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## Balanced Treatment and Bans on Discrimination —Significance and Issues of the Revised Part-Time Work Act—

*Michiyo Morozumi*

*Meiji Gakuin University*

In Japan, the Part-Time Work Act was enacted in 1993 with the purpose of promoting improvements in the treatment of persons engaged in part-time labor. While this act was not meant to impose legal restrictions on employers, it underwent major revision with the legislation approved in May 2007, against a backdrop of the quantitative increases and qualitative changes in part-time workers in recent years (the revised version of the Act has been in force since April 1, 2008). The Revised Part-Time Work Act represents a step forward in furnishing essential legal regulation relating to the treatment of part-time workers. It strengthens the obligations of business operators with regard to the elucidation of labor conditions, the provision of balanced treatment and the conversion of part-time workers to full-time workers, with penal provisions introduced in connection with certain stipulations. The Act notably bans the discrimination against part-time workers who fulfill certain conditions in comparison to full-time workers.

Parts I and II of this article introduce the background and contents of the revised Act. Part III examines the proper approach to rules banning discrimination on grounds of being a part-time worker, and Part IV examines the revised Act from the perspective of legislative policy.

### I. The Revised Part-Time Work Act: Background and Circumstances

The Part-Time Work Act (Act on Improvement, etc. of Employment Management for Part-Time Workers) was enacted in 1993. Although the Act stipulated measures to be adopted by employers in the interest of improving the treatment afforded to part-time workers, all such stipulations consisted of duties to make sincere efforts in that direction, with no binding legal constraints imposed upon the employers in case of the breach thereof.

However, when the court rendered a judgment on the *Maruko Keihoki Co., Ltd. case* in 1996 (See Part III. 1), the question of how to legally deal with disparities in treatment between regular employees and part-time workers began to attract attention. As a result, the Japanese government also embarked upon the studies of improvements in legal rules from the perspective of how to provide “balanced treatment” in Japan. The final report issued by the Part-Time Work Workshop in 2002<sup>1</sup> emphasized the importance of comprehensive approaches aimed at realizing “equitable treatment based on the ways and kinds of work,” including the legislation of Japanese-type balanced treatment rules. However, based on the view that the formation of a social consensus is prerequisite for this legislation, the report limited itself to recommending that, for the time being, some guidelines be shown to the

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<sup>1</sup> The final report, *Pato Rodo no Kadai to Taio no Hokosei* [Theme of part-time work and courses of action], issued by the Part-Time Work Workshop chaired by Hiroki Sato (2002).

business operators such as: (i) In cases when part-time workers perform the same duties with regular employees and there is no clear difference observable in the actual career management between them, the methods for determining treatment should be the same for both of them. (ii) Even in cases when the different methods can be rationally applied, if the current duties and responsibilities are the same, the balanced treatment should be considered.<sup>2</sup>

As shown above, the Japanese legal policies so far preferred the autonomous schemes by the business operators and workers and abstained from setting up coercive legal rules. However, the recent revision of the Part-Time Work Act has taken a new step, with imposing certain penalties on the nonfulfillment of the obligations on the part of the business operators and banning some disparities in the treatment against the part-time workers as illegal discriminations. It is believed that this has raised the effectiveness of the Act to a considerable degree.

It is already indicated<sup>3</sup> that the factors behind the recent revision are the increase of part-time workers in number and the changes in their characters. According to the Labor Force Survey (issued by the Ministry of Internal Affairs and Communications), in 2006, the number of employees working less than 35 hours per week (excluding agriculture and forestry) had climbed to 12.05 million persons, thereby accounting for over 20% of all workers. In addition to this, within the worsened employment situation, from the latter half of the 1990's, the companies tended to refrain from hiring regular employees in order to reduce labor costs, and allot the posts previously held by the regular employees to the part-time or temporary workers. This led to the so-called "shift of part-timers to core positions," that is, an increase of part-time workers entrusted with work duties equivalent to those of regular employees, and this in turn sparked a heightened sense of inequity toward the treatment disparities afforded to these part-timers compared to their regular employee counterparts.

Around the same time, the worsening in employment opportunities raised the number of jobseekers, especially among younger people, who are forced to become part-time workers due to their inability to obtain jobs as regular employees. Their low wages are not enough to support themselves financially and there emerged the issue of earning gaps, a situation that has generated strong social demands for improvements in such treatment disparity. Furthermore, amidst prospects of imminent labor shortages due to Japan's declining birthrate and aging population, there was increasing awareness of the need, as national employment policy, for improvements in favorable work opportunities geared to take ample

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<sup>2</sup> Based on this, the Part-Time Work Guideline was revised in August 2003.

<sup>3</sup> Regarding the circumstances leading up to revision, refer to Hironobu Chin, *Rodogawa kara Mita Kaisei Pato Taimu Rodoho no Hyoka to Mondaiten* [Evaluation and problematical points of the Revised Part-Time Work Act viewed from the labor side], *Kikan Rodoho* (Quarterly Labor Law), no. 220, 76-77; and Hiroyuki Matsui, *Kaisei Pato Taimu Rodoho no Igi to Kadai* [Significance and issues of the Revised Part-Time Work Act], *Kikan Rodoho* (Quarterly Labor Law), no. 220, 84-85. Concerning the background details, see the final report issued by the Part-Time Work Workshop (see n.1 above).

advantage of the labor (skills) of women, senior citizens and others desiring flexible working conditions characterized by low levels of workplace restraints. This too can be considered a key factor behind the decision to retool this Act.

## II. Contents of the Revised Part-Time Work Act

### 1. Applicability

Generally speaking, while the term “part-time workers” is used to refer to persons who work fewer hours than regular employees do, in Japan, there are also instances in which this expression is used as a generic term to indicate “non-regular employees” (workers other than regular employees). The latter term also includes persons who, although referred to under “part-time employees” or other names, actually work the same number of prescribed working hours for the regular employees (“pseudo-part-timers,” “full-time part-timers”). Therefore, when engaging in discussions of so-called “part-time workers,” there is a need to clarify which category is actually being referred to.<sup>4</sup>

The Part-Time Work Act is applied to the “part-time workers” in the former meaning, that is, “short-time workers.” In more specific terms, “short-time workers” are defined as “workers whose prescribed weekly working hours are shorter than those of ordinary workers employed at the same place of business” (Article 2). When falling under this “short-time worker” definition, the Act will be applied regardless of whether these workers are named “part-timers,” “non-regular workers,” “temporary workers,” “contract employees” or other names (from here on, in the absence of special indication, “part-time workers” shall refer to “short-time workers”).<sup>5</sup> In contrast, “full-time part-timers” who work the same number of prescribed working hours as regular workers do not correspond to the category of “short-time workers,” so the Act is not applicable. However, under the Guidelines Referring to Measures Pertaining to Improvement in the Employment Management and Other Areas of Short-time Workers to be Devised by Business Operators (Ministry of Health, Labour and Welfare Notice No. 326, October 1, 2007), it is stated that consideration should be devoted to the spirit of the Act with regard to this genre of workers as well (see Part III).

There has been no change in this definition of “short-time workers” itself since the original enactment of the act. As for their counterparts, the “regular workers,” a new interpretation thereof has been expressed through a notification accompanying the recent revision (Circular Notice No. 1001002 issued by the Equal Employment, Children and Families

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<sup>4</sup> Mari Osawa, “*Pato Taimu*” *Rodo to Kinto Taigu Gensoku: Keizaigaku-teki Apurochi* [“Part-time” work and the equal treatment principle: An economic approach], *Nippon Rodoho Gakkaishi* [Japan labor law association magazine], no. 90, 95-97 (1997).

<sup>5</sup> Regular employees with temporarily shortened working hours due to child care or other reasons (see Articles 23 and 26 of the Child and Family Care Leave Act) are considered to be “regular workers” in light of the employment system and wage structure, and are thus not subject to application under the Part-Time Work Act.

Bureau, Ministry of Health, Labour and Welfare, October 1, 2007, hereinafter referred to as the “Circular Notice”). According to the Circular Notice, the “regular workers” provided in Article 2 shall refer to workers who are ruled to be “regular” in accordance with the social common sense, and will generally pertain to the regular type of workers engaged in the same type of duties at the places of business in question. In cases when no such regular-type workers are present, workers engaged in the same type of duties on a full-time basis shall be considered to be “regular workers,” and if no workers in that category are present either, persons who are prescribed the longest weekly working hours (for example, 35 hours per week) shall be considered to be “regular workers.” In cases when there are no so-called “regular workers” engaged in the same type of duties, “regular workers” whose prescribed working hours at the said places of business are longest shall be the basis of comparison (No. 1-3[3] of the Circular Notice).

The Circular Notice insists that the aforementioned definition of the “regular workers” is not limited to “full employees” so that the Act should be applied to as many places of business as possible (No. 1-1[2]), and the consistency be achieved with the revised Act’s categorization of short-time workers by the types of duties they perform (No. 1-3[3]). It is true that, according to these standards, the applicability of the Act definitely expands, but the methods for ruling are extremely technical and complex, a situation that actually creates concerns of undermining the Act’s effectiveness.<sup>6</sup> There is actually no necessity to classify according to the types of duties when determining the applicability of the Act, because some of its provisions are applicable regardless of whether or not persons are engaged in the same type of duties as those of “regular workers” (Articles 6 and 7, Articles 11-13). Thus, it should be sufficient to compare the types of duties when applying individual provisions (for example, Article 8, Article 10, etc.). It should be better to consider regular-type workers at the place of business in question as “regular workers,” regardless of the types of duties they perform.

## 2. Obligations to Clearly Express and Explain Working Conditions

As for the key points of this legal revision, the first one is the strengthening of the obligations of employers to clearly express and furnish explanations of the specific working conditions involved.

In contrast to the working conditions for regular employees, which are normally determined uniformly on the basis of formal work regulations or other means, the treatment of part-time workers is in most cases determined individually. This makes their working conditions vague and their situations highly prone to confusion. Under the former Act, therefore, employers are obliged to make efforts to issue documents pertaining to working conditions upon hiring part-time workers. With the recent legislative revision, however, the issuing of

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<sup>6</sup> Hajime Wada, *Pato Rodoho Kaisei no Igi to Kongo no Kadai* [Significance and future issues of the Revised Part-Time Work Act], *Kikan Rodoho* (Quarterly Labor Law), no. 220, 73 (2008).

such documents has been rendered a mandatory obligation as far as certain working conditions are concerned (presence or absence of wage increases, retirement benefits and bonuses—Article 6, Part-Time Work Act). Upon violations, fines are imposed to a maximum of 100,000 yen (Article 47 of the act). As a result, when the business operators hire short-time workers, they are bound to perform not only the obligation to clearly indicate the general working conditions in accordance with Article 15 of the Labor Standards Act (term of contract, place of work and duties to be performed, work starting and finishing times, presence or absence of prescribed overtime work, break times, holidays, vacations, methods for determining wage and for its payment, retirement and dismissal), but also the obligation to issue documents in accordance with the Part-Time Work Act.

Newly established, furthermore, has been the obligation of accountability with regard to working conditions. Upon request from the part-time workers, the business operators are required to furnish those workers with the explanations of the matters taken into consideration when determining their treatment (Article 13) concerning the matters regulated under Article 6 through Article 12 of the Act (issuing of work condition documents, procedures for preparing work regulations, bans on discriminatory treatment, wage determination methods, education and training, social service facilities, and measures for the sake of promoting conversion to regular worker status). For example, in cases when workers request explanations of the methods used to determine the wages (Article 9, Paragraph 1), the business operator is required to detail what types of factors have been taken into consideration in determining the wages of the short-time workers as a whole, and how those factors have been evaluated with regard to the particular worker in question (No. 3-9 of the Circular Notice).

### 3. Bans on Discriminatory Treatment (Balanced Treatment)

As the second key point of the revised Act, with regard to “short-time workers who deserve to be treated equally with regular workers,” the treatment that places such workers at disadvantages compared to “regular workers” is banned as illegal discrimination (Article 8, Paragraph 1). Prohibited is the discriminatory treatment relating to a broad sphere of matters, such as “wage determination, implementation of education and training, use of social service facilities and other treatment,” excluding, however, working hours and matters concerning recruitment and hiring, because the ground for the ban of discrimination lies in the short-time employment form. Furthermore, if the disparities in wages and other matters are based on differences in personal volition, ability, experience, work results and so on, the practice does not constitute violations of this article, because it is not “discrimination on the grounds of being a short-time worker,” as long as the assessments and evaluations are implemented objectively.

The category of “short-time workers who deserve to be treated equally with regular workers” and the discrimination against whom is banned by the Act refers to persons who satisfy all of the following three requirements: (i) Their “job contents” are the same as those

of regular workers. (ii) Their work contracts concluded with the business operators are without determined period of time, or their contract can be properly regarded as having no settled period of time for the reasons of repetitive renewal of fixed-term work contracts (Article 8, Paragraph 2). (iii) Their job contents and allocations are presumably subject to change to the same extent as that of the regular workers throughout the entire period of the employment contract with the business operator in question.

In the Circular Notice, detailed mention is made of the specific standards used to decide the appropriateness of these conditions (No. 1-4[2]) and No. 3-3[3]). According to these standards, the requirement (i) refers to cases when the core contents of the work are the same (as those of regular workers), and there are no conspicuous differences in the responsibilities accompanying the duties. With regard to (ii), the Circular Notice states that judgments on whether or not the work contracts will be treated as contracts for which no terms are determined will be made on the basis of integrated consideration of the constancy of the duties of the worker in question, the job contents, the basic nature of his position, the words and acts on the part of the business operator that generate expectations for sustained employment, the number of renewals, the renewal procedures, the renewal conditions of other workers, etc. Condition (iii), meanwhile, refers to the short-time workers for whom the presence/absence or the extent of the possibility of changes in the job contents and allocations is effectively the same as that of the regular workers.

Part-time workers meeting these conditions are able to dispute the disparities in the treatment between the “regular workers” and themselves as illegal discrimination. Article 8 of the revised Act is a mandatory provision under private law, so the acts of the business operators in violation of this provision (including failure to grant promotions or other omissions) corresponds to illegal acts (Article 709 of the Civil Code). Their acts such as dismissals and relocation orders against this provision are null and void, and so is the part of the contracts and work regulations that is violating this article. There is a view that this article may be interpreted as a stipulation that directly governs the contents of work contracts, thereby recognizing the right to demand rectification of discrimination<sup>7</sup> (the right to claim wage differentials, promotion, etc.). However, considering that the Part-Time Work Act does not contain a provision with uncontestable force such as that in Article 13 of the Labor Standards Act and that the Act’s ban on discrimination differs in nature from gender discrimination or racial discrimination (see Part III. 3 below), it should be understood that the range of recognition will not extend to these types of claim rights.<sup>8</sup>

#### 4. Balanced Treatment

The third key point of the revised Act is that for the benefit of the overwhelming ma-

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<sup>7</sup> *Id.* at 71-72.

<sup>8</sup> Kazuo Sugano, *Rodoho* [Labor laws] 190 (8th ed., Kobundo 2008) denies the rights to claim rectification of discrimination on the grounds that the contents of the said rights are unclear.

majority of part-time workers who fail to correspond to so-called category of “short-time workers who deserve to be treated equally with regular workers,” the Act stipulates specific duties to endeavor or to adopt measures for the purpose of providing balanced treatment (equal treatment) in regard to some matters.

### (1) Wage Determination

The business operators should make their endeavors to maintain a balance between the regular workers and the short-time workers, when deciding the wages of the latter, taking into account their job contents, the results of their duties, their volition, abilities, experience and other factors (Article 9, Paragraph 1). The “wages” mentioned here are limited to compensation closely linked to the actual duties (basic salary, bonuses, service allowances, etc.), and, as a general rule, do not include commuting allowances, retirement allowances, family allowances and other benefits.

In addition, if the part-time workers whose job contents are the same as those of regular workers (“short-time workers with the same job contents,” see Article 8) undergo changes, for a certain period of time, in their job contents and allocations to the same extent as that of the regular workers, their wages for that period should be decided through the same methods as are applied to the regular workers (Article 9, Paragraph 2).<sup>9</sup>

### (2) Implementation of Education and Training

When business owners provide education and training for regular workers with the purpose of bestowing those workers with the abilities necessary for their job contents (for example, arranging for workers involved in accounting operations to undergo training in bookkeeping practices necessary for performing their duties, etc.), they shall also be obligated to offer the same education and training programs to part-time workers performing duties consisting of the same job contents (Article 10, Paragraph 1). This does not apply, however, when the said part-time workers already possess those abilities. This obligation is a so-called “duty to adopt measures,” therefore, it is interpreted that, in case of the violations of this article, the workers can demand only damage compensation based on illegal acts within the context of private law, and have no right to claim implementation of the actual education and training.<sup>10</sup>

With regard to other kinds of training and education (for example, training and overseas study necessary for career development), the business operators shall endeavor to im-

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<sup>9</sup> According to the Circular Notice, in cases, for example, when regular workers are promoted from “Section leader” to “Chief,” “Unit Chief (subject to transfer)” and “Deputy Store Manager,” and part-time workers are promoted from “Person in Charge” to “Section leader,” “Chief” and “Unit Chief (not subject to transfer),” the business operators are required, on account of their duty to endeavor, to determine the wages to be paid during the period in which those part-time workers serve as Section leaders or Chiefs through the same methods as are applied to the regular workers (No. 3-4[4]).

<sup>10</sup> Sugano, above n. 8, at 191.

plement programs consistent with the job contents, motivation, abilities and other aspects of the part-time workers, regardless of whether or not their job contents are the same as those of the regular workers (Article 10, Paragraph 2).

### (3) Use of Social Service Facilities

With regard to the opportunities to utilize service facilities (dining facilities, lounges, dressing rooms), business operators must make considerations to provide all part-time workers (regardless of their job contents) with the same opportunities as those provided for regular workers (Article 11).<sup>11</sup> According to the Circular Notice, while such considerations do not include the enlargement of facilities in cases when the opportunities are limited due to the capacity of the said facilities or other factors, it is required that use not be limited to regular employees and that specific measures be taken to expand the opportunities of the part-time workers, such as the flexible utilization of the facilities in terms of time (No 3-6[2]).

## 5. Conversion to “Regular Worker” Status

The fourth key point of the revised Act is the obligation of business owners to devise certain measures for the sake of furnishing part-time workers with opportunities to convert to the status of regular workers. Business owners must adopt, at least, one of the following measures: (i) Upon recruiting regular workers, the part-time workers already employed shall be informed of the content of that recruitment. (ii) In case of in-house recruiting for the regular workers’ posts, the part-time workers already employed shall have an opportunity to apply for those posts. (iii) Establishment of an examination system for the conversion of part-time workers to regular worker status. (iv) Other measures for the purpose of promoting conversion to regular worker status (for example, providing assistance necessary to receive the education and training needed to attain the abilities required for regular employees, etc.) (Article 12). As these measures should be implemented for the benefit of all part-time workers, the business operators cannot be exempted from this duty by personally offering regular employee positions to some part-time workers favorable for them. Additionally, the purpose of this article is not to grant the part-time workers already employed a privilege to be hired, but to furnish them with an opportunity for conversion to regular worker status (No. 3-8 of the Circular Notice).

## 6. Dispute Resolution

As the fifth key point in this context, the revised Act establishes new dispute resolution procedures relating to the treatment of part-time workers regulated by the Act (the is-

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<sup>11</sup> Although the legal nature of the obligation to make considerations mentioned here is vague, it is effectively positioned to be stronger than the duty to endeavor and weaker than the duty to adopt measures.

suing of documents pertaining to working conditions, the duty to explain decisions on treatment, bans on discrimination, education and training, social services, measures for conversion to regular worker status).

As initial recourse, when receiving complaints from workers with regard to the aforementioned matters, business operators shall strive to achieve independent resolutions, for example, by consigning the matters in question to a complaint arbitration body (Article 19). In cases when independent resolutions prove difficult, the following alternative dispute procedures are available: (i) Advice, guidance and recommendations from prefectural labor bureau directors (Article 21). (ii) Arbitration by a grievance mediation committee (“Equal Treatment Arbitration Council”) in accordance with the Act on Promoting the Resolution of Individual Labor-Related Disputes (Article 22).<sup>12</sup>

### III. Regulations on Disadvantageous Treatment Due to Part-Time Worker Status

#### 1. Part-Time Worker Treatment Disparities and Legal Regulation

Over the years to date, theoretical discussions concerning the balanced treatment of part-time workers have largely concentrated on the pros and cons of legal redress for wage disparities. While there are numerous different views of this subject, they may be generally classified into the following two categories: (i) Approval of legal redress on the basis of the breach of public policy (Article 90 of the Civil Code) in certain cases, while also adopting a generally positive stance with regard to legislation of balanced treatment for part-time workers (redress affirmation theory). (ii) The stance of basically consigning the rectification of wage disparities to the market (redress denial theory).

Even among those who affirm the use of redress, however, opinions were divided into some variations as to the contents of the principle of balanced treatment that effectively forms public policy. The variations are: (i) The theory asserting application of the principle of equal pay for equal (value) work.<sup>13</sup> (ii) The theory of recognizing violations of public policy on the condition that the part-time workers assume responsibilities identical to those of regular employees in terms not only of the contents of the work but also of the overtime work and reallocation (the principle of equal pay for equal responsibility).<sup>14</sup> (iii) The theory which, taking the purpose of Article 3 of the former Part-Time Work Act into consideration, recognizes violations of public policy when the business operators are neglectful about

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<sup>12</sup> Applied for these arbitration procedures are the stipulations pertaining to arbitration under the Equality Act (Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment) (Article 23).

<sup>13</sup> Junryo Honda, *Pato Taimu Rodosha no Genjo to Kinto Taigu no Gensoku* [The current state of part-time workers and the principle of equal treatment], Osaka University of Economics and Law Institute of Legal Studies Bulletin, no. 13, 134-35 (1991).

<sup>14</sup> Yuichiro Mizumachi, *Pato Taimu Rodo no Horitsu Seisaku* [Part-time labor legal policy] 237 (Yuhikaku 1997).

conspicuous disparities lacking “balance” with the regular employees, and asserts that the proportional redress based on “balance” should be afforded (the balancing principle),<sup>15</sup> etc.

On the other hand, those who deny the redress have also made various assertions to date: (i) The view that no wage system using duties as the standard has been established in Japan, rendering it difficult to approve the principle of equal pay for equal work as public policy.<sup>16</sup> (ii) Viewed from the perspective of comparative law, the balanced treatment of part-time workers is not a universal principle like that of prohibition of gender discrimination, but rather an issue of labor market policy. From a policy standpoint, there is a threat that mandatory legal regulation would produce negative effects (reduced job opportunities, job segregation, etc.).<sup>17</sup> (iii) As for the “part-time workers in its proper sense” whose working hours are shorter, a balance with the regular employees should be acquired not through balanced treatment, but rather by limiting the obligations of overtime work, reallocation and other matters when interpreting the said labor contracts.<sup>18</sup>

In terms of judicial precedents as well, with regard to wage disparities between regular employees and part-time workers performing the same type of work, disputes have been carried over the question whether public policy violations can be confirmed. In the ruling on *the Maruko Keihoki Co., Ltd. case* in 1996,<sup>19</sup> the wage disparities between regular employees and temporary employees (whose working time was 15 minutes shorter than the prescribed working hours) engaging in the same work at the plant were declared to be partially in violation of public policy. This judgment gained attention for its approval of damage compensation demands based on illegal acts. However, a lower court ruled that wage disparities between regular employees and temporary employees (whose working time was slightly shorter than prescribed working hours) engaged in the same shipping duties were within the sphere of contractual freedom and did not comprise violation of public policy.<sup>20</sup> In this way, no solid legal principle has been formed on the basis of established judicial precedent.

As the recent legal revision expressly banned the discriminatory treatment of

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<sup>15</sup> Michio Tsuchida, *Pato Taimu Rodo to “Kinko no Rinen”* [Part-time labor and the principle of balance], 119 *Minshoho Zasshi* [The Journal of Civil Code and Commercial Code], no. 4-5, 555-57, 563-73 (1999).

<sup>16</sup> Takashi Shimoi, *Pato Taimu Rodosha no Hoteki Hogo* [Legal protection of part-time workers], *Nippon Rodoho Gakkaishi* [Japan labor law association magazine], no. 64, 18-19 (1984); Susumu Noda, *Pato Taimu Rodosha no Rodo Joken* [Working conditions of part-time workers], *Rodoho Gakkaishi* [Japan labor law association magazine], no. 64, 71 (1984); Kazuo Sugano & Yasuo Suwa, *Pato Taimu Rodoho to Kinto Taigu Gensoku* [The Part-Time Work Act and the principle of balanced treatment], in *Gendai Yoroppaho no Tenbo* [Overview of contemporary European law] 131 (Ichiro Kitamura ed., University of Tokyo Press 1998), etc.

<sup>17</sup> Sugano & Suwa, *id.* at 122, 130, 132; Shimoi, *id.* at 14.

<sup>18</sup> Noda, above n. 16, at 50-52.

<sup>19</sup> *Maruko Keihoki case* ruling, Nagano District Court, Ueda Branch, Judgment, March 15, 1996, Rohan 690-32.

<sup>20</sup> *Nihon Yubin Teiso case*, Osaka District Court, Judgment, May 22, 2002, Rohan 830-22.

“short-time workers who deserve to be treated equally with regular workers,” the traditional need to devote studies to the presence or absence of violations of public policy has been eliminated.<sup>21</sup> However, the stipulations applied to the other category of the workers (Articles 9 through 11) provide no guarantee of balanced treatment as a legal right, and the ground for the legal redress remains the violation of public policy (Article 90 of the Civil Code). Accordingly, the conventional types of discussions are still meaningful.

## 2. Characteristics of Bans on Discrimination under the Part-Time Work Act

As the rules of non-discrimination in labor relations to date, bans have been placed on discrimination on grounds of nationality (including race), beliefs or social position pursuant to Article 3 of the Labor Standards Act, on gender discrimination pursuant to Article 4 of that Act and the Equality Act (Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment). Under the Labor Union Act, meanwhile, disadvantageous treatment on the grounds of membership in a labor union or similar reasons has been banned as unfair labor practices (Article 7, No. 1). In addition to these, Article 10 of Employment Measures Act recently added a ban in principle on discriminatory recruitment and hiring customs based on age. Finally, with the present Part-Time Work Act, the prohibition of discrimination against part-time workers has been legislated.

Compared to the rules on banning discrimination based on the Labor Standards Act, the Equality Act and other conventional legislation, the bans on discriminatory practices in accordance with the Part-Time Work Act may be said to have the following three major distinguishing characteristics.

First, the requirements for establishing discriminatory bans are rigid and technical in nature. This is due to the fact that the scope of the “regular workers” used as the counterpart in this context is extremely limited. For example, in the case of gender discrimination, no provision of the related acts requires that the workers in question are engaged in the same type of work (Article 4 of the Labor Standards Act, Article 6 of the Equality Act, etc.), and the judicial precedents also confirm the presence of discrimination if gender discrimination can be demonstrated to exist by comparing the female worker in question with the male worker engaging in *similar* (not necessarily the *same*) work or by comparing collectively the groups of female and male workers with the same age and academic backgrounds, except when the employer proves the rationality of the disparities.<sup>22</sup> In contrast, in the case of discrimination against part-timers, even if the job contents (including the levels of responsibility) are the same as those of the regular employees, when differences exist in the term of contracts, the presence/absence or extent of reallocation and other points, comparisons with

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<sup>21</sup> Under the present conditions, it is said that the plaintiffs in the *Maruko Keihoki* case would be subject to application under Article 8 of the revised act.

<sup>22</sup> Recent examples include the *Showa Shell Sekiyu* case, Tokyo District Court, Judgment, January 29, 2003, Rohan 846-10 (wage discrimination); the *Shiba Shinkin Bank* case, Tokyo High Court, Judgment, December 22, 2000, Rohan 796-5 (promotion discrimination), etc.

the said regular employees will not be recognized at all, thereby rendering it impossible to establish the case for discrimination.<sup>23</sup> Moreover, each of the three requirements for comparison (job contents, term of contract and the possibilities of changes in the job contents and of reallocation) cannot be clearly established and is open to interpretation, and the methods of comparison with the “regular workers” described in the Circular Notice become extremely complex.

The second distinguishing characteristic of discrimination bans under the Part-Time Work Act is that the rules of non-discrimination are treated as one aspect of the principle of balanced treatment (“maintaining treatment in balance with that of regular workers” [Article 3]), which is the original purpose of the Act. The revised version of the Act classifies the part-time workers into the following three (or four) categories:

- (i) Persons who should be treated as the same as the “regular workers.”
- (ii) Persons with the same job contents as the “regular workers” (short-time workers with identical job contents).
  - (ii)-1 Persons whose schemes of human resource utilization are the same as those of “regular workers” over set periods of time.
  - (ii)-2 Persons other than those cited above.
- (iii) Persons whose job contents differ from those of the “regular workers.”

Of these categories, only disparities in treatment against the category (i) are banned as discrimination. For those who belong to the categories (ii) and (iii), which constitute overwhelming majority statistically, mere duty to endeavor or to adopt measures is stipulated pertaining to wages, education and training, and social services (Articles 9 through 11). Therefore, it is not the same treatment as that afforded to general workers (equal treatment) that is required for the latter categories, but rather treatment considered to be in equilibrium with that afforded to regular workers (balanced treatment), that is, fair treatment in accordance with the differences in the ways and kinds of work. Accordingly, while not all differences with regular employees are denied, conspicuous disparities in treatment that cannot be rationally justified by the differences in the job contents or the ways and kinds of work may be regarded as incompatible with the spirit of the Act or possibly even considered to be violating public policy.

Bans on discrimination based on the Part-Time Work Act are in an inseparable relationship with this principle of balanced treatment. Examining the overall content of the revised Act, it can be stated that the basic idea pertaining to the treatment of part-time workers is balanced treatment (see Articles 1 and 3 of the Act), while it is embodied in the form of ban on the discrimination with regard to certain workers.

Thirdly, the ban on the discrimination in the Act is complemented by the stipulations

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<sup>23</sup> Accordingly, while the so-called gender-specific career course system is considered to be in violation of the Equality Act, the practice of clearly differentiating between part-time workers and regular employees within employment management for recruitment, hiring and assignment is considered lawful, with treatment disparity in this case failing to correspond to violations of Article 8.

that require the business operators to promote the transition of part-time workers to regular employee status (Article 12). As the status of being a part-time worker is a position in contractual terms, different from gender, race and other natural categories, a fundamental solution for persons working as part-timers desiring to secure jobs as regular employees is the transitions to such regular employee status. Consequently, if the possibility to become regular employees is effectively open to these workers, the need for mandatory regulation of treatment disparities would be lowered to a proportional degree.

### 3. Why Regulate Part-Time Worker Discrimination?

As noted above, the Part-Time Work Act can be said to introduce a new type of discrimination banning rules that differs on many different points from the bans on racial discrimination, gender discrimination and other types of prejudice. The difference emerged from the very fact that discrimination on the grounds of being part-time workers differs in character from discrimination based on race, gender or other grounds.

Employers must always use some sort of standards to differentiate between workers. While, in principle, the employers are free to adopt whatever standards they please, they are not permitted to make use of certain standards as they constitute illegal discrimination. The previous rules which prohibit discrimination (based on gender, nationality or race, beliefs, social position, membership in or forming of labor unions, etc.) are justified persuasively in the following manner.<sup>24</sup> (i) Attributes that cannot be chosen through one's own will (gender, race, social position) and (ii) Execution of constitutionally guaranteed basic personal rights (beliefs, labor union membership) cannot be used as the grounds for excluding the individuals with these attributes from employment opportunities or work advantages, for the exclusion corresponds to fundamental infringements of the personal respect and freedom that comprise the ideal of law. The laws that ban such discrimination can be seen as guaranteeing the basic human rights, and are characterized from the perspective of comparative law by the common features of the comprehensive and double-sided bans on discrimination and the limitation of the exceptions to this ban.<sup>25</sup> Existing at the base of these rules is the premise that disparities on the grounds of difference in personal job performance abilities<sup>26</sup> are rational and not illegal discrimination (while gender, race and other attributes do not exert

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<sup>24</sup> Keisuke Abe, *Sabetsu wa Naze Kinjirarenakereba Naranainoka* [Why must discrimination be banned?], in *Sabetsu Kinshiho no Shin-Tenkai: Daibashiti no Genjitsu wo Mezashite* [New developments of the laws of banning discrimination: Striving to realize diversity] 28-29 (Hideyuki Morito & Yuichiro Mizumachi ed., Nippon Hyoronsha 2008).

<sup>25</sup> Ryoko Sakuraba, *Nenrei Sabetsu Kinshi no Hori* [The legal principles of bans on age discrimination] 5-7, 309-10 (Shinzansha 2007).

<sup>26</sup> The term "job performance abilities" used here does not refer merely to the specific job contents and performance, but rather is used in a broader sense encompassing the particular individual's character, motivation and experience, the ability to mount flexible responses to reallocation and overtime work, the degree of time and energy which can be devoted to work and other pertinent factors.

an impact on job performance abilities)<sup>27</sup>.

In contrast to this, the very fact of being a part-time worker is a position based on a contract concluded on the basis of the will of the parties involved, and fails to correspond to either (i) or (ii) above. In addition, because the Act of becoming a part-time worker comprises the choice of ways and kinds of working that differ from those of regular employees (at the very least, in terms of working hours), it will normally have some influence on job performance skills in the broad sense of the word. Accordingly, disadvantageous treatment for reasons of being part-time workers does not violate individual respect or freedom directly, and should not be prohibited uniformly regardless of the socioeconomic conditions at hand, which, in contrast, is the case with the racial or gender discrimination.

This leads us to the question of why there is a need to ban as discrimination disadvantageous treatment implemented for the reason of being a part-time worker. In the first place, within the free market, it is simply impossible for everyone wishing to become a regular employee to be hired in that status, even though they possess the abilities, motivation and other attributes needed to become regular employees, and some of them are inevitably forced to become part-time workers against their wills. As noted at the outset, there has been an increase in such persons under the employment conditions emerging in recent years, leading to no small number of cases in which contracts for the part-time workers cannot essentially be said to represent choices based on the wills of the parties involved.<sup>28</sup> Moreover, approximately 70% of all part-time workers are women, the majority of whom choose to work part time in order to achieve balance between the work and the home. Behind this choice, however, can be found the influence of the division of labor between men and women, which has served to amplify and solidify gender discrimination at the workplace. For these reasons, under the current socioeconomic conditions in Japan, the disadvantageous treatment of the part-time workers (particularly, in cases of performing the same duties as regular employees do or conspicuous treatment disparities) should be evaluated as socially inequitable, thereby leading to demands for regulation by the law.

Taking into account the socioeconomic conditions in Japan, the rules of non-discrimination in the revised Act have been introduced as one means of achieving balanced treatment between the regular and the part-time employees, under a policy objective that seeks to rectify such social inequities and move to more positive utilization of part-time workers (see Article 1 of the act). In other words, the rules are based on the policy considerations rather than aiming at ensuring universal human rights.

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<sup>27</sup> Abe, above n. 24, at 30.

<sup>28</sup> According to the *Comprehensive Fact-Finding Survey Relating to Diversification of Employment Patterns* (Ministry of Health, Labour and Welfare 2003), the ratio of persons becoming part-time workers as a result of failing to gain employment as regular employees was 21.6% (for all non-regular employees, the figure rose to 25.8%).

#### IV. Legislative Policy-Oriented Studies of the Revised Act

If bans on discrimination against part-time workers are considered to be rules developed from a policy standpoint, then there is no necessity to adopt comprehensive or double-sided bans such as those established against racial or gender discrimination. Rather, it should be preferable to establish non-discrimination rules with a certain degree of flexibility that are consistent with the goals to be achieved.<sup>29</sup> How, then, should the revised Act be evaluated from this type of legislative policy perspective?

Although the revised Act is quite significant insofar as it provides for the first time the ban on discrimination based on the “part-time” employment form, it is also said that only several percent of all part-time workers fulfill the conditions under Article 8 of the revised Act. In view of this, I would like to address the question of whether the workers to be legally protected are being excluded or not from the aforementioned policy perspective.

First, as was already pointed out, with regard to the “full-time part-timers” whose prescribed working hours are the same as those of regular employees, the demands for equal treatment are the strongest from the perspective of social equity. However, because this category of worker fails to correspond to the “short-time workers” as defined by law, the ban on discrimination does not extend to this group. Under the present law, taking into account the guiding principle of the revised Act and the purpose of Article 3, Paragraph 2 of the Labor Contract Act (“Labor contracts shall be concluded between workers and employers and changed based on considerations for balances responding to work conditions”), redress should be carried out in accordance with public policy (Article 90 of the Civil Code).<sup>30</sup>

Secondly, while the types of part-time workers are diversifying, many of them choose part-time work for the sake of achieving a balance between the work and the responsibilities of family life (child care, nursing care, housework, etc.). It is difficult for such persons to comply with demands for work transfers (especially moves to faraway locations) or constant overtime work,<sup>31</sup> which is exactly the reason why they choose the form of part-time work. It would be hard for such workers to fulfill the requirements stipulated in Article 8 of the revised Act.<sup>32</sup>

The need to introduce mandatory regulation for this category of part-time workers, whose choice is seemingly voluntary, would be evaluated lower than that for the so-called involuntary part-time workers. From a policy perspective, however, against the backdrop of

<sup>29</sup> Regarding age discrimination, see Sakuraba, above n. 25, at 5.

<sup>30</sup> See comments by Tsuchida in Panel discussion, *Shin-Rodo Rippo to Koyo Shakai no Yukue* [Whither new labor legislation and employment society?], Jurist, no. 1347, 29.

<sup>31</sup> Within the Circular Notice, the presence/absence and degree of prescribed overtime work are mentioned as essential elements in rendering judgments on “degree of responsibility” regarding “job contents” requirements (No. 1-4[2] B).

<sup>32</sup> This can also be considered to apply widely to workers who choose part-time employment due to their own personal disabilities or illnesses.

Japan's declining birthrate and aging of its population, it is extremely important that part-time employment be expanded as a favorable job mode facilitating normally a balance between the work and the family responsibilities. Furthermore, in view of the fact that the majority of such workers have no desire to become regular employees, measures designed to promote transition to regular employee status will fail to correct treatment disparities. This will justify the high necessity for the legal regulation of the unbalanced treatment.

Furthermore, the majority of workers choosing part-time employment for the sake of achieving balance with their family responsibilities are women. As noted above, while disadvantageous treatment for the reason of being part-time workers does not directly comprise gender discrimination, it does possess the effect of amplifying and solidifying gender gaps in the workplace. In the European Union this reality was perceived from early on, with regulations in force against even indirect discrimination against women prior to the issuing of the directive stipulating balanced treatment for part-time workers (EC Directive 81, 1997).<sup>33</sup> As such, while at first glance distinctions between part-timers and full-timers do not appear to have any linkage to gender, they are in effect standards that put women at a disadvantage. Because of this, in the absence of demonstration on the part of the employers that such distinctions are based on true need and are both appropriate and necessary as means of achieving the goals in question, they are banned as illegal gender discrimination.

It is a question of legislative policy how the law will deal with disadvantages at the workplace caused by the fact that women primarily bear the burdens of family responsibilities. In the EU, active efforts are made to rectify and alleviate gender gaps through the legal principles of discrimination prohibition and the balance-support measures. In the United States, meanwhile, the stress is placed on the importance of formal equality, with part-time worker treatment disparities also not treated as illegal discrimination.<sup>34</sup> In Japan, amidst the nation's sinking birthrate, support for the balance between work and home is advanced through the Child and Family Care Leave Act (Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave) and other measures. Under the Equality Act as well, the Act of including the ability to comply with demands for transfer accompanied by physical reallocation within the requirements for being hired in managerial track positions is regulated as indirect discrimination (Article 7 of the Act and Article 2 of the Enforcement Regulation of the Act). According to the above examples, Japan can be said to select the former (European) approach as the basic direction of legislative policy.

In light of the points mentioned above, when considering the regulation of disadvantageous treatment of part-time workers in Japan as legal policy, a need may be identified for

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<sup>33</sup> Earlier rulings include Case 96/80 *Jenkins v. Kingsgate* (1981) ECR911; Case 170/84 *Bilka-Kaufhaus v. Karin Weber von Hartz* (1986) ECR1607, etc. At present, indirect discrimination based upon gender is banned under EC Directive 207 in 1976 (revised through EC Directive 73 in 2002). Barnerd, C., *EC Employment Act* 472-74(3rd ed., Oxford University Press 2006).

<sup>34</sup> Sugano & Suwa, above n.16, at 120-22.

ample consideration of the interests of persons who work part-time with the goal of achieving a balance between the work and the family responsibilities.<sup>35</sup> It is true that the presence/absence and the extent of transfers and overtime work (that is, the degree of actual restraint by the company) is widely used as essential elements in determining wages and other treatment, with a certain level of rationality recognized to exist under Japan's employment system. Accordingly, although the use of the degree of such restraint as a standard for determining treatment should not be banned in itself, in cases when conspicuous treatment disparities are established despite the fact that the work contents, contract period and other factors are the same, it would appear reasonable to require the employers to concretely demonstrate that the disparities can be explained rationally, for the above mentioned standards result in a disadvantage for workers shouldering family responsibilities.

As legislative theory, therefore, it would appear desirable to render as illegal the irrational and conspicuous treatment disparities, either by alleviating the requirements for placing bans on discrimination, or by obliging balanced treatment in cases when job contents, contract period or other factors are the same. In view of the policy-based character of bans on discrimination against part-time workers, it should be feasible to move first to the introduction of mandatory rules relating to wages, where inequitable disparities are most contested.<sup>36</sup> The adoption of mandatory rules for non-discrimination or balanced treatment in such a manner is also likely to concur with the spirit of the revised Act which demands the business operators to establish objective and transparent standards in order to realize fair treatment for the part-time workers (see Articles 6, 9, and 13, etc.).<sup>37</sup>

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<sup>35</sup> While bans on disadvantageous treatment of part-time workers as indirect discrimination against women, as is the practice in the European Union, are conceivable, in light of the fact that balancing work and family responsibilities is essentially an issue relevant to both men and women, it would be preferable to establish rules within the *Part-Time Work Act* based on consideration of the interests of all workers in this category.

<sup>36</sup> Under the current act, in view of the spirit of Articles 1 and 3 of the revised Act and Article 3 Paragraph 2 of the Labor Contract Act, it is conceivable that this type of conspicuous disparity could constitute redress as violations of public policy. With regard to balanced treatment as public policy, see Michio Tsuchida, above n.15, at 563-73.

<sup>37</sup> As opinions in support of compulsory balanced treatment as upcoming legislative policy, see comments by Miyazato and Tsuchida in the panel discussion mentioned above, n.30, at 30, 32.