The Context of Employment Discrimination in Japan

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Charles Richardson went for a Sunday horseback ride along the old Tokkaido Road. The road was heavily used by important government officials who were routinely rotated between their provincial offices and the country’s capital. Shimazu Hisamitsu, the prince of Satsuma, was returning to his home in western Kyushu this particular Sunday—September 14, 1862. The move was complicated because it meant moving both the prince and several hundred loyal retainers. When Richardson came upon the prince’s retinue, he neglected to dismount from his horse to show respect. It was his last mistake. A small band of samurai who accompanied the parade did the only honorable thing. They killed Richardson.¹

I. INTRODUCTION

As egregious as the “Namamugi Incident”² may seem to an
American, the samurai who killed the foreigner did “the only honorable thing” in the context of Japanese culture at the time.\(^3\) Similarly, many commentators on employment discrimination and its regulation in Japan also often ignore the present cultural context.

This article compares the context of Japanese employment discrimination to that which occurs in the United States and the impact the context has on laws created to deter such discrimination. Part II begins the discussion with an overview of discriminatory practices in Japan. Specifically, the section is divided into three parts: age discrimination, race/national origin/caste discrimination and gender discrimination. Part III is organized in a similar way, but is a discussion of discrimination in the United States. Next, Part IV synthesizes the previous sections and analyzes the differing types of discrimination within each country’s cultural context. The article concludes with a variety of general observations regarding the cultural differences between Japan and the United States.

II. JAPAN

A. Age Discrimination

Age discrimination occurs early in the hiring process in Japan. This is facilitated in part by age requirements for classified advertisements in newspapers and magazines.\(^4\) Additionally, Japanese job applicants are required to put their age on their resume. The resume in Japan is normally hand-written on a form that applicants can purchase at bookstores.\(^5\) These forms normally have a space for the applicant’s age.\(^6\) When an applicant does not fill out these forms completely, human resource managers will not consider the applicant for a position at a firm or company.\(^7\)

Age discrimination is an integral part of traditional Japanese employment practices. Promotions and salary raises are based on loyalty and seniority.\(^8\) Implicit in loyalty and seniority is an employ-
ee's age. If an employee works for ten years and changes companies, the new company will have employees who have worked there since they graduated from college. To the employees who have been there their whole working life, the new worker appears disloyal and, thus, has no seniority. Therefore, he will not get promotions or raises even though it is likely he was offered more money to work at the new place initially. Furthermore, in Japan, since a person who has transferred in did not start working at the company from the beginning, he will not be accepted by the other employees even if he works there until he retires. Because of this implicit age discrimination, there is little mobility in the Japanese work force.

Japanese workers also face age discrimination in retirement. Ninety-three percent of the companies in Japan that have more than 5000 employees have a mandatory retirement age of sixty. During economic downturns there is pressure to retire as early as age forty-five.

Although many companies have mandatory retirement ages, Japanese workers get something in return: lifetime employment. Because Japanese workers get paid by age instead of performance, they are allowed to work at a company until they retire. There is a legal doctrine that restricts discharges of employees. The Japanese Supreme Court has ruled that companies cannot discharge an employee unless the termination is reasonable "in light of the circumstances of the case and prevailing social norms." The prevailing norm is that it is unfair to discharge an employee because she is unproductive or incompetent. Because of this, incompetent

10. Id.
11. Id.
12. Id.
13. Id.
15. Id. at 352.
19. Id. at 310.
20. Id. at 311 (citing Judgement of Apr. 25, 1975, Saikōsai [Supreme Court], 29 Minshū 1).
21. Hamabe, supra note 8, at 311.
employees are rarely discharged. 22 Usually they are reassigned to some unimportant position where they cannot get promoted. 23 Thus, it is legally recognized that age discrimination is not prohibited in Japan. 24

B. Race/Caste/National Origin Employment Discrimination

On the surface, the opportunity for race discrimination appears to arise early in the hiring process in Japan because Japanese résumés require a picture of the applicant. 25 A person reviewing résumés will quickly be alerted if an applicant is of a different race. From an American perspective, having a picture on a résumé seems untenable. There are a number of different races that constitute a substantial number of applicants in the United States. Sending a picture with every résumé would give employers the opportunity to unlawfully screen applicants according to race. 26 In Japan, however, ninety-nine percent of the population is Japanese. 27

Even though a high percentage of the people are Japanese, the Japanese still discriminate against Koreans, Ainu, 28 and Burakumin. 29 The Korean population in Japan is an interesting minority. An estimated twenty percent of the people in Japan have some Korean ancestry. 30 Only an estimate is possible, however, because many have become citizens and assimilated into society so their number is not accurately ascertainable. In order to become a Japanese citizen, Korean-Japanese people must change their name to a typical Japanese name. 31 There appears to be three levels of commitment to a new name related to getting Japanese citizenship and avoiding discrimination.

First, there are Korean-Japanese individuals who changed their names to typical Japanese names and do not get discriminated against

22. Id. at 312.
23. Id.
24. Id. at 310.
25. KURIHARA, supra note 5.
28. Ainu-member of an indigenous Caucasoid people of Japan who speak the language of the Ainu people. See infra notes 41-45 and accompanying text.
29. Burakumin-identical to traditional Japanese except that their ancestors were considered to have worked in "unclean" professions. See infra notes 46-64 and accompanying text.
if no one discovers that they are of Korean ancestry. Historically, employers have hired investigators to check the background of prospective employees for Korean ancestry. It is not clear how often this occurs today.

In addition to Korean people who have changed their names to a typical Japanese name for citizenship purposes, some change their names to a Japanese name that still indicates that they are Korean. For instance, most Japanese names have two Chinese characters, and most Korean names have one Chinese character. When a Korean resident adds another Chinese character to their popular Korean name, it satisfies requirements for citizenship in Japan but the name will still be identifiable as Korean. Although they are Japanese citizens, they can easily be screened out during the application process just as easily as a picture would usually allow racial screening in the United States.

A third category of Japanese residents with Korean ancestry is that of an "Ethnic Korean." Ethnic Koreans have kept their Korean citizenship. Many Koreans retain their Korean citizenship because they are afraid that friends and colleagues will regard them as "betrayers of the fatherland." The choice to retain Korean citizenship subjects this category to limitations on government employment. Even though a Korean citizen may have never lived anywhere but Japan, he or she is still considered a foreigner and may not become a civil servant of Japan.

Japanese people also discriminate against a group of people called the Ainu. The Ainu are the aboriginal people who inhabited Japan before the modern Japanese. They do not look like the Japanese, and they have their own cultural traditions. Discrimination against Ainu occurs early in the hiring process because they have been

32. See generally Lash, supra note 30, at 8.
33. Id. at 8-9.
35. Id.
36. Id.
37. See Lash, supra note 30, at 8.
39. Lash, supra note 30, at 8.
40. Id.
41. Id.
42. Id.
43. Id.
segregated to a different part of the country.\textsuperscript{44} Because applicants put their pictures on their résumés, employers have an opportunity to screen Ainu before interviewing them. The Japanese also perpetuate segregation through the legal system by not allowing the Ainu to own land without a specific government grant of ownership.\textsuperscript{45}

Another group that is subjected to discrimination by the Japanese majority is the Burakumin. Unlike the Ainu, the Burakumin have the same appearance, and follow the same traditions as the Japanese majority.\textsuperscript{46} The only difference from the majority is that the ancestors of the Burakumin worked in professions that were considered "unclean" by the religious traditions followed by the Japanese in the 1600s.\textsuperscript{47} The Burakumin were the leather producers, butchers, undertakers or workers in other professions dealing with death.\textsuperscript{48} They were declared outcasts by the ruler at the time and forced to live separately from the rest of the population.\textsuperscript{49} Many Japanese people did not want to be near them because they were considered dirty. In fact, before they were called Burakumin, Japanese people called them "eta" which literally means "filth."\textsuperscript{50}

Throughout Japanese history, Japanese people have refused to marry or work with Burakumin.\textsuperscript{51} That discrimination continues today. In 1969, the Japanese government passed a law to curb discrimination against Burakumin,\textsuperscript{52} but to little avail. Soon after the law went into effect, a private detective published a commercial book listing the locations and addresses of Buraku neighborhoods.\textsuperscript{53} This book was used to check for Buraku history in prospective employees and prospective marriage partners.\textsuperscript{54} The government ceased the publication of the first book,\textsuperscript{55} but another list was published.\textsuperscript{56}

\footnotesize{44. Lansing & Domeyer, supra note 27, at 142. Most of the Ainu live in a city in Japan called Hokkaido which is inhabited primarily by other Ainu. \textit{Id.}
45. \textit{Id.} (citing The Act for Protection of the Former Primitive Inhabitants of Hokkaido of 1899).
46. \textsc{Frank K. Upham}, \textit{Law and Social Change in Postwar Japan} 70 (1987).
47. Bryant, supra note 31, at 118.
48. \textit{Id.} See also \textsc{Upham}, supra note 46.
49. \textsc{Upham}, supra note 46.
51. \textit{See generally} Bryant, supra note 31, at 109. Burakumin were "shunned by society," and "couldn't eat, drink, or bathe with peasants." \textsc{Upham}, supra note 46, at 79.
52. \textsc{Upham}, supra note 46, at 86. \textit{See infra} note 69 for a discussion of the Special Measures Law for Assimilation Projects.
53. \textsc{Upham}, supra note 46, at 114.
54. \textit{Id.}
55. \textit{Id.}
56. \textit{Id.} at 115.
This cycle continued eight times up until 1979.  

Today, screening of Burakumin occurs at an early stage in the hiring process. Because of the lists used in the past, Japanese employers know where Buraku neighborhoods are without even using them. This knowledge allows employers to screen for Burakumin simply by looking at the address on an applicant’s résumé. The Burakumin can also be screened through family registrations. All Japanese family histories are registered with the government. One component of the family registration is called the “honseki” which is a registrant’s ancestral address. Knowing the ancestral address allows an employer to screen an applicant who has moved out of the Buraku neighborhoods. Because family registrations are relied upon so heavily by Japanese people, some résumé forms require information from the registrations or copies of certain parts of the registrations. One indication that the honseki is used for discrimination is that Burakumin will change their honseki on their family registrations to hide their background. It is also known that employers view too many changes of one’s honseki on a family registration as an indication that someone is hiding their Buraku background.

In 1961, the Japanese government created the Deliberative Council for Buraku Assimilation to study the Buraku situation and report its findings and recommendations. The report was completed in 1965. It recognized that the Burakumin were in a very serious predicament. Their living standards were poor due to the deep-rooted discrimination by the Japanese majority. It recommended special legislation to deal with the problem. In 1969, the government passed the Special Measures Law for Assimilation Projects (SML) in response to the report. Although the SML created no duties for the government to do anything or legal rights for the

57. Id. Maps outlining Buraku neighborhoods were also utilized by employers. Telephone Interview with Masao Orita, Director of Human Resources, Kaseihinshogi Kabushiki Kaisha, Tokyo, Japan (Sayoko O. Madison trans., Jan. 24, 1996) (on file with the author).
58. Id.
59. See Bryant, supra note 31, at 111-13.
60. Id. at 116.
61. Id. at 111-13.
62. Id. at 120-21.
63. Id. at 118-19.
64. Id.
65. UPHAM, supra note 46, at 86.
66. Id.
67. Id. at 85.
68. Id. at 86 (citing the SML).
Burakumin, the Buraku Liberation League (BLL) viewed it as a victory.

C. Gender-Based Discrimination

Gender-based discrimination in employment occurs early in the hiring process in Japan. Classified advertisements are separated into male and female categories, or are listed in a magazine that advertises only male or female listings. This shows that discrimination occurs even before a woman applies for a position with a company.

When a Japanese woman sends her résumé to a company, she can be selected on the basis of her physical characteristics. Recall that the Japanese traditional application process enables companies to select in this manner by having a space on résumé forms for a picture of the applicant. Although the picture should only be used for identification, it can easily be inferred that they, in fact, use résumés in this manner. Companies in Japan often select women based on their physical characteristics. For example, Kinokuniya Bookstore actually had a written policy against hiring “ugly women,” “short women, those under 140 centimeters,” and “women with spectacles.”

After they are hired, women are further discriminated against in the salary they receive. In Japan, the women receive approximately fifty percent of men’s salaries. Women receive nearly the same salary until they get married or have a child and then they leave the

69. Id. The legislation was similar to other Japanese legislation in that it gave “broad authority for governmental action while mandating virtually nothing.” Upham describes the SML as “extremely broad and aspirational.” Id.

70. Id. The Buraku relished the government’s acceptance of “moral responsibility to eliminate Buraku discrimination.” Id.


72. TORIBAYU, supra note 4. This is a woman’s magazine with classified advertisements. Because only women buy it, only classified ads targeted for women are contained in it. Sayoko O. Madison, Interview, supra note 34.

73. Lash, supra note 30, at 19.

74. See KURiHARA, supra note 5. In Japan, applicants use a résumé form that they buy at the bookstore. Id. at 7. There is normally a space for the picture of the applicant. Id. at 103-39. If the picture is not on the résumé, it will likely not be considered. Id. at 14.

75. Masao Orita Interview, supra note 57. Mr. Orita suggested that the picture is only used for identification. Id.

76. Lash, supra note 30, at 42 n.142.


78. UPHAM, supra note 46, at 127. Bennett, supra note 77, at 171 n.11.
workforce. When they return to work, they often do so as temporary employees who get paid less than permanent workers. Temporary employees also are not considered for the same promotional opportunities as permanent employees, which causes the women who re-enter the workforce as temporary workers to continue receiving lower pay.

Employers discriminate against women after they are hired by expecting women to retire after they get married, which is not expected of men. Although it has been illegal to discriminate in this manner since it was found to violate Article 90 of the Civil Code by the court in the Sumitomo case, it is still practiced widely in Japan. Japanese books on interviewing show clear evidence of this type of discrimination. Jitsumukyoikku Publishing sells separate interviewing handbooks for women and men. Sample questions in the handbook for women include "Do you have a boyfriend?" and "What do you want to do with your job when you get married?" These questions are not in the handbook for men. The explanation accompanying the question "Do you have a boyfriend?" indicates that the employer is trying to ascertain whether the applicant is likely to get married and quit soon. The model answer to that question also suggests, regardless of whether she is involved in a relationship, that the applicant should lie and say that she does not have a boyfriend. The explanation accompanying the question about marriage suggests that the applicant should also do research about the company or firm before the interview to find out if they expect women to retire after they get married.

79. UPHAM, supra note 46, at 127.
80. Id. 80% of temporary employees in Japan are women. Id.; Bennett, supra note 77, at 149 n.5.
81. UPHAM, supra note 46, at 127.
82. Hamabe, supra note 8, at 325.
83. UPHAM, supra note 46, at 133. A woman went to work for Sumitomo Cement after the company had implemented a rule requiring women to sign an agreement to retire at age 30 or upon marriage. She was fired because she got married and refused to resign. Id. at 131.
84. Hamabe, supra note 8, at 325; Knapp, supra note 17, at 112.
85. See '96 MENSETSU BEST APPEAL JOSHI GAKUSEI BAN ('96 Mock Interview Questions for Female Students) (1995).
86. See '96 MENSETSU BEST APPEAL DANSHI GAKUSEI BAN ('96 Mock Interview Questions for Male Students) (1995).
87. JOSHI, supra note 85, at 114.
88. Id. at 68.
89. See generally DANSHI, supra note 86.
90. JOSHI, supra note 85, at 114.
91. Id.
92. Id. at 68.
One reason given for the continued discrimination against women in employment is that the permanent workers are expected to make a total commitment to the company. Because men in Japan are not considered as useful around the house or in childbirth, they are expected to make this commitment. As such, the men are referred to as "corporate warriors." As corporate warriors, men in Japan are expected to make a total commitment to the company for which they work. Traditionally, women were not expected to make this commitment because of their responsibility to maintain the home as well as statutory restrictions imposed on women's overtime.

Macro-economic analysis demonstrates one reason why the Japanese have been slow to change. The Japanese essentially have two workforces: the permanent workforce that cannot be fired except in extreme cases and the temporary one that serves as a buffer when the country goes into an economic crisis as it is in now. Having these two workforces gives Japan the economic advantage of preserving the life-long employment contract even when the country is in a recession. The lifelong employment contract fosters commitment and loyalty from the managers.

The laws in Japan regarding gender-based discrimination in employment are more developed than laws dealing with age and race discrimination. In 1985, Japan enacted the Equal Employment Opportunity Laws. The EEOL were a culmination of the United Nation's "Decade for Women." During the Decade for Women, the Japanese government felt substantial pressure from the United Nations to address gender-based discrimination.

93. Knapp, supra note 17, at 83; see also Hamabe, supra note 8, at 326. The stereotypical male, a "corporate warrior," often works more than 3000 hours in a year and risks karoshi, which means death from overwork. Knapp, supra note 17, at 83-84.
94. See Knapp, supra note 17, at 93. "[W]ives spend an average of three hours and thirty-one minutes daily on domestic chores and child care; in contrast, husbands spend an average of eight minutes." Id.
95. See generally id. at 83-94.
96. Id. at 83 n.2.
97. Id. at 91.
98. UPHAM, supra note 46, at 128.
100. Bennett, supra note 77, at 162.
101. Knapp, supra note 17, at 83 n.12.
102. Bennett, supra note 77, at 162.
103. Id.
105. Id. at 614.
Nations to deal with the issue of employment discrimination against women. The EEOL have created an arm of the Ministry of Labor that handles gender-based discrimination complaints. Some salient characteristics of the EEOL are voluntary compliance, voluntary conciliation, and arbitration procedures.

Although the EEOL prohibits discrimination against women, it only require voluntary compliance on the part of employers. The EEOL provides no sanctions against employers who discriminate. The literal translation is that employers "shall endeavor" not to discriminate against women in hiring and recruiting. Although there was some litigation in Japan for gender-based employment discrimination before the Act, disputes are now handled in large part through procedures established by the EEOL. Under the laws, women now have the option of reporting their claims to their employer, the Ministry of Labor's Offices of Women's and Young Workers' Affairs, or the Equal Employment Opportunity Mediation Commission.

III. THE UNITED STATES

A. Age Discrimination

Although, historically, newspapers were allowed to include age restrictions in print advertisements, the Age Discrimination in Employment Act (ADEA) limits such advertising. The Equal Employment Opportunity Commission (EEOC) relies on Hodgson v. Approved Personal Service to help clarify which language in advertisements may violate the ADEA in its guidance manual.

106. Id.
107. Id. at 606. The "enforcement" mechanisms in the EEOL to handle sex discrimination complaints include voluntary resolution by the employer, mediation or some similar help from the Ministry of Labor, and investigatory and consulting from the Ministry of Labor and the Prefectural Office of Women's Young Workers' Affairs. Id. at 620.
108. Id. at 606.
109. Hamabe, supra note 8, at 324; Bennett, supra note 77, at 156. For a discussion on how many employers comply, see infra part III.D.
110. Hamabe, supra note 8, at 324.
111. Bennett, supra note 77, at 155; Parkinson, supra note 104, at 607.
112. For a discussion of the cases, See Upham, supra note 46, at 129-44.
113. Parkinson, supra note 104, at 606.
114. Bennett, supra note 77, at 156; Parkinson, supra note 104, at 607.
116. 529 F.2d 760 (4th Cir. 1975).
involved over fifty advertisements that an employment agency placed.\textsuperscript{118} The court scrutinized each one individually for overall content that would tend to discriminate based on age.\textsuperscript{119} Trigger words in advertisements such as "recent college graduate," "young," or "junior" were not a per se violation of the Act.\textsuperscript{120} It is also interesting to note that none of the advertisements in the case explicitly indicated a particular age restriction or age range.\textsuperscript{121} EEOC guidelines specifically prohibit explicit age restrictions or ranges to the extent that they would hinder applicants from a protected age group from applying.\textsuperscript{122}

Because of the law restricting age references in advertisements, the earliest that age-based discriminatory screening can occur is when a company receives a résumé if work experience is properly documented and dated on the résumé. A study conducted by the Fair Employment Council of Greater Washington, Inc. (FEC) and the American Association of Retired Persons (AARP) found that older applicants are discriminated against 26.5 percent more often than younger applicants.\textsuperscript{123} Ages in the study were ascertainable by the employer through the dates of graduation from college and amount of experience of each applicant.\textsuperscript{124}

If not apparent in an applicant's résumé, an employer may screen an applicant by sending an application with a space to fill in the date of birth.\textsuperscript{125} This is illegal if the application does not state the statutory prohibition against discriminating based on age in employment.\textsuperscript{126} When challenged, an employer will have to overcome close scrutiny in showing a legitimate, non-discriminatory reason for inquiring about the information.\textsuperscript{127}

In addition, an employer can screen out older applicants in a personal interview based on whether or not the applicant looks old. There is very little case law regarding this method of discriminating

\begin{itemize}
  \item \textsuperscript{118} Id. at 4028.
  \item \textsuperscript{119} See Hodgson, 529 F.2d at 760.
  \item \textsuperscript{120} Id. at 765. The discriminatory effect of an advertisement is determined by content, not by trigger words. \textit{Id}.
  \item \textsuperscript{121} Id. Current Japanese advertisements specify ages and age groups. See TORIBAYU, supra note 4.
  \item \textsuperscript{122} See Hodgson, 529 F.2d at 760.
  \item \textsuperscript{123} Employee Testing Shows Age Bias Against One in Four Job Applicants, [Current Developments] Daily Lab. Rep. (BNA) No. 35, at d14 (Feb. 23, 1994).
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} See Policy Goals on Job Advertising, \textit{supra} note 117, at 4033 (discussing an example of an applicant who was screened due to his age by an employer who mailed an application inquiring about his date of birth).
  \item \textsuperscript{126} See 29 C.F.R. § 1625.5 (1991).
  \item \textsuperscript{127} Id.
\end{itemize}
EMPLOYMENT DISCRIMINATION

based on age because it is very difficult to detect.

In the United States, employees can be promoted based on seniority as long as it is not discriminatory against someone in a protected age group.128 The ADEA prohibits discrimination in hiring, termination, treatment while employed, advertising, employment agency referrals, union activities, and retaliatory actions for asserting rights based on age.129 In general, the ADEA protects workers forty years of age or older.130 Younger workers are not entitled to any rights based on a reverse discrimination theory.131

B. Race Discrimination

In the United States, the opportunity to discriminatorily screen based on race or national origin can occur as early as the employer receiving a résumé. This opportunity arises if the applicant's race is related to an ethnic minority identifiable in the applicant's name. For example, in another study by the FEC, a Hispanic woman with a Hispanic last name called an optometrist's office to inquire about an opening for a receptionist position.132 After being put on hold for five minutes, she was told that the office was not taking any more applications.133 Less than thirty minutes later, a woman who did not have a Hispanic last name called about the same position and secured an appointment for an interview.134 This same study found that Hispanics were discriminated against approximately twenty percent of the time that they applied for jobs.135

Another manner of screening applicants based on race in the United States is to interview only applicants who have been referred by current employees.136 By only considering applicants who hear about job openings through "word of mouth," employers can perpetuate their historical ratios of minorities and non-minorities.

128. Id. § 1625.8.
130. Id.
133. Id.
134. Id.
136. See E.E.O.C. v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991) ("word of mouth" recruiting was alleged with the support of statistical evidence); see also E.E.O.C. v. Consolidated Serv. Sys., 989 F.2d 233 (7th Cir. 1993) (affirming a district court decision based on word of mouth recruitment without any evidence of prejudice against any underrepresented groups).
This type of discrimination is very difficult to detect. Thus, allegations usually must include statistical evidence. An interesting aspect of this type of discrimination is that it is acceptable for minorities to recruit "fellow minorities" in this manner.

Discriminatory screening can also occur at the interview stage of the application process. Most companies continue to use the interview process for selecting candidates for employment, even though research shows that it has little validity or usefulness as a prediction tool. One possible reason for this reliance on procedure with little validity or usefulness is that it gives the employer the opportunity to discriminate unlawfully without detection. In another study by the FEC, African American and Caucasian applicants with virtually equivalent backgrounds applied for jobs. The study revealed that "in nearly all cases, the black and white testers were treated with equal politeness during the interview." The results of the hiring process, however, showed that twenty five percent of the African American applicants were discriminated against. The researcher for the study, Marc Bendick, believes that this number is actually low compared to reality because employers often do not advertise jobs in order to avoid minority applicants altogether.

Employers in the United States also discriminate against Native Americans in employment. Discrimination occurs early in the hiring process by putting Native Americans on reservations. By doing so, they are essentially left out of the applicant pools for most employment opportunities. Native Americans can often be screened in the same way as Hispanics because their names are usually identifiable as Native American. They can also be screened in the same way as African Americans in the interview process because they look different from Caucasians.

137. See Chicago Miniature Lamp Works, 947 F.2d at 297.
138. See Consolidated Serv. Sys., 989 F.2d at 236.
140. Robert L. Dipboye, 12 RESEARCH IN PERSONNEL AND HUMAN RESOURCES MANAGEMENT 79, 83 (Gerald R. Ferris ed., 1994); Eder & Buckley, supra note 139, at 75; F. Maier & Verser, supra note 139, at 240.
142. Id.
143. Id.
144. Id.
Title VII of the Civil Rights Act of 1964, however, prohibits discrimination based on race and national origin.\textsuperscript{146} The statute applies to hiring, termination or promotion based on discriminatory actions or reasons.\textsuperscript{147} Although intent to discriminate in such cases is usually very difficult to prove, it has been made easier by Supreme Court decisions that allow plaintiffs to use statistics and which shift the burden of proof to the employer after the plaintiff outlines a prima facie case.\textsuperscript{148}

C. Gender-Based Discrimination

In the past, one source of sex discrimination in the workplace was gender specific classified ads. In fact, up until 1973, newspapers could claim First Amendment protection for printing classified advertisements divided by gender. The Supreme Court announced that such protection would no longer be recognized with its decision in \textit{Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations}.\textsuperscript{149}

In \textit{Pittsburgh Press}, the defendant newspaper publisher permitted advertisers to determine whether they wanted to place their ad in a female or male column in the newspaper.\textsuperscript{150} If the advertiser did not choose a column, the defendant newspaper would inquire as to which they preferred and then place the advertisement in the appropriate column.\textsuperscript{151} The Court analyzed two cases which dealt with advertisements placed in newspapers.\textsuperscript{152} They concluded that, because the advertisements at issue in \textit{Pittsburgh Press} were purely commercial in nature, and not any type of political statement, they were not protected.\textsuperscript{153} Thus, relief from First Amendment protection allowed courts to discourage discrimination caused by gender-separated classified ads in newspapers.

As in Japan, if an employer wants to screen job applicants based on gender, the earliest opportunity is in the receipt of the résumé. Although some names are gender-neutral, most are distinguishable. When the names are not distinguishable by gender, the next opportunity to screen by gender might take place during the personal

\begin{itemize}
\item \textsuperscript{146} 42 U.S.C. §§ 2000e to 2000e-17 (1988).
\item \textsuperscript{147} LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 1.01 (2d ed. 1994).
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} 413 U.S. 376 (1973).
\item \textsuperscript{150} \textit{Id.} at 380 n.5.
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} See \textit{New York Times v. Sullivan}, 376 U.S. 254 (1964) (holding that the advertisement was a political advertisement which should be accorded First Amendment protection); see also \textit{Valentine v. Chrestensen}, 316 U.S. 52 (1942) (holding that the advertisement was merely commercial and not political so it did not receive the same protection as the advertisement in \textit{New York Times}).
\item \textsuperscript{153} \textit{Pittsburgh Press}, 413 U.S. at 387.
\end{itemize}
interview. Research shows that certain occupations are almost exclusively male and some almost exclusively female.\textsuperscript{154}

Much of the focus on gender discrimination in the United States has been in the area of wages. After a woman gets hired, women tend to earn sixty-five percent of what men earn in wages.\textsuperscript{155} Additionally, women are not treated equally in the workplace. According to John J. Donohue, fifty-five percent of women, with full-time jobs, feel that they do not receive equal treatment because of their gender.\textsuperscript{156} According to Donohue, a significant number of managerial employees would not like to work for a woman.\textsuperscript{157} This tends to show that women managers do not get the same respect as male managers.

Sex discrimination is also clearly prohibited by Title VII.\textsuperscript{158} Additionally, sexual harassment and discrimination based on pregnancy are considered sex discrimination under this law.\textsuperscript{159}

\textbf{IV. CONTEXTUAL COMPARISONS}

A. Generally

The relationship between society and the law in Japan contrasts greatly with the corresponding relationship in the United States. The Japanese legal system tends to be less coercive.\textsuperscript{160} Instead of relying on laws for order in society, Japanese people follow "Giri," which literally translated means "obligation." Giri defines every relationship so that its followers know exactly what to expect from each other in a given situation involving two or more Japanese people.\textsuperscript{161} This concept of Giri appears to instill trust in Japanese people toward other Japanese people who are insiders to Giri. Therefore, outsiders who do not know how to follow Giri tend to appear to the Japanese as barbaric.

"Litigation [in Japan] has been characterized as an alienating, politically impotent method of pursuing social change."\textsuperscript{163} This view

\textsuperscript{155} Id. at 26.
\textsuperscript{157} Id. at 1339-40.
\textsuperscript{159} Id.
\textsuperscript{160} Parkinson, supra note 104, at 604.
\textsuperscript{162} Id. Giri operates concurrently with the formal legal system. Id. at 209.
\textsuperscript{163} UPHAM, supra note 46, at 121.
sees legal doctrines and individual rights as diluting political movements, like employment discrimination, instead of mobilizing it. The Japanese hate law. Litigation is for “millionaires’ sons and psychopathic personalities.” It is considered shameful to sue someone or even be mentioned in court.

The Japanese also identify with being a homogenous culture. The cultivation of homogeneity leads to in-group feelings of hostility toward people who are in the “out-group.” This has been given as the reason why Japanese often make racist comments about other countries.

There appears to be a movement towards individualism in Japan. If the movement actually manifests itself in the next generation, it may become more acceptable to vindicate individual rights through the legal system. In the context of a more litigation friendly society, Japan may be able to overcome some of the problems that the United States has already addressed.

In contrast, “[r]ights [in the United States] are considered as American as apple pie.” Americans tend to be rights-oriented which leads to an “inverted feudalism.” Instead of viewing the law as the Japanese do, i.e., in terms of obligations toward other people, Americans view legal rights as empowering them to say “you must do this for me.” Although the original civil rights laws were written more in terms of legal obligations, the rights enumerated in these laws have evolved to become analogous to property. Becoming rights-oriented has prompted the United States Congress to pass employment discrimination laws protecting seventy percent of all workers. Apparently, litigation in the United States is not reserved

164. Id.
167. Id.
170. Lansing & Domeyer, supra note 27, at 166.
171. Sayoko O. Madison Interview, supra note 34.
173. Id. at 118. Inverted feudalism is when the rights-bearers assert legal and moral superiority over all others. Id.
174. Id. at 120.
175. Id. at 122.
176. Id. at 126. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that public assistance receivers had a property right in continuing to receive benefits).
177. Howard, supra note 172, at 126. Howard also refers to Aaron Wildavsky’s calculation that “if you apply all the protected categories, they add up to 374% of the
for millionaires' sons and psychopathic personalities.

B. Age Discrimination

Age discrimination in Japan gets very little criticism. Although certain practices of the Japanese would be illegal in the United States, the fact of the matter is that the Japanese elderly have a much higher participation rate in the labor force as compared with other nations.\textsuperscript{178}

Age discrimination appears to be an outgrowth of the group ethos in Japan. Linking promotions to loyalty and seniority reduces the emphasis on individual performance and on individuals in general. This allows employees to be group conscious without jealousy and competitiveness with other individuals. The focus on group behavior probably supports the older workers. Because the older workers are less familiar with newer technology they may tend to be less productive. This emphasis on loyalty and seniority keeps these older workers in the workplace, because if they were judged by individual ability they may not be needed.

Although there is presently no problem with age discrimination in Japan, if society changes toward emphasis on individuals, there will be problems. Without group support for loyalty and seniority, older workers will be compared to younger workers who do know how to use computers. Soon, older Japanese will need protection similar to that which older workers in the United States already receive. If the future older workers need protection because of a change toward individualism in Japan, protection will be easier than it would be today because a shift toward individualism will lead to a culture which is more conducive to the enforcement of individual rights. With such group emphasis and disdain for the law that exists now, a law similar to the ADEA would be of little use in Japan today.

C. Race/Caste/National Origin Discrimination

Because of the low percentage of minorities in Japan, employment discrimination against minorities has not received much criticism from other nations.\textsuperscript{179} Japan has dealt with discrimination against different minority groups in different ways. In dealing with discrimi-
nation against Koreans, the Japanese have made efforts to assimilate Koreans into their society. The Koreans who do not want to change their names to Japanese names often work in areas where they deal with other Korean people and do not need to worry as much about discrimination. A similar phenomena has occurred in the United States. Chinatown in New York City is a good example. The Chinese people in Chinatown do not have to worry about discrimination from the other Chinese people who employ them within Chinatown.

There is very little information on what steps have been taken toward helping the Ainu in Japan. Recently, the Japanese Parliament approved the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. The Ainu appear to welcome the approval of the Convention because they believe it may bring about important changes. However, since it took thirty years to approve, it is unclear what effect the ratification of the convention will really have.

The question of the Burakumin is not how the majority of Japanese people dealt with them but how the Burakumin have dealt with the Japanese majority. As mentioned, the Japanese passed the Special Measures Law for Assimilation Projects (SML) to help assimilate the Burakumin. The effect was to fuel the Buraku Liberation League (BLL) activism and denunciation. Denunciation occurs when a person or small group is singled out because they have exhibited discrimination or animus toward Burakumin and then are belittled mercilessly until they apologize. Since the promulgation of the SML, the government has tolerated BLL denunciations. Some members of the BLL were prosecuted, however, after a particular denunciation that became violent. The District Court acquitted the members because their denunciation tactics were considered to be self-defense against discrimination and "legal remedies against discrimination are limited." The Osaka High Court reversed the acquittal six years later because of the unreasonableness of the tactics used, but only gave the BLL member who was convicted a suspended three month sentence. According to Frank

181. *Id.*
182. *See UPHAM*, supra note 46, at 86 (citing the SML).
183. *Id.*
184. *See generally id.* at 87-112. Denunciations have been severe enough to cause the target to commit suicide. Sayoko O. Madison Interview, *supra* note 34.
185. *UPHAM*, supra note 46, at 86.
186. *Id.* at 96.
187. *Id.* at 98 (quoting 782 Hanji 23, 31 (Jun. 3, 1975)).
Upham, the denunciation tactics have brought about some progress in the plight of the Burakumin but probably serve to further alienate themselves. The tactics seem to have had little effect on improving Burakumin employment opportunities.

Although the Japanese government appears to have done little to improve the position of minorities up until now, they will learn little from the American example. The American system will not help them for two reasons. First, it is rights-oriented which runs against the grain of Japanese culture as discussed in part IVA. Second, it has done little to help the position of minorities in the United States. Aside from the research conducted by Mark Bendick discussed above, census data shows that between 1956 and 1991, the unemployment rate for African Americans has risen from about twice that of whites to around two and a half times that of whites.

D. Gender-Based Discrimination

As a result of heavy criticism regarding the treatment of women in Japan, some proposals have been made to improve Japan’s EEOL. M. Diana Helweg suggests having a neutral agency deal with the EEOL instead of the Ministry of Labor, adding enforcement sanctions to the laws that the new agency can utilize, making the agency proactive instead of reactive, and including a private cause of action in the laws. This sounds too much like imposing American ways on the Japanese.

A criticism of the EEOL in Japan has been that it creates no rights and duties. After the EEOL was enacted, however, the employment terrain for women visibly improved. The year before it was enacted, twenty-three percent of all opportunities for new university graduates were for men only. The following year, that percentage went down to three percent. Also, positions for new graduates for where there was no gender distinction before enactment

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189. Id. at 123.
190. Id. at 122. The focus of the BLL denunciations has been on securing recantments and apologies for discrimination by companies that discriminate, instead of securing permanent employment. Id.
191. See LARSON, supra note 147, § 2.01.
195. Id.
196. Id.
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was thirty-two percent. The year after enactment, the percentage went all the way up to seventy-two percent. In contrast, even ten years after the Civil Rights Act of 1964, "principles developed in race discrimination cases were not necessarily applicable to gender-based discrimination claims." Furthermore, the statistics regarding gender-based discrimination in Japan, when adjusted for different variables, do not appear so terrible. When adjusted for parity, the women generally earn more than seventy percent of what men earn as opposed to the fifty percent cited earlier without considering parity.

Estimates are that Japan will soon have a labor shortage with so many workers retiring in the next few years. Although the women have been feeling the heat of the recession more than the men, with a labor shortage, the Japanese will have to hire more female workers which will, with the EEOL already in place, change the face of discrimination in Japan more than any coercive laws.

Title VII has not changed sex discrimination in the United States by giving aggrieved parties the weapon of a private right of action. Women started entering the workforce before the laws were enforced. Supplying a right of action to women did not coerce employers into not being discriminatory. Rather, it sent a message to employers that Congress thinks discrimination against women is wrong. The Japanese government has done the same thing with the EEOL. By creating the arbitration and mediation procedures for handling gender discrimination complaints, the Japanese government has also sent a message to Japanese employers that discriminating against women is wrong.

The Japanese government's creation of a voluntary system of enforcement is appropriate when compared with the American government's creation of the EEOC. In the United States, there was already a trend toward more women entering the workplace. Female participation in the workforce had started to grow around 1947. Although Title VII may have boosted the movement and acceptance

197. Id.
198. Id.
199. Bennett, supra note 77, at 149.
200. UPHAM, supra note 46, at 125-26. The adjustments were for amount of experience and education. Id.
201. Knapp, supra note 17, at 126-36.
202. Masao Orita Interview, supra note 57; Sayoko O. Madison Interview, supra note 34.
204. Id.
205. Id.
of women in the workplace, American workers were already starting to become accustomed to women in the workplace at the time the law was enacted. In contrast, when the EEOL was enacted in Japan there was no such trend.

It is also important to note that the Japanese legal system tends to operate "on the basis of harmony, consensus, and compromise rather than legally binding rights and duties." Because the Japanese, at the time of the enactment of the EEOL, were not accustomed to women in the workplace, they needed a mechanism to bring about a change in attitudes. The EEOL was an appropriate mechanism to effectuate that change. Despite concerns about Japan's EEOL, there is evidence that it is working. Several companies have been positively singled out in the media for their efforts to take the EEOL seriously and change the manner in which they treat women.

V. CONCLUSION

The differences between Japan and the United States are not as great as one would expect. Discrimination still occurs in the United States; it just happens at later stages of the hiring process than it does in Japan. Using litigation to solve discrimination problems in the United States may be limited because, as the Minister of Justice in Japan has said, discrimination is "a matter of the heart" and cannot be solved through legal remedies.

The solution to the problem in Japan is to fashion a remedy for the Japanese that will include a disparate impact theory in the obligations and duties of employers. The Ministry of Labor has already had some success with voluntary measures with published goals for the EEOL. The Ministry could keep a published list of all firms that meet certain goals with regard to different areas of concern in employment. The list could include all the companies who do not meet an easily attainable goal. The list could also praise the companies who are doing the best in regard to the published goals. The group mentality of the Japanese would put pressure on the companies that do not meet the goals, the same way that American companies feel pressure to avoid litigation that publicizes their discriminatory practices.

206. See UPHAM, supra note 46, at 121.
207. Id. at 209.
208. Helweg, supra note 193, at 311. Helweg's note is a scathing review of Japan's EEOL and views the success stories as limited so she did not refer to any specific examples. See generally id.
209. UPHAM, supra note 46, at 117.
210. See generally Helweg, supra note 193, at 293.
The use of group pressure may actually bring about a change of heart in the Japanese culture which, if it does happen, may occur sooner than it will in the hearts of Americans.