

# Introduction

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## The Theme and Its Background

The 9th Comparative Labor Law Seminar (JILPT Tokyo Seminar) was held in Tokyo on February 19, 2008, with participants from the U.S., the U.K., Germany, France, Australia, Korea, Taiwan and Japan. Under the theme of “New Developments in Employment Discrimination Law,” the seminar was designed to explore the current situation of employment discrimination law with special emphasis on its expansion into new areas. As organizers of the seminar, we sent the following memo to the participants to explain the theme and its background.

*The theme of the 9th Tokyo Seminar is the law of employment discrimination, with special emphasis on its expansion into new areas such as discrimination because of age or part-time status. What are the recent developments in employment discrimination law in your country? How do the newer types of discrimination differ from the “traditional” ones such as race and sex?*

*In Japan, the Equal Employment Opportunity Act was amended in 2006 for the second time since its enactment. By shifting from a ban on “discrimination against women” to “discrimination on the basis of sex,” and by adopting the concept of indirect discrimination in certain areas, the amendment marked a significant development in Japanese sex discrimination law. In addition, in June 2007, other statutes were amended (1) to mandate that employers give equal opportunity regardless of age at the time of recruitment and hiring of workers and (2) to prohibit wage and benefits discrimination against part-time workers who are equivalent to regular workers in certain aspects. It appears that these measures are aimed at achieving broader employment-policy goals as well as vindicating equality rights of individual workers. While Japan has yet to prohibit discrimination because of disability, a new era of employment discrimination has certainly begun.*

*The same may be true of the European Union member states. The Framework Directive on Equal Treatment (2000/78/EC) added age, disability, and sexual orientation, among others, to the prohibited grounds, and the legislative body of each country has acted upon it. It is interesting to see how such new types of discrimination law operate along with the preexisting ones in achieving equality in the workplace. Meanwhile, in the U.S., where a federal statute has prohibited age discrimination in employment since 1967, the Supreme Court took the position in 2005 that prohibition of age discrimination is targeted at protection of older workers. Does this mean age discrimination is somewhat different from race or sex*

*discrimination? And why don't we hear about discrimination against part-time employees in the U.S.? In other countries as well, employment discrimination is an area experiencing remarkable developments in recent years and we believe it presents fascinating issues for comparative discussion.*

## **Proposed Outlines**

Based on such an idea, we asked the participants to cover the following issues in their national papers.

1. *General description of employment discrimination law in your country*
  - *Please present a brief historic overview of employment discrimination law. Have there been notable developments in recent years?*
  - *Do you have statutes to prohibit discrimination on the following grounds?*
    - *race/ethnicity*
    - *sex*
    - *religion/beliefs*
    - *age*
    - *disability*
    - *sexual orientation*
    - *employment status (such as part-time and fixed-term contract)*
  - Are there any other grounds for discrimination prohibited by law?*
  - *Do they cover all aspects of employment? Do you have special laws regarding wages, such as equal pay between men and women?*
  - *Does your Constitution offer a basis for anti-discrimination statutes?*
  - *What are the most typical cases of employment discrimination?*
2. *Structure of proof and remedy of employment discrimination*
  - *Taking the example of race and/or sex discrimination, what constitutes illegal discrimination and what are justifiable grounds for distinction or disparity?*
  - *Does your law mandate prohibition of so-called indirect discrimination? If yes, how are the courts applying the theory?*
  - *How do you compare newer types of discrimination (e.g. age, disability, employment status) with traditional ones (e.g. race, sex) in terms of definition and proof of discrimination?*
  - *Are there any particularly important issues of remedial procedure regarding employment discrimination cases?*
3. *Relationship between employment discrimination law and employment policy considerations*
  - *Did (or would) prohibition of age discrimination affect employment practices of your country? What about prohibition of employment-status discrimination?*
  - *Do you have measures to promote employment of elderly or disabled people? How do they relate to prohibition of discrimination because of such traits?*
  - *What are the merits and demerits of addressing employment issues from the standpoint of "discrimination"?*
4. *Finally, please identify the most important issue of employment discrimination in your country today and give your opinion as to its future direction*

## Papers and the Discussion

The national papers presented at the seminar are contained in the following pages. They are all informative, and readers will find it interesting to see various developments of anti-discrimination laws in each country. While the growing importance of this area is commonly observed, there are differences in specific grounds covered by law and in legal and societal contexts in which they came to be addressed. It is impossible to summarize the contents of the papers here, but a word or two would be appropriate for each country by way of introduction.

In the United States, which led the history of employment discrimination law with the enactment of Title VII of the Civil Rights Act of 1964, the search for substantive equality is still in progress under a complex body of statutes and judicial interpretations, and the issue of contingent workforce is becoming serious.

In the United Kingdom, since the seminal Sex Discrimination Act of 1975, so many anti-discrimination statutes have been enacted under the influence of both the U.S. law and the EC law that an effort is being made to streamline them, and there was a remarkable increase of litigation recently regarding equal pay.

In Germany, a comprehensive statute called the General Equal Employment Act, which prohibits discrimination based on race or ethnic origin, gender, religious or secular belief, disability, age or sexual identity, was enacted in 2006 to comply with EC Directives, and the issue of age discrimination is raising particularly difficult problems.

In France, the legal framework to deal with EC Directives was adopted by a similarly comprehensive statute, the statute law of November 16, 2001, although it is only recently that the judicial court acknowledged the doctrine of indirect discrimination, and in 2006 the use of anonymous CV was mandated for larger employers.

In Australia, anti-discrimination laws developed relatively early with the adoption of the Racial Discrimination Act of 1975, followed by prohibition of sex discrimination in 1984, disability discrimination in 1992, and age discrimination in 2004, but their individual complaints-based model is showing its limits in promoting equality.

In Korea, prohibition of sex discrimination has been strengthened considerably in recent years through amendments of the Equal Employment Opportunity Act of 1987, and new laws were enacted to prohibit discrimination against fixed-term and part-time employees in 2006 and to prohibit disability discrimination in 2007.

In Taiwan, the Employment Service Act of 1992, a comprehensive statute prohibiting discrimination based on race, religion, country origin, sex, and disability, among others, was expanded in 2007 to cover age and sexual orientation, and another statute was enacted in 2002 to specifically deal with gender discrimination.

In Japan, despite the 2006 amendment of the Equal Employment Opportunity Act and the new legal provisions regarding age and part-time status mentioned above, anti-discrimination laws are still modest, leaving the stage of hiring largely unregulated, with a trend toward the approach of employment policy rather than human rights.

After presentations of these national papers, there was a general discussion among the participants. The issues include whether and in what respect the newer types of employment discrimination are different from the traditional “core;” the relationship between employment policy considerations and human rights aspect of equality; the position of employment discrimination law, especially its relation to the traditional labor law; and the role of the courts and the parties involved in the application of employment discrimination law. Naturally, there were no specific conclusions, but all the participants enjoyed the lively discussion and deepened their understanding of the theme.

## **Concluding Remarks**

Before bringing the readers to the national papers, we would like to make three short points regarding employment discrimination law. Firstly, prohibition of employment discrimination is a valid cause. Nobody will doubt the evils of invidious discrimination, and law can and should play an important role in combating them. Secondly, on the other hand, anti-discrimination law is a powerful tool in that it condemns the violating employer as the discriminator. While such an effect is absolutely necessary in some areas, the legislator may choose to avoid it in other areas. Thirdly, even under anti-discrimination legislation, substantive equality is not an easy goal to achieve. Employment discrimination law may need to develop new tools and ideas in addition to negative rights of employees. It may also be necessary to improve general labor and employment laws so as to form the basis for substantive equality.

There is no ready-made recipe. Each country has to pursue the best portfolio of measures in view of its own conditions. However, it is definitely necessary and beneficial to learn from the systems and actual experiences of other countries. We believe this book provides invaluable information for this purpose.