordinary worker.

4.6.2 Part-Time Workers Act

The Part-Time Workers Act was first enacted in 1993 with the aim to improve employment management of part-time workers. This act had no prohibition on sex discrimination. In 2007, a legally binding provision was introduced to ban discrimination between part-time workers and ordinary workers, which was former article 8 of the 2007 Part-Time Workers Act.

In 2014, a revision to the Act expanded the scope of its application. The current article 8 of the Act stipulates that different treatments between part-time workers and ordinary workers shall not be unreasonable. The current article 9 prohibits discriminatory treatment due to their being a part-time worker when the part-time worker is the "equivalent to ordinary workers."

More generally, articles 3 and 10 of the Act impose on employers the duty to make efforts. Article 3 states that employers "may seek to ensure" balanced treatment of part-time workers and ordinary workers. Also, article 10 stipulates that it is the employers' duty to make efforts to decide wages for part-time workers (excluding part-time workers equivalent to ordinary workers), with due consideration for balance with ordinary workers.

Part-time workers refer to workers whose prescribed weekly working hours are shorter than "ordinary workers" employed at the same place of business. "Ordinary workers" under the Part-Time Workers Act refer to regular workers.[290] When there are no regular workers at the same place of business, ordinary workers mean non-regular full-time workers at the same place of business.[291]

4.6.3 Labor Contracts Act (Fixed-Term Worker)

The Labor Contracts Act was enacted in 2007, and covers labor contracts not only for fixed-term workers, but for workers across the board.[292] In 2012, article 20 of the Labor Contracts Act was introduced, and stipulated that differences of labor conditions due to the existence of a fixed term between a fixed-term labor contract and an indefinite-term labor contract with the same employer shall not be unreasonable, considering the content of the duties of the workers and the extent of responsibility, the extent of changes in the content of duties and work locations, and other circumstances. The factors considered under article 20 are same as article 8

[290] Part-Time Workers Act art2

[291] Circular Notice for the implementation of Act on Improvement, etc. of Employment Management for Part-Time Workers, Circular Notice of the Ministry of Health, Labor and Welfare, Kihatsu No. 0724-2/Syokuhatsu No. 0724-5/Nouhatsu No.0724-1/Kojihatsu No.0724-1, 24 July 2014 (Circular Notice for the implementation of Part-Time Workers Act)

[292] Labor Contracts Act, Act No. 128 of December 5, 2007

of the Part-Time Workers Act.[293] Part-time workers with fixed-term contracts are covered by both articles. In the Metro Commerce case, the court stated that article 20 of the Labor Contracts Act does not cover the principle of equal remuneration for equal work or work of equal value.[294]

4.6.4 The Work Style Reform Bills

The Work Style Reform Bills were proposed to implement the Japanese version of equal pay for equal work championed in the 2017 Action Plan.[295]

First, if enacted, the Bills would expand the prohibition of discriminatory treatment in article 9 of the Part-Time Workers Act to fixed-term workers.

Next, the Work Style Reform Bills would unify article 8 of the Part-Time Workers Act and article 20 of the Labor Contracts Act. The draft article 8 prohibits unreasonable differences in treatment between part-time/fixed-term workers and ordinary workers. In the Bills, factors considered are not changed from the current article 8, namely the job description (content of jobs and the level of responsibility), the extent of changes in job description and assignment, and other circumstances. However, the Bills add that employers shall take those factors into consideration when it is recognized as appropriate in relation to the nature and the objective of the treatment.

4.6.5 The Definition of Wage

Article 9 of the Part-Time Workers Act prohibits discrimination involving "the decision of wages … and other treatment." The term "wages" in article 9 is interpreted as including bonuses, allowances and other remuneration.

The term "treatments" in article 8 of the Part-Time Workers Act and the term "labor conditions" in article 20 of the Labor Contract Act encompass not only decision in basic wages but also other labor conditions including allowances and bonuses.

However, article 10 of the Part-Time Workers Act has a narrower definition of wage. Under article 10, wage refers payment closely related to the job description. "Job description" means a description of his or her work and the level of responsibilities associated with said work. The definition of "wage" under article 10 excludes commutation allowances, retirement allowances, family allowances, housing allowances, separation allowances, child education allowances and any wages payable in any name other than those payable closely related to the job description.[296]

The draft article 8 and 9 of the Part-Time Workers Act in the Work Style Reform Bills concerns basic wages, bonuses and other treatment. "Other treatment" includes a broader range of remuneration.

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[293] Michio Tsuchida *Roudou Keiyaku Hou (Contract of Employment Law)* (Japanese only) (2nd edn Yuhikaku 2016)792 813

[294] Metro Commerce case(n220). It was the first instance. The case is pending at the high court as of April 2018.

[295] The Cabinet of Japan, the Work Style Reform Bills (n11)

[296] Ordinance for Enforcement of the Act on Improvement, etc. of Employment Management for Part-Time Workers, Ordinance of the Ministry of Labor No. 34 of November 19, 1993, art 3

4.6.6 Comparable Workers in Non-Regular Employment Law

Articles 8 and 9 of the Part-Time Workers Act and article 20 of the Labor Contracts Act do not adopt a broad scope of comparison. The Part-Time Workers Act limits comparisons to those between workers in the same place of business. The Labor Contracts Act limits comparisons to those between workers hired by the same employer. The Work Style Reform Bills would expand the scope of comparisons from those in the same place of business to those between workers hired by the same employer both under article 9 and 8 of the Part-Time Workers Act. However, unlike C175, comparisons with a worker in a same branch of activity is not allowed.

Due to job segregation under a single employer, a comparison between female non-regular workers and regular workers with different jobs may justify broader differences in treatments.The Metro Commerce case illustrates this in application to article 20 of the Labor Contracts Act. [297] In the case, plaintiffs with fixed-term contracts argued that they were comparable to regular workers engaged in the same job, namely working at shops at metro stations. However, the court compared the plaintiffs with "regular workers as a whole" hired by the defendant company, and decided that while the plaintiffs were working in a specific job, most of the regular workers were engaging in various kinds of jobs, with few regular workers exclusively working at shops in metro stations.

This led to the conclusion that the job content and the level of responsibility were different between fixed-term and regular workers, and that the range of changes in job content and assignments were different. Based on such differences, the court ruled that the gaps in the rate of basic wage raises, eligibility for housing allowances and the retirement bonuses, and bonus amounts were not unreasonable, because it was in the interest of the defendant company to attract more qualified people as regular workers by offering better conditions. Only the different rate in overtime pay was found to be unreasonable by the court.

4.6.7 "Equivalent to Ordinary Worker"

4.6.7.1 Criteria in Part-Time Workers Act

The Part-Time Workers Act does not contain the concept of "value."

Article 9 of the Part-Time Workers Act prohibits discriminatory treatments of part-time workers "equivalent to ordinary workers" employed at the same place of business. The part-time worker equivalent to ordinary workers refers to the part-time worker whose (i) job description (contents of jobs and the level of responsibility) is equal to the ordinary worker and (ii) job description and assignment are likely to be changed within the same range as the job description and assignment of ordinary workers. Change of assignment refers to labor mobility within a company due to personnel change including transfers, relocations and promotions [298]

[297] Metro Commerce case(n220)
[298] Circular Notice for the implementation of Part-Time Workers Act (n291) 4

The second criterion, the range of changes, is influenced by the Japanese labor practice of regular workers having long-term employment, wherein job descriptions are not specified, and flexibility in job description and assignment is expected. The second criterion justifies the labor practice, which treats employees differently depending on the possibility of change in job description and mobility.[299]

However, part-time workers are usually not expected to perform different jobs in a company. Many female part-time workers have less mobility due to family responsibilities. The second criterion can work as a loophole because employers can set different arrangements for part-time workers to escape from their duty stipulated by article 9.

Article 9 was revised in 2014 and enforced on 1 April 2015. Before the revision in 2014, former article 8 of the 2007 Part-Time Workers Act, which corresponds to the current article 9, had an additional third requirement, namely having an in-definite term contract. The narrow scope was criticized by trade unions because only 1.3% of part-time workers could enjoy equal treatment under the former article 8.[300] According to a survey conducted in 2011, which trade unions based their criticisms on, only 2.1% of part-time workers are able to enjoy equal treatment under the current article 9.[301] As of October 2016, the Government reported that the statistics on the impact of the latest revision of Part-Time Act in 2014 have not been made available.[302]

The Work Style Reform Bills expands the protection under the article to fixed-term workers, using the same criteria. However, the number of part-time/fixed-term workers who benefit from the revision will not be large due to the strict criteria of the article.

4.6.7.2 2012 Guidelines for Part-Time Work Job Evaluation

Despite its strict criteria, one positive aspect about article 9 of the Part-Time Workers Act is the possibility of a comparison of job contents, unlike with the Labor Standards Act.

Regarding job evaluations of part-time workers, the MHLW issued "The Guidelines for Job Evaluation through the Grading Method by Element" in 2012 (hereinafter "the 2012 Guidelines for Part-Time Work Job Evaluation or the 2012 Guidelines"). The Government explains that the 2012 Guidelines use a breakdown method, which enables a "comparison between the duties of part-time workers and regular workers."[303]

However, the content of the 2012 Guidelines allow for the potential for discriminatory evaluations to take place.

First, the 2012 Guidelines recommend setting factors for evaluation depending on the actual conditions of each company. There is no guidance for setting factors to evaluate job in a gender-neutral manner, or in a non-discriminatory manner for

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[299] ibid 12

[300] *Japan*- CEACR, Observation, 2014, C100

[301] MHLW, *Paat taimu roudousya sougou jittai tyousa no gaikyou* (Overview of the General Survey on Part-time Workers 2011) (Japanese only) (14 December 2011), Hyo16, sangyou, jigyousyo kibo, paat no koyo kikan no sadame no umu betsu jigyosyo wariai (Table 16: Percentage of businesses hiring part-time workers equivalent to the ordinary worker by type of industry and size of establishments) < http://www.mhlw.go.jp/toukei/list/132-23b.html#05>accessed 26 March 2018

[302] *Japan*-CEACR, Observation, 2017, C100

[303] *Japan*-CEACR, Direct Request, 2014, C100

part-time workers. Therefore, the 2012 Guidelines have the risk of underrating of female or part-time jobs.

The 2012 Guidelines use "constituent elements" to grade the contents of duties.[304] Comparisons are based on points that the constituent element acquires.[305] In the 2012 Guidelines, eight factors are used as a model for "constituent elements." They are the "substitutability of human resources," "innovativeness," "expertise," "degree of discretion," "complexity of communication with persons outside and inside company," "complexity of matter to be addressed," and "contribution to the achievement of entire company."[306] In addition, the 2012 Guidelines refer to factors, namely skill, effort, responsibilities and working conditions, which are recommended by the guidebook issued by the ILO as gender neutral.[307]

Among the "constituent elements," the "substitutability of human resources" estimates whether finding a worker for a job through employment or relocation is difficult or not.[308] This does not entail an evaluation of the content of the work, but rather, evaluates the market value of the work. Other "constituent elements" can correspond to sub-factors of skill, efforts or responsibility which are mentioned in the analytical job evaluation recommended by the ILO. However, those eight factors are suitable for evaluating jobs in managerial positions. Other skills used in routine work, such as "establishing and maintaining manual and automated filing or records management and disposal"[309] are not considered. There are few factors concerning burdens placed on workers, such as working conditions. Therefore, the work carried out by part-time workers would likely score low points when evaluated based on these "constituent elements."

A more problematic aspect of the 2012 Guidelines is "the index corresponding to the system and implementation of utilization of personnel" that allows wage differences between regular and part-time workers, which corresponds to the second criterion of article 9 of the Part-Time Workers Act. The 2012 Guidelines explain that the index is in place for consideration of flexibility of working time and working place, a range of change in job contents, and differences in future career paths. Such factors are seen as influencing wages but cannot be taken into account in an analytical job evaluation process according to the 2012 Guidelines.

However, the 2012 Guidelines do not provide sufficient guidance on the extent to which differences in those factors should impact wages of part-time and regular workers. The 2012 Guidelines explain that the appropriate rate of the index differs from company to company. Therefore, each company should set a reasonable rate of index that can convince workers of their acceptability. Whether workers are "convinced" or not is not an appropriate standard. Considering the power imbalance between employers and non-regular workers, the latter can be easily coerced to say they are "convinced" by a disadvantaged standard. As chapter 2.4.1 indicated, non-regular workers are dissatisfied with their wages. However, there is no guarantee that they can express such sentiment.

As a result, even if the points for job contents are the same based on analytical job evaluations using the "constituent elements," an employer can set "the index

[304] *Japan*-CEACR, Direct Request, 2017, C100
[305] ibid
[306] MHLW, The 2012 Guidelines for Part-Time Work Job Evaluation (n246)
[307] Chicha (n112)
[308] MHLW, The 2012 Guidelines for Part-Time Work Job Evaluation (n246)
[309] Oelz (n107) 40

corresponding to the system and implementation of utilization of personnel" at 80%, or whatever rate the employer thinks is appropriate, allowing wage differences corresponding to the index to go unchanged. Thus, the index allows disproportionate wage gaps between part-time and regular workers.

4.6.7.3 How is "Equivalence" Decided in Courts?

Under article 9 of the Part-Time Workers Act, discrimination is ultimately decided by courts.

The Niyaku Corporation case was the first case where a court decided that the plaintiff was a worker equivalent to the ordinary worker.[310] This case concerned the former article 8 of the 2007 Part-Time Workers Act. The court interpreted the second criterion of the article, namely the range of change in an assignment by looking at actual practices at the company. Although in the rules of employment, the possibility of relocation was different between part-time workers and ordinary workers, the court found that relocation had not been ordered to ordinary workers at the district level where the plaintiff was working for the previous 10 years. The court concluded that the range of assignment of the plaintiff was the same as that of regular workers.

However, it should be noted that the plaintiff was a male part-time worker and that the employer did not dispute the sameness of the job description as truck drivers between the plaintiff and regular workers.

Considering job segregation under the same employer, it would be difficult to prove the equivalence of job descriptions between part-time workers and regular workers in some cases. For example, in the Kyoto Women's Center case, the court admitted that it is illegal for unreasonably wide wage gaps to exist between two workers engaged in the same work.[311] However, the court found no comparable regular worker engaging in the same job as the plaintiff, who was a female fixed-term part-time worker. The court concluded the plaintiff's job description was not same nor with same value as the one of the job of regular workers.

4.6.7.4 Remedy for Violation

In cases in which violation of article 9 of the Part-Time Work Act are confirmed, courts order the payment of compensation based on tort law.

The amount of damages awarded should be quantified based on the difference between the renumeration of part-time worker and a comparable ordinary worker. In the Niyaku Corporation case, the court ordered the defendant to compensate the exact difference in bonuses between the plaintiff and an ordinary worker.

Before the current article 9 of the Part-Time Workers Act was enforced, in Maruko Alarm case, the court ruled that the plaintiffs would be entitled to compensation as a violation of article 90 of Civil Code only when the wage of plaintiffs was less than 80% of female regular workers who performed the same duties, with a comparable length of service.[312]

Therefore, article 9 improved the equal treatment, although eligibility criteria is applied narrowly.

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[310] Oita District Court 10 December 2013 Roudou Hanrei No.1090, p44 (Niyaku Corporation case)
[311] This case concerned wage gap before the enforcement of the former article 8 of the 2007 Part-Time Workers Act. Kyoto Women's Center case (n219)
[312] Maruko Alarm case(n220)

4.6.8 How Justification is Considered?

Articles 8 and 9 of the Part-Time Workers Act and article 20 of the Labor Contracts Act are silent on where the burden of proof sits in cases of discrimination or unreasonable treatment. The above articles include factors which are usually considered as justifications, such as mobility and adaptability in job contents or work location.

In court cases under article 20 of the Labor Contracts Act, a worker should prove the facts supporting unreasonable treatments, and an employer needs to prove facts supporting difference in treatment as reasonable.[313]

4.6.9 Unreasonable Difference

Both article 8 of the Part-Time Workers Act and article 20 of the Labor Contracts Law prohibit "unreasonable" differences in treatment between part-time/fixed-term and ordinary/indefinite-term workers. However, what is unreasonable is a very subjective matter.

The Government published the Draft Guidelines of Equal Pay for Equal Work in December 2016, whose aim is to clarify what is and is not unreasonable.[314]
The 2017 Action Plan summarizes the Draft Guidelines as follows:[315]

> "The draft guidelines cover not only basic pay, pay rises, bonuses, and various kinds of allowances, but also education, training, and welfare."
>
> "Although companies tend to explain that indefinite-term full-time work[er]s and fixed-term or part-time workers are expected to play different roles and therefore decision criteria or rules of the wages, which include basic pay or various allowances, for them become different. However, this explanation cannot be regarded as sufficient because it is too subjective and abstract. We require companies to set decision criteria or rules of the wages that are not irrational in the context of objective and concrete situations such as job contents or range of shifts in job contents or personnel positioning."

However, the Draft Guidelines do not clarify how much of a wage difference is tolerated corresponding to differences in factors, such as job contents or the range of changes in job descriptions or personal assignment. According to the Draft Guidelines, the gap in basic wages between a part-time and a regular worker performing the same job can be reasonable when the regular worker is expected to be assigned to a managerial post with the possibility of relocation and changes in job content in the future, and is performing the routine job temporarily in order to gain experience.[316] It is unclear how much of a wage gap is deemed reasonable in such situations. Considering that the 2012 Guidelines for Part-Time Work Job Evaluation allow employers to set "the index corresponding to the system and implementation of utilization of personnel" at whatever rate the employers think is appropriate, a wide gap could be deemed reasonable.

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[313] Metro Commerce case(n220)
[314] Council for the Realization of Work Style Reform of Japan, Doitsu roudou doitsu chingin gaidolain an (the Draft Guidelines for Equal Pay for Equal Work) (Japanese Only) (20 December 2016)< http://www.kantei.go.jp/jp/singi/hatarakikata/>accessed 18 April 2018
[315] The 2017 Action Plan (n10)
[316] The Draft Guidelines for Equal Pay for Equal Work(n314)

4.7 Adequacy of Enforcement

4.7.1 Administrative Enforcement

The Equal Employment Opportunity Act has administrative dispute settlements procedures and administrative sanctions with regard to the enforcement of the Act. Under article 17 of the Act, employers and employees can use dispute settlement mechanisms run by prefectural labor offices. Under article 18 of the Act, employers and employees can use a conciliation procedure. In addition, under article 29 of the Act, prefectural labor offices give employers advice, guidance and recommendations. However, none of them are frequently used concerning direct or indirect discrimination cases under articles 6 and 7 of the Act.[317]

Under article 18 of the Part-Time Workers Act, prefectural labor offices may give guidance to employers. Articles 24 and 25 of the Act offer assistance on dispute settlement by prefectural labor offices. However, these procedures are not frequently used in relation to articles 8, 9 and 10 which concern different treatments in pay.[318]

Therefore, administrative enforcement mechanisms are not a powerful tool in addressing the low pay of part-time female workers.

4.7.2 Labour Inspections

Labor inspections have found only a small number of violations of article 4 of the Labor Standards Act. Two cases of violations were found out of 132,829 regular inspections in 2011.[319] In 2015, there were only three cases of violations out of 133,116 regular inspection cases.[320]

4.7.3 Court

As this section has shown, administrative enforcement mechanisms and labor inspections are not effectively working on gender wage discrimination or prohibition of discrimination in the Part-Time Work Act.

In the end, enforcement is left up to the courts. However, this poses a heavy burden on women, since most of them have neither the time nor the money for litigation.[321] In particular, lawsuits regarding sex wage discrimination take a long time from the first instance to the final judgement or settlement in higher instances. Even if they win, the effect of the judgement is individual.

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[317] Prefectural Labor Offices, *Heisei 28 nendo Todouhuken roudoukyoku koyou kankyou kintou bu de no hou sekou jyoukyou* (Situation of Enforcement of Law 2016) (Japanese Only) < http://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000167772.html >accessed 26 March 2018

[318] ibid

[319] *Japan*-CEACR, Direct Request, 2014, C100

[320] Labour Standards Bureau Ministry of Health, Labour and Welfare, *Roudou Kijun Kantoku Nenpou Vol. 68 Heisei 27 nen (Anual Labour Standards Inspection Report Vol.68 2015)* (Japanese Only), *Japan*-CEACR, Direct Request, 2017, C100

[321] Iwasawa (n251) 214

5 Analysis of Japanese Law in Compliance with International Law

5.1 Overview

This chapter analyzes whether the two approaches in Japanese law, namely sex discrimination approach and non-regular employment law approach, comply with the obligation to promote the equal pay principle and whether the Government takes sufficient measures to eliminate underlying causes of pay differentials. Then it analyzes whether the new approach, namely the Japanese version of equal pay for equal work based on non-regular employment law, offers better protection for female part-time workers and points out the absence of the principle of non-discrimination. This chapter prepares for the recommendations for the more effective implementation of the equal pay principle in Japan in the next chapter.

5.2 Sex Discrimination Approach

As chapter 3 showed, article 2 (1) of C100 obligates Member States to "promote" the principle of equal pay for work of equal "value." Although article 2 (2) does not obligate the States to adopt a specific method for application, the method that a State chooses should be comprehensive and effective enough to promote the equal pay principle.

Japan adopts national laws and regulations by means of application of the equal pay principle in article 2 (2) (a) of C100. As chapter 1 mentioned, the Government of Japan repeats that article 4 of the Labor Standards Act satisfies the requirement of C100.[322] Indeed, article 4 of the Labor Standards Act prohibits direct sex discrimination in relation to "wages." The definition of "wages" is as wide as "remuneration" in C100.

However, Japanese laws including the Labor Standards Act lack most of the essential aspects of the equal pay principle enshrined in C100 and other international human rights treaties.

First, the scope of comparison in the Labor Standards Act is limited to within the same employer in practice, whereas C100 requires a broader comparison. Further, the "employment management category" in the EEOA Guidelines narrows the scope of comparison within the same category under the same employer when deciding discrimination under the Equal Employment Opportunity Act. This influenced the interpretation of illegal wage discrimination under article 4 of the Labor Standards Act. For example, the 2010 Guidelines on Sex Wage Disparity only recommend surveys on wage disparity by employment management categories. This exacerbates wage disparity between workers in different employment types.

[322] *Japan*- CEACR, Observation, 2014, C100

Next, the Labor Standards Act does not incorporate the concept of "value" nor has a framework for objective job evaluations. Also, there are no guidelines for objective job evaluations issued for sex wage discrimination. Only one court case, namely the Kyo-gas case has adopted not only "value" but also objective job evaluation.

Third, the Labor Standards Act has no definition of indirect wage discrimination. The Equal Employment Opportunity Act does not prohibit wage discrimination and the scope of indirect discrimination under the Act is very limited.

Forth, a remedy for violation of article 4 of the Labor Standards Act is not always proportionate.

As a result, many courts have denied to recognize the equal pay principle as a legally binding norm in Japanese legal system.[323] Court cases in Japan show the need for introduction of the concept of "value" in legislation. It will lead to a unified adoption of the concept of "value" and a broader scope of comparison between female part-time workers and male regular workers.

Therefore, Japanese laws based on sex discrimination approach are not comprehensive and effective. The Government does not comply with the obligation to promote the principle of equal pay for work of equal "value."

5.3 Non-regular Employment Law Approach

This section compares with C175 and the Part-Time Workers Act since both directly address wage gap due to part-time work.

First of all, both C175 and the Part-Time Workers Act lack the concept of value. Both do not allow comparison between part-time and full-time workers with different contents of jobs by objective job evaluation. Therefore, chapter 3 concluded that C175 provides narrower protection than C100. The Part-Time Workers Act has a narrower scope of application than C175.

While C175 limits the scope of application to "basic wage," the Part-Time Workers Act prohibits pay discrimination including basic wages, bonuses, and other forms of renumeration. However, C175 sets a clearer standard, namely a proportionate basic wage. In contrast, the Part-Time Workers Act prohibits pay discrimination only when a part-time worker is considered to be "equivalent" to an ordinary worker. If a part-time worker is not "equivalent" to an ordinary worker, then only an "unreasonable" difference is prohibited, which allows a wider margin for a difference in pay than proportionality.

Regarding comparable workers, C175 allows a broader comparison since it includes comparable full-time workers "in the same branch of activity." The Part-Time Workers Act limits the comparison within the same place of business, although the Act does not require same duration of the period of the employment, unlike C175. While the Work Style Reform Bills extend the range of comparisons to these under the same employer, it is still narrower than C175.

"Same or a similar type of work or occupation" in C175 may enable a wider comparison than the Part-Time Workers Act since workers in a same occupation can perform different work. Moreover, C175 provides for the comparison of actual work carried out between part-time and comparable full-time workers. In contrast, the Part-Time Workers Act compares not only the contents of jobs that workers are

[323] Court cases (n220)

currently performing, but also the range of changes in job descriptions (contents of jobs and the level of responsibility) and assignment. This means that the Act allows for a difference in pay based on future expectations for a worker from a company. As chapter 4.6.7 pointed out, this is influenced by the labor practice of regular workers under long-term employment in Japan.

5.4 Underlying Causes of Pay Differentials

5.4.1 Sate Obligations

As chapter 3.2.2 and 3.3.3 indicated, articles 3 and 7 (a) of ICESCR require States parties to identify and eliminate the underlying causes of pay differentials. Articles 11 (1) (d), 2 (f) and 5 (a) of CEDAW require the States parties to take measures to eliminate discrimination based on gender bias or stereotyped roles of men and women.

C100 requires to repeal any existing legislation when it is contrary to the equal pay principle. Article 3(c) of C111, article 2 (f) of CEDAW and articles 2 and 3 of ICESCR also require modifying or abolishing existing laws which do not conform with the rights protected under these articles.[324] The obligation to eliminate underlying causes requires States parties to consider the effect of apparently gender-neutral laws.[325] This obligation applies to discrimination in private sector since States parties have obligation to protect individuals from violation by private actors.[326]

Considering these obligations, States must review legislation and modify it when it is insufficient to eliminate underlying causes of discrimination even if the legislation does not directly violate the right to equality. States must not aggravate the underlying causes of discrimination with their legislation.

Further, States must take "positive action" to promote the application of the equal pay principle under article 2 (1) of C100 because just having legislation is not sufficient for effective implementation of the equal pay principle. Positive action is also required to address the underlying causes of discrimination and structural inequalities under C111, CEDAW and ICESCR.[327] Article 4 of C100 requires cooperation with employers' and workers' organization. In addition, participation of female workers is crucial.

5.4.2 Underlying Causes in Japan

The stereotyped gender role and undervaluation of female work are the underlying causes of the gender pay gap in Japan. Under the traditional male breadwinner model, employers classified women as subordinate workers and underrated female work because women were supposedly a minor contributor to the company in the long-term, since many female workers would leave upon marriage or childbirth. As court cases have shown, in reality, many female workers

[324] CESCR GC 16 para 18, CESCR GC20 para 37
[325] CESCR GC 16 para18
[326] CEDAW art 2(e), ICESCR arts 2, 3(b)(c)
[327] CESCR GC 20 para 9

performed jobs of the same value as male comparable workers.[328] However, gender stereotypes and the underrating of female jobs covered up the discriminatory implementation of the wage system based on "the individual ability to perform the job" (shokuno pay) and the career-tracking system.

This typical structure of discrimination against female workers is reproduced in discrimination against female part-time workers. As chapter 2.3.1 has shown, stereotyped gender roles under the male breadwinner model has set low wages for part-time workers since part-time work had been a typical working style of housewives. Today, many women still choose part-time work due to family responsibilities.[329] Moreover, undervaluation of "non-regular" worker is also an underlying cause of low pay of part-time workers. As seen in chapter 2.4.2, the perceptions that the quality of work is different, that regular workers have a higher responsibility than non-regular workers, and that regular workers are expected to play roles different from those of part-time workers, have also worked to justify wage disparities. As chapter 4.4.3 and chapter 2.3.2 pointed out, the widespread practice of adopting different pay systems for part-time workers and regular workers entails a significant gap in eligibility for regular increases in basic wages, bonuses, retirement pay and additional allowances. As a result, non-regular workers performing the same or similar jobs as regular workers earn less than the latter.

Employers take advantage of this discriminatory structure to reduce labor costs.

As chapter 3.5 pointed out, adopting a "demand-side approach," such as a wage structure, is important rather than focusing on "supply-side deficiencies" in order to close the wage gap. [330] The Government must address systemic inequalities to eliminate underlying causes based on the demand-side approach and repeal legislation which aggravates underlying causes of pay differentials.

5.4.3 Analysis

5.4.3.1 Analysis of legislation

The current Japanese laws on sex discrimination do not address systemic inequalities. Article 4 of the Labor Standards Act has not sufficiently addressed pay discrimination between workers with different jobs. The Equal Employment Opportunity Act has worked to justify different pay settings based on "employment management categories." As chapter 4.3 pointed out, the policy of gender equality focuses on "supply-side" deficiency, such as shorter lengths of service and smaller number of women in managerial positions. The Government has not taken sufficient measures to address discriminatory implementation of the wage system based on "the individual ability to perform the job" (shokuno pay) system or the career-tracking system.

Furthermore, the current non-regular employment laws reinforce systemic inequality. The Part-Time Workers Act imposes the conformist pressure on part-time workers. This is due to the strict criteria of "equivalence" to an ordinary worker for equal treatment. In this instance, a female part-time worker needs a comparable full-time worker having an almost same job description and same range of changes

[328] Showa-Shell Sekiyu(Nozaki) case (n245), Kanematsu case(n256), Kyo-gas case(n267)
[329] JILPT, JILPT Report No.86 (n58)
[330] Rubery "How to close the gender wage gap in Europe: towards the gender mainstreaming of pay policy" (n211)184, 185,207

in job description and assignment in the same establishment. The Act does not work to change discriminatory wage settings between part-time and ordinary workers. The Work Style Reform Bills will not drastically change the situation, because it still requires equivalence to the ordinary worker.

5.4.3.2 Analysis of Positive Action

Positive actions are weak in Japan. First, the contents of positive actions are not appropriate to address low pay of female part-time workers. The positive actions which the Government of Japan advocates are not about objective job evaluation using "value."[331] The voluntary guidelines regarding the wage gap are not sufficient to eliminate gender bias or structural imbalance between female part-time and male regular workers. The 2010 Guidelines on Sex Wage Disparity is designed for regular workers and the treatment is meant to be separated by employment management categories. Although the 2012 Guidelines for Part-Time Work Job Evaluation adopts a type of analytical job evaluation, it does not sufficiently prevent gender-bias and bias against part-time workers from affecting the evaluation.

Furthermore, calls for voluntary implementation are weak. The MHLW encourages employers to use the 2010 Guidelines on Sex Wage Disparity and the 2012 Guidelines for Part-Time Work Job Evaluation. However, the implementation of the guidelines is up to employers. Employers have no legally binding duty to survey wage disparity or to conduct objective job evaluations. Even if they implement the Guidelines, worker's participation is not guaranteed.

Moreover, collective dimension is weak. Collective agreements have not played a significant role in reducing pay gap of female part-time workers. Administrative sanctions are not often used. Considering the heavy burden of lawsuits, a voice of female part-time workers is not heard at court easily.

5.4.3.3 Disadvantages of Female Part-Time Workers

Female part-time workers still have double disadvantages, namely, gender stereotyped roles and the underrating of non-regular workers. Nevertheless, Japanese laws do not work to address the supply-side deficiency, namely the discriminatory labor practice. On the contrary, laws impose pressures on female part-time workers to conform with the norm of male regular workers in order to claim equal pay. Therefore, the Government of Japan has not taken sufficient measures to eliminate underlying causes of pay differential. The duty to take "positive action" is not discharged by the Government of Japan.

5.5 Japanese Version of Equal Pay for Equal Work

The Government of Japan started to advocate the "equal pay for equal work" between "regular" and "non-regular" workers in the 2017 Action Plan and submitted the Work Style Reform Bills in 2018. This section analyses whether the non-regular employment law approach will be able to provide a better protection for female part-time workers compared with the sex discrimination approach in Japanese law.

[331] The Government of Japan, Periodic reports to CEDAW Committee, 2014 (n275)

The Labor Standards Act has no clear framework to compare wages between male regular and female non-regular workers. In contrast, at least the Part-Time Workers Act has a framework of comparison between part-time and full-time workers in relation to prohibition of pay discrimination. The Work Style Reform Bills extend the scope of the prohibition to fixed-term workers. Therefore, non-regular employment laws have a framework to address disadvantage due to non-regular employment.

However, as the following cases show, if a non-regular worker is in female-dominated job, her double disadvantages are not sufficiently addressed. Without the concept of "value," the non-regular employment law approach has significant limitations since it cannot compare the value of different jobs.

The Niyaku Corporation case and the Metro Commerce case are symbolic.[332] In Niyaku Corporation, the plaintiff was a male part-time driver who could find comparable regular workers with the same job description. The court approved that he was equivalent to ordinary worker and that difference in the amount of bonus and eligibility of retirement allowance was contrary to the Part-Time Workers Act.

In contrast, in Metro Commerce as seen in chapter 4.6.6, the plaintiffs are female fixed-term workers, working at the shop at metro stations. While this case is about article 20 of the Labor Contracts Act, it can be applied to situation of female part-time workers since wholesale retail industry is one of the industries dominated by female part-time workers.[333] Cashier is considered a "female job." In this case, while there were few regular workers exclusively doing same job, most of the regular workers had a wider range of change of job description than plaintiffs. The court drew a comparison with regular workers as a whole and concluded most of the differences in pay were not unreasonable.

These cases show that the non-regular employment law approach addresses disadvantages which can clearly be attributed to employment type. When job description is different, wider gap is not corrected since differences in treatment can be attributed to differences in job description.

Here again lack of "value" is a key. As chapter 3.4.4. pointed out, the opposition against adopting "value" in C175 was that wage discrimination against part-time arose because of numbers of hours worked, not because of differences in work performed.[334] However, as chapter 2 and 4 showed, lower pay of part-time workers occurs not because of numbers of hours worked, rather, mainly because of undervaluation of quality of jobs of part-time workers based on the working style of regular workers in Japan. Due to job segregation within the same enterprise, a comparison of contents of jobs to reveal unexplained wage gap cannot be conducted without the concept of value and objective job evaluation.

If the Part-Time Workers Act incorporates "value" and objective job evaluations between part-time and ordinary workers, it could be more effective and direct to address the low pay of female part-time worker than the sex discrimination approach. Most of the different treatments between female part-time workers and male regular workers are due to employment types, and at face value gender neutral. In addition, it is not easy to establish indirect gender discrimination, because it requires the domination of one sex and it allows objective justification.

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[332] Niyaku Corporation case(n310), Metro Commerce case(n220)
[333] MHLW, Report of Female Workers 2016(n43)
[334] International Labour Conference, Provisional Record 81st Session Geneva 1994 para41

However, the effectiveness of non-regular employment law approach could be undermined depending on the implementation of objective job evaluations and the interpretation of justifications. First, the gender bias and underrating of part-time job could bring undervaluation of work of female part-time workers. Next, under non-regular employment law approach, like C175, justification would be allowed. Without eliminating the underlying causes of low pay, wider justification would be allowed for low pay of female part-time workers. Efforts to eliminate gender bias and structural inequality must be made. To do so, a comprehensive approach based on the principle of non-discrimination is necessary.

5.6 Lack of the Principle of Non-Discrimination

As chapter 4 has shown, the Government of Japan has repeatedly revised the Equal Employment Opportunity Act and non-regular employment laws, such as the Part-Time Workers Act and the Labor Contracts Act. In addition, the Government enforced the Act on Promotion of Women's Participation in 2016 and submitted the Work Style Reform Bills in 2018 to introduce the Japanese version of "equal pay for equal work."

However, none of them has brought a comprehensive approach to implement the principle of non-discrimination nor the perspective of substantive equality in the legal system in Japan, which C111 and CEDAW require States to provide through comprehensive policy and legislation.

First, as chapter 5.4 concluded, the Government has not addressed the systemic inequality that the existing labor practices create and perpetuate. On the contrary, the Government recognizes that the practice in Japan, composed of a long-term employment system, a wage system including components such as a seniority system, and labor unions organized by company, is "rational and is effective in building trust between employers and workers." [335] It still maintains that employment management system or the career-tracking system itself is not discriminatory despite of female domination in low-paid categories. The Government lacks the perspective from female workers who experienced discrimination under the existing practice. Due to this perception, regarding gender wage disparity, the Government has no plan to adopt a comprehensive definition of direct/indirect discrimination in act in spite of the broad definition of discrimination adopted in C100, C111, CEDAW and ICESCR. As chapter 4.3 indicated, the Government focuses on increasing the length of service and number of female employees in managerial positions and improving work-life balance based on the Act on promotion of Women's Participation and the Fourth Basic Plan on gender equality.

Next, based on the principle of non-discrimination, objective standards are necessary to address structural inequality. Analysis of international human rights law in chapter 3 shows that eliminating structural inequality has lot of challenges, even when law has objective standards. It is obvious that subjective standards, such as "convincing" or "not unreasonable" reinforce the structural inequality.

[335] Director-General, GB.312/INS/15/3 (n12) para35

However, as the 2017 Action Plan in chapter 2.4.3 and the 2012 Guidelines for Part-Time Work Job Evaluation in chapter 4.6.7.2 has shown, the Government set standards to amend the practice for worker, as "feeling of convincing," which means a feeling of satisfaction. It disregards that workers who suffer from structural inequality cannot easily say that they are not satisfied because of fear of having a further disadvantage or because of lack of opportunities to choose other jobs or because of lack of knowledge about their rights.

Also, as chapter 4.6.9 has shown, the norm which only prohibits "unreasonable" treatment in non-regular employment law is also subjective and lowers the protection. The draft article 8 of the Part-Time Workers Act in the Work Style Reform Bills note that employers should consider factors, such as the range of change in job description, when it is appropriate in relation to the nature and the objectives of treatments concerned. It helps to limit the subjective justification for wage difference due to undervaluation of part-time work. However, the criterion is still "not unreasonable," which allows wider difference.

Nevertheless, the Government has no plan to introduce gender equality perspective or the concept of "value" into non-regular employment law and still maintains the criteria based on regular worker model to claim equal treatment.

Thus, the Government has not adopted the comprehensive principle of non-discrimination.

6 Recommendations and Conclusion

6.1 Establishment of the Principle of Non-Discrimination

Japanese law has neither a comprehensive anti-discrimination law nor definition of "discrimination" regarding sex pay discrimination and the equal treatment between regular and non-regular workers. As chapter 4.3 has shown, the Fourth Basic Plan is not an appropriate national policy to promote gender equality. As chapter 5 pointed out, the lack of adoption of the fundamental principle of non-discrimination weakens the effect of revisions of laws to address the low pay of female part-time workers.

First, as the CESCR and the CEDAW committee recommend, the ratification of C111 is essential.[336] The ratification of C111 makes it possible to conduct more detailed and comprehensive supervision over the national policy on discrimination in the employment area.

Second, it is necessary to enact a comprehensive non-discrimination law with the comprehensive definition of direct and indirect discrimination as effective implementation of policy to promote equality of opportunity and treatment in respect of employment and occupation. The unified definition of direct and indirect discrimination should be applied to the Labor Standards Act, the Equal Employment Opportunity Act and other non-regular employment laws.

As an excuse of non-ratification of C111, the Government of Japan stated that "given the wide range of discrimination grounds in employment and occupation provided for in the Convention, the conformity of national legislation with the Convention had to be carefully examined before it could be ratified."[337] However, it has been 60 years since the adoption of C111 in 1958. Japan has ratified CEDAW and ICESCR. The Japanese legislation must be consistent with the principle of non-discrimination. If not, a further revision is necessary. There is no reasonable excuse for further delay. Furthermore, as chapter 2.4.3 has shown, because of the demographic change in Japan, the Government recognizes the demand for female labor. The increased participation of female labor must be accompanied by the principle of non-discrimination. It is the right timing for the fundamental departure from the traditional male breadwinner model.

[336] CESCR Concluding observations, Japan, 2013(n217) para15, CEDAW Committee, Concluding observations, Japan, 2016 (n219) para35(g)
[337] General Survey 2012 (n7) para 923

6.2 Incorporation of the Concept of "Work of Equal Value"

The Government of Japan repeated its view that article 4 of the Labor Standards Act satisfies the requirement of C100.[338] In contrast, the ILO CEACR has repeatedly pointed out that the scope of comparison of article 4 of the Act is too narrow and it has not been applied to different contents of jobs and urged the Government to incorporate the concept of work of equal value.[339] The discussion in chapter 4 supports the opinion of the ILO CEACR.

As chapter 3 concluded, the concept of "value" is paramount to overcome the shortcomings from conformist pressures which the equal pay principle inherently includes. As chapter 3.2.5 has pointed out, "value" mitigates the "conformist pressure" since it works as neutral criteria for comparison which apply to both male and female workers.

As chapter 5.2 discussed, the Government of Japan does not comply with an obligation to promote the equal pay principle. Therefore, it is necessary to explicitly incorporate the concept of work of equal value in Japanese laws including article 4 of the Labor Standards Act as well as the Equal Employment Opportunity Act.

Technically, there are various ways to incorporate the concept to the Labor Standards Act. It can be structured as follows; in addition to the current article 4, article 4 (2) should be added to state "women and men workers shall have equal wages for work of equal value." Instead, the current article 3 can add sex as a prohibited ground of discrimination. In addition to article3, article 3 (2) can state that "all workers shall have equal wages for work of equal value without distinction on the basis of sex, nationality, creed or social status of any workers. Further, article 3 (3) can state that "employers shall not engage in any treatment contrary to the principle of equal wages for work of equal value in article 3 (2) unless they provide objective justification, without regard to sex." In addition, the Labor Standards Act should not limit the scope of comparison to the same employer as C100 requires.

The Equal Employment Opportunity Act also should incorporate the concept of "value" explicitly. First, article 6 of the Act should include "wages" as a matter on which the provision prohibits direct discrimination. It leads prohibition of indirect discrimination under article 7 of the Act. The definition of wages should be as wide as the Labors Standards Act.

Further, the Part-Time Workers Act should incorporate the concept of "value" so that the comparison with value between work performed by part-time and ordinary workers is possible.

These revisions enable female part-time workers to claim equal pay by comparison with "value" of different work performed by male regular/non-regular workers. This is the first step to establish the equal pay principle as a legally binding norm in Japanese legislation.

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[338] *Japan*- CEACR, Observation, 2017, C100

[339] General Survey 2012(n7) para 676, reproduced in *Japan*- CEACR, Observation, 2014, C100, Director-General, GB.312/INS/15/3 (n12) para52, *Japan*- CEACR, Observation, 2017, C100

6.3 Introduction of Objective Job Evaluation

One of the biggest disagreements between the Government of Japan and the ILO CEACR lies in the suitability of the objective job evaluation to the "Japanese wage system."[340] The Government is of the opinion that "the objective job evaluation method under which wages are decided according to the content of duties at one stage is not compatible with the salary system of Japan."[341] The Government insists that Japanese wage system is not only based on the contents of a job but also "the individual ability to perform the job" (shokuno pay) and other factors.[342] This rejection of objective job evaluation underlies non-incorporation of the concept of "value" since the analytical job evaluation advocated by the ILO presupposes the concept of "value."

However, as chapter 4.4.3 has shown, the job-based pay is already widely used for part-time workers.

Moreover, the Government introduced the objective job evaluation partly at least between non-regular and regular workers. First, article 9 of the Part-Time Workers Act introduced the comparison of job descriptions between part-time and regular/full-time workers. The article 9 can be used as a legal foundation to develop the objective job evaluation in Japan.

Next, the 2012 Guidelines for Part-Time Work Job Evaluation introduced job evaluation with analytical methods although the 2012 Guidelines allow the arbitrary selection of "constituent elements" and use "the index corresponding to the system and implementation of utilization of personnel" which allows disproportionate wage gaps between part-time and regular workers.

Further, the attitude of the Government expressed in the 2017 Action Plan which can be used to develop the "objective job evaluations." As Chapter 4.6.9 has pointed out, the 2017 Action Plan encourages companies to conduct "the clarification of jobs/skills and the fair evaluation." The 2017 Action Plan notes that it is "too subjective and abstract" to justify setting the different "decision criteria or rules of the wages" between regular and non-regular workers just because they "play different roles."[343] The 2017 Action Plan requires "companies to set decision criteria or rules of the wages that are not irrational in the context of objective and concrete situations such as job contents or range of shifts in job contents or personnel positioning."[344]

To coordinate the directions in the 2017 Action Plan and the 2012 Guideline, the further revision of the 2012 Guidelines is necessary. As chapter 3.2.6 has concluded, a carefully designed analytical job evaluation enables the evaluation of the "value" of a female job without "conformist pressure." As chapter 4.6.7.2 has indicated, the 2012 Guidelines should provide with guidance for setting factors to evaluate contents of jobs without gender bias and discriminatory generalization of part-time workers. Further, the 2012 Guidelines should abolish "the index

[340] *Japan*-CEACR, Direct Request, 2014, C100
[341] *Japan*-CEACR, Direct Request, 2017, C100
[342] *Japan*-CEACR, Direct Request, 2014, C100
[343] The 2017 Action Plan (n10) 8,9
[344] The 2017 Action Plan (n10) 8,9

corresponding to the system and implementation of utilization of personnel" which an employer can set arbitrarily to lower the wage of part-time workers.

The objective job evaluation should be incorporated into laws regarding gender pay discrimination. When the Labor Standards Act and the Equal Employment Opportunity Act incorporate the concept of "value," these acts need a method to compare with "value." The objective job evaluation is necessary to provide with a method free from gender bias. The 2010 Guidelines on Sex Wage Disparity should be revised to introduce the objective job evaluation.

This recommendation may encounter the objection from the Government and employers. The 2012 Guidelines for Part-Time Work Job Evaluation reveals Japanese perception about shortcomings of "job-based pay"; job-based pay sets wage based on narrowly defined contents of jobs, which makes relocation or shift of jobs difficult and cost for maintaining wage system more expensive.[345] The Government and employers concern that frequent changes in wage is costly and that decline in wage is difficult since job contents of regular workers are expected to change within the same employer under the long-term employment system.

However, the cost of the implementation of the objective job evaluation cannot be an excuse to avoid tackling with gender discrimination. As chapter 3.2.6 has pointed out, article 11 (1) (d) of CEDAW recognizes that the right to "equality of treatment in the evaluation of the equality of work." The wage system should not shift the cost of evaluation to female workers.

Moreover, the objective job evaluation does not necessarily mean setting different wages for each different job in an employer. "Value" can set a certain range of wage corresponding to multiple jobs. Different jobs can be classified into one range of work of equal value after an objective job evaluation is conducted.

Even under the shokuno pay system, "the individual ability to perform the job" should be evaluated objectively because the ambiguity and subjectivity of evaluation of the ability to perform the job have worked discriminatory towards women as chapter 4.4.3 showed.

The relocation or shift of job description is possible even if a company introduced the objective job evaluation. In case of a relocation or a shift of job within the same value, wages do not necessarily change. In case of a relocation or a shift of job to a work of lower value, wages are susceptible to change. Employers cannot lower wages or other working conditions without a collective agreement or a consent of a worker.[346] However, this is not a good reason to avoid the objective job evaluation as a whole, which creates discriminatory pay disparity for many female workers. A relocation or demotion to a job with lower value is less frequent compared with persistent undervaluation of female job.

[345] MHLW, The 2012 Guidelines for Part-Time Work Job Evaluation (n246)

[346] Art 9 of Labor Contracts Act, except for the case where requirements of article 10 of the Act are satisfied to change the rules of employment set by an employer.

6.4 Comprehensive Incorporation of Indirect Discrimination

As chapter 4 has pointed out, the concept of indirect gender pay discrimination has not worked to address pay gap of female part-time workers in Japan although most of the different treatment in pay between regular workers and non-regular workers are at face value gender neutral.

As chapter 3 has pointed out, C100, C111, CEDAW and ICESCR encompass indirect discrimination. The ILO CEACR "recalls that neither the Labour Standards Act nor the Equal Employment Opportunity Act protect against indirect gender discrimination affecting salary levels between men and women." [347]

Therefore, it is necessary to make sure that the Labor Standards Act and the Equal Employment Opportunity Act include the comprehensive definition of indirect discrimination, and that article 4 of the Labor Standards Act and article 7 of the Equal Employment Opportunity Act explicitly prohibit indirect discrimination in relation to wages.[348] As chapter 4.5.6 pointed out, the lack of social consensus cannot be an excuse for not adopting a comprehensive definition of indirect discrimination in acts. Therefore, the EEOA Guidelines which decide discrimination under the Equal Employment Opportunity Act based on employment management categories should be amended. With regard to pay discrimination, enabling comparison of pay across employment management categories is essential to address pay disparity between female part-time workers and male regular workers.

In addition, the standard and factors to decide "objective justification" for indirect discrimination should be clarified. As chapter 3.3.6 and 3.5 discussed, a justification factor must have a clear necessity in relation to a specific job. As chapter 4.5.7 shown, the EEOA Guidelines define justification as "a legitimate reason" and allow a broad business necessity as justifications. The EEOA Guidelines should apply a stricter proportionality test to indirect discrimination to enable scrutiny of the structural inequality. This would influence the interpretation of justification in gender pay discrimination under article 4 of the Labor Standards Act.

6.5 Proportionate Remedy for Pay Discrimination

As chapter 4.5.8 has shown, in case of violation of article 4 of the Labor Standards Act, female workers sometimes cannot gain a proportionate remedy even they prove their value of work is the same as the value of a comparable worker's work. As chapter 3.5 has pointed out, both C100 and C175 require a proportionate remedy to the wage gap. Under C100, when the value of work is different, the difference in the rate of remuneration should be proportionate to the difference of the value. Similarly, article 5 of C175 requires that the basic wage of a part-time worker should be proportionate to a comparable full-time worker unless

[347] *Japan*-CEACR, Direct Request, 2017, C100

[348] Mori *Building a System for Implementing the Principle of Equal Pay for Work of Equal Value in Japan*(n266) 315

justification can be provided by the employer. To comply with international standards, Japanese laws should clarify the consequences of a violation. At the very least, the proportionate damage to the difference of value must be awarded to a female worker who has proved pay discrimination.

As chapter 4.6.9 has shown, the criteria of "not unreasonable" under article 8 of the Part-Time Workers Act and article 20 of the Labor Contracts Act can be very subjective. The subjectivity allows a margin of discretion, resulting in discriminatory implementation and a wide gap in treatment between part-time and ordinary workers or fixed-term and indefinite-term workers.[349] The criteria should be amended and new criteria should be proportionality corresponding to the difference in factors such as job descriptions (duties and level of responsibilities), the scope of duties, job rotation and other relevant factors. Although proportionality also requires interpretation, it renders higher protection than standard of "not unreasonable." The Draft Guidelines of Equal Pay for Equal Work should objectively clarify the standard of proportionality.

6.6 Further Revision of Non-Regular Employment Laws

In 2011 in the representation procedure of the ILO, the Government of Japan expressed its view that "the issue of treatment of non-regular workers is not related to the application of" C100.[350] However, the ILO CEACR recalls that C100 applies to non-regular employment and different treatment in pay between regular and non-regular workers "impinges" on the application of C100.[351] As chapter 5 has revealed, the current non-regular employment laws do not eliminate the underlying causes of pay differentials, on the contrary, they reinforce the systemic inequality. The Work Style Reform Bills are not sufficient to eliminate the systemic inequality.

First, the Part-Time Workers Act should ensure the application of the principle of non-discrimination to part-time workers, as expressed in article 4 of C175. Also, it should ensure the proportionate wage between part-time and ordinary workers corresponding to the value of work. "Unreasonable" difference should not be the standard.

To achieve the end, articles 3 and 10 of the Part-Time Workers Act should impose legal obligations on employers to ensure the proportionate wage, since the current articles 3 and 10 set only duty to make efforts to offer "balanced" treatment between part-time workers and ordinary workers in respect of wages. Otherwise, employers would not correct the wage disparity between part-time and full-time workers carrying out similar or the same jobs as chapter 2.3.2 showed. The Work Style Reform Bills is not enough since the duty is still only making efforts, although the draft article 10 added the factor related to "the actual conditions work" to be considered." In addition, the definition of wage should be comprehensive. As chapter 4.6.5 pointed out, the narrower definition of wages in article 10 should be amended.

Next, the Part-Time Workers Act should incorporate the concept of "value" and set the principle of equal remuneration of work of equal value between part-time

[349] chapter 4.6.6, Metro Commerce case (n220)
[350] Director-General, GB.312/INS/15/3 (n12) para 42
[351] *Japan*-CEACR, Observation, 2017, C100

and ordinary workers. Articles 8 and 9 of the Part-Time Workers Act should be unified by incorporating the concept of "value" in terms of differences in pay. Equivalence should not be the standard to claim equal treatment.

The factors mentioned in article 8 and the criteria in article 9 should be reorganized to correspond to the concept of "value." "Value" should be broke into skill (qualifications), effort, responsibilities and working conditions to cover all factors of part-time workers' and ordinary worker's jobs. Those factors include "the job description" which means "contents of jobs" and "the level of responsibility" under articles 8 and 9. It is necessary to change the current narrow comparison of job description based on the interpretation of a circular notice.[352] Next, the factors included in the second criterion of article 9 of the Part-Time Workers Act, namely the range of changes in job description and assignment, shall be scrutinized whether those factors reinforce structural inequality. It is necessary to clarify what factors can be used as justifications for setting different wages between part-time and ordinary workers.

The procedural aspect should also be clarified. In principle, when a part-time worker proved that the value of the jobs is equal, employers should prove justifications.

6.7 Introduction of Proactive Model

The Government of Japan is of the opinion that the ultimate interpretation and application of sex pay discrimination and the equal treatment for non-regular workers should be done by courts on a case by case basis. [353]

However, as chapter 3.2.8 identified, the importance of C100 lies in assessing value, not necessarily in proving discrimination. Considering the burden of lawsuits, proactive model imposing a positive duty on employers is important to implement the equal pay principle.

Imposing legally binding positive duties on employers is recommended since the previous approach by voluntary guidelines and administrative enforcement is weak to change the perception and conduct of employers in Japan as chapter 2 and 4 have shown.

As a starting point, there should be a legal obligation on employers to survey the wage gap between female part-time and male full-time workers. As the ILO CEACR recommended in its observation in 2017, the Act on Promotion of Women's Participation should require a mandatory survey on gender wage gap and publishing the result of survey when employers devise action plans, however the scope of application is limited to employers hiring more than 300 full-time employees.[354] The survey should also include the data on gender wage gap across and within employment types. Moreover, the Act should require analysis of the causes of the wage gap.

As a pragmatic measure, the Act should guarantee the participation of workers in setting and implementing action plans. The representation of both female and male, and regular and non-regular workers must be ensured. Article 8 (4) of the Act, which only sets the duty of employers to disseminate the action plans to workers,

[352] Circular Notice for the implementation of Part-Time Workers Act (n291)
[353] Director-General, GB.312/INS/15/3 (n12) para 33
[354] *Japan*-CEACR, Observation, 2017, C100. Act on Promotion of Women's Participation art8

should be revised. Participation of female workers enables more accurate analysis on the causes of the gender wage gap and encourages actual implementation of action plans.

6.8 The Role of Domestic Courts

Japanese law is based on the complaints-led model. As chapter 5 indicated, positive action is weak in Japan. The collective agreements have not played a significant role in addressing the wage disparity of female part-time workers in Japan. The administrative sanction is not frequently used to the address low pay of part-time female workers. Labor inspection has found only small number of violation pursuant to article 4 of the Labor Standards Act. The Government of Japan leaves the responsibility of final interpretation of laws regarding non-discrimination and the equal pay principle to courts. Therefore, domestic courts have a key role in the enforcement of laws regarding the principle of non-discrimination and the equal pay principle. Even if a proactive model is introduced, the importance of the court will remain to resolve disputes.

However, as chapter 4 showed, Japanese courts do not sufficiently address structural inequality when deciding pay discrimination cases. They do not review domestic laws in light of international human rights law. On the contrary, when domestic laws are less progressive than international human rights law, the courts deny the applicability of provisions of international human rights treaties.

The CESCR and the CEDAW Committee urges the Government to intensify education on international human rights treaties and raising awareness among the legal profession.[355]

The courts should recognize their role, namely, "to protect the rights of the most vulnerable and disadvantaged groups in society."[356] It is the judiciary that decides whether a provision in a treaty is self-executing or not.[357]

The courts also should recognize the difference between "justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration)."[358] In relation to the equal pay principle, imposing a positive duty to conduct objective job evaluation on the private sector may require further elaboration in domestic law. However, the CESCR states article 7 (a) (i) seems "to be capable of immediate application by judicial and other organs in many national legal systems."[359] Equality is a fundamental right, which is justiciable at Japanese courts. Deciding pay discrimination based on substantive equality between men and women at courts does not need further elaboration. When interpreting existing laws, if courts consider the perspectives of substantive equality in international human

[355] CESCR Concluding observations, Japan, 2013(n217) para7, CEDAW Committee, Concluding observations, Japan, 2016 (n219) para9

[356] CESCR, "General Comment No. 9" in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I) (CESCR GC 9) para 10

[357] ibid para 11

[358] ibid para 10

[359] CESCR, "General Comment No. 3" in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (27 May 2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I)(CESCR GC3)para5

rights law, they can use the concept of "value," adopt objective evaluation without gender bias, consider structural inequality when delimiting a comparable worker and confer proportionate remedies. The courts can clarify the rules of shifting of the burden of proof and set higher standards for justification for wage differences.

6.9 Concluding Remarks

The gender pay gap is persistent and wide in Japan. There is significant disparity between female part-time workers and male full-time workers.

However, the equal pay principle enshrined in C100, CEDAW ant ICESCR has not been fully incorporated into Japanese laws although Japan ratified those conventions.

As chapter 3 has shown, it is necessary to implement the equal pay principle based on the insight of the substantive equality. Otherwise, the equal pay principle is not free from the conformist pressure.

The Government of Japan tried to address the gender wage gap and started to advocate the Japanese version of "equal pay for equal work" between "regular" and "non-regular" workers.

However, none of them has brought fundamental change in light of international human rights law. As a result, the wage gap is still a significant and pressing issue in Japan. The reason is that the Government refuses the incorporation of the concept of "value" to maintain the wage system based on male regular worker norm in spite of its discriminatory implementation towards women and part-time workers. As chapter 4 has shown, Japanese law lacks most of the essential aspects of the equal pay principle enshrined in international human rights law. Without being supported by the principle of non-discrimination, the pursuit of equal treatment will not be adequately addressed. Also, without incorporating the comparison with "value" of work, the Japanese version of "equal pay for equal work" results in forcing female non-regular workers to conform with the norm of male regular-workers due to the strict criteria of "equivalence" to ordinary workers for equal treatment.

As chapter 2.4.3 and 6.1 revealed, the current demographic change in Japan requires the fundamental departure from the traditional male breadwinner model. To achieve this, the 2017 Action Plan and the Work Style Reform Bills have the potential of introducing the objective job evaluation if it is accompanied by the perspectives of substantive equality. However, the 2017 Action Plan lacks a human rights perspective.

Therefore, the recommendations in chapter 6 should be implemented to address the significant wage disparity between female part-time workers and male regular workers from the perspective of substantive equality. Japanese law should establish the principle of non-discrimination, incorporate the concept of "value," introduce the objective job evaluation without gender bias, incorporate indirect discrimination comprehensively, confer the proportionate remedy for pay discrimination, introduce the proactive model and encourage the progressive incorporation of international human rights law within domestic courts.

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