THE LEGAL TREATMENT OF 'PART-TIME' WORKERS IN JAPAN: CHALLENGING THE *SALARIIMAN* OR CREATING THE *SALARIIWOMAN*?

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[*Part-time workers in Japan are predominantly women. The terms of their employment are inferior to those of regular workers in Japan. The reasons for this have historical, cultural and legal aspects. The primary aim of this article is to present the extent of discrimination against Japanese part-time workers as it is reflected in the law. The author approaches this task from two angles: first, by presenting the legal impediments to equal treatment of part-time workers and second, by analysing recent initiatives of the bureaucracy, District Court and parliament to change those impediments. The author concludes that the recent initiatives have led to a partial improvement in the conditions of work for women part-time workers, but have had little impact on the broader structural issues facing women seeking equal participation in the work force.*]

Japanese women are like Christmas cakes.

Popular Japanese saying.

When a married woman takes a side job, it generally goes by the incomplete-sounding name *pāto* or 'part', an abbreviation of the English 'part-time'.

Cherry Kittredge.[1]

The difference between what men and women are offered by the company system is very marked.

Rodney Clark.[2]

1. *INTRODUCTION*

The analogy of Japanese women to Christmas delicacies provides an important starting point for an analysis of the 'part-time' labour force and the laws governing them. Such an analogy may be seen by the foreigner as simply another example of the curious ways of the Orient. However, the popular saying is relevant because it encapsulates a truism regarding the perceived structural bases for the female role in Japanese society. Japanese women are meant to be like Christmas cakes in that once they pass their 'twenty-fifth' they cannot be sold on either the marriage or the labour market. In other words, in traditional Japanese society there is an inextricable linkage of gender and labour. Women, from their mid-twenties, are to devote their attention to affairs of their own household. Work force participation by women in their twenties and thirties drops accordingly.

However, Japanese women are not like Christmas cakes. What is popularised is not what is real. The average age of marriage of a Japanese woman is 26.8.[3] More importantly, in reality both the marriage and the labour market entry or re-

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1 Kittredge, C., *Womansword: What Japanese Words Say About Women* (1987) 104.

2 Clark, R., *The Japanese Company* (1979) 234.

3 This figure is slowly increasing, leading to the variant of the popular saying: 'Japanese women are like New Year's noodles'.

entry of older Japanese women does occur and is occurring in ever-increasing numbers. But the linkage of gender and labour continues in that the employment of older Japanese women is usually as a 'part-time' worker. As a 'part-time' worker, her employment is on significantly inferior terms to those of 'regular' workers.

The particular aims of this article are twofold. A first concern is to examine the institutional barriers to better treatment of the 'part-time' employee in Japan. What legal structures perpetuate the linkage of gender and labour and the associated poorer working conditions of 'part-time' employees in Japan? To answer this question, the policy, precedent and legislation relating to the 'part-time' phenomenon is examined.

A second concern of the article is to analyse the responses of government and the courts to determine the effect on the Japanese work force. In particular, is it possible that the 'part-time' sector is developing, as it has in some countries, as a viable alternative option for the current members of the 'regular' work force? Or is a class of second-rate and largely female employees being created as the distinction between the 'part-time' and the 'regular' is exacerbated? Put another way, is the tendency to challenge the *salariiman* or create the *salariiwoman*? Answering this question naturally involves critical analysis of the role of law in social change in Japan.[4]

At stake are two important issues: equal opportunity for women in the work force, and access to flexible working practices for men. Furthermore, if the strong comparative advantage of Japanese industry on world markets and the resulting capital surplus accruing to industry are enjoyed as a product of internationally inferior conditions for a substantial section of the work force, naturally this raises questions of unfair competition at an intergovernmental level. The issue is not only of relevance to those developed countries which are watching their traditional markets being undercut. A soaring yen and increasing political will to be seen as a regional leader have combined to place Japan's foreign investment and offshore production in Asia at their highest levels since the second world war.[5] As a

[4] Japan's acute labour shortage of the 1980s, in tandem with the repercussions of an aging society, has added urgency to the search for new forms of labour. The increase in 'part-time' work is a response of the market to this demand and is the focus of this article.

'Part-time' workers should be distinguished from two loosely defined groups of temporary workers. In 1985, the Law for Securing the Proper Operation of Workers Dispatching Undertakings and Improved Conditions for Worker Dispatchings (*Rōdōsha Hakken Jigyō no Tekisei na Unei no Kakuho Oyobi Hakken Rōdōsha no Jūgyo Jōken no Seibito ni Kansuru Hōritsu*) (Law No.88 of 5 July 1985) was enacted.

Whereas prior to 1985 the indirect supply of labour was subject to a government monopoly, under the 1985 Law agencies can be authorized to hire temporary workers in specified work categories for service in other enterprises. Promulgation of the new Law resulted in a dramatic increase in the supply of temporary labour. These temporary workers are generally young people (of both sexes but more usually female) who possess particular skills. They are usually paid at a rate to compensate them for the insecurity of their employment. While there is evidence to suggest that temporary workers under the Law suffer from similar unfair labour practices to those of 'part-time' workers and other non-regular employees in Japan, these workers constitute a separately regulated and clearly defined group of workers and are not the subject of this article.

The second group of temporary workers are commonly called '*arubaito*' workers in Japan. This title is often, although not exclusively, given to student workers who are engaged in 'side-jobs.' From a legal standpoint, however, these workers are almost indistinguishable from 'part-time' employees, therefore by default much of the ensuing discussion is applicable in their case.

[5] Japan's foreign investment in the ASEAN countries in the three years from 1985 to 1987 was

corollary to the transfer of technology beyond Japan's seas, management structures and employment practices are also reproduced in new surroundings. Notions of the use and treatment of 'part-time' workers are part of the package awaiting assembly.

By way of background, part two presents the extent of discrimination in the working conditions of 'part-time' workers in comparison with 'regular' workers. Part three outlines the legal constructs for an analysis of the Japanese work force. The aim is to discover who are included in and who are excluded from the group of workers labelled 'part-time' in Japan. Parts four, five and six focus on the recent initiatives by those in authority to deal with the issues raised by the increase in 'part-time' employment. Part four deals with the recent response by the Ministry of Labour to the ballooning 'part-time' phenomenon. Part five deals with a recent response by the courts to the same issue. The decision in the case of *Sanyo Electric*[6] is discussed. Part six presents three select legislative provisions that impact on the 'part-time' work force. Part seven highlights difficulties encountered by 'part-time' workers should they seek to challenge their inferior working conditions on grounds of discrimination. A summary of conclusions completes the article.

2. *BACKGOUND*

2.1 *Number, Gender and Age*

Estimates of the number of 'part-time' workers in Japan vary. The Japanese Government's only comprehensive survey of 'part-time' labour, conducted in October 1990, found the number of employees labelled as 'part-time' to be 6,070,000, or 14.6 percent of the total work force. Omitted from this survey were enterprises employing five workers or less. Given that the greatest incidence of 'part-time' employment is either in very large or very small enterprises,[7] the actual number of 'part-time' workers in Japan may be significantly higher.[8] One estimate places it at 20 percent of the total Japanese work force, although it may be higher still.[9] These numbers indicate a population of significant size. Further, the number of Japanese 'part-time' employees has increased annually since 1982, as has their percentage of all workers.[10]

US$422 million compared with a total of US$593 million in the previous three decades: Yamashita, S., *Transfer of Japanese Technology and Management to the ASEAN Countries* (1991) 23.

6 *Sanyo Denki Jiken* (*Sanyo Electric* case), Osaka District Court, 20 February 1990, in (1990) 558 *Rōdōhanreishū* 45.

7 Rōdōshō, Fujin-kyoku and Fujin Rōdō-ka, *Pātotaimu Rōdōsha o Meguru Hōritsu Mondai* (Legal Problems Relating to Part-Time Workers) (1990) appendix 1, table 2.

8 Pātotaimu Rōdōsha Sōgo Jitai Chōsa (Survey on the State of Part-Time Employees) in Asahi Shimbun, 14 September 1991: '*Gonin ni hitori ga furutaimu*' (One in five are full-time) 9. The most recent government figure states the number of part-time workers to be 8.02 million: (1993) 32(2) *Japan Labour Bulletin* 4.

9 Rōdōshō, Fujun-kyoku Hen, *Pātotaimu Rōdō No Tenbō To Taisaku* (Part-Time Labour Policies and Prospects) (1987) 19.

10 In the six years from 1982 to 1988 the total numbers of 'regular' employees have decreased by 2.1 percent and the numbers of non-'regular' employees have increased by 68.8 percent: Yamashita, K., '*Nihon-Teki Koyō Kankō To Hi-Seiki Jūgyō-In*' (Japanese-Style Employment Practices and Irregular Employees) (1989) 73 *Nihon Rōdōhō Gakkai-Hen* 71, 72.

The increase in the 'part-time' labour force is a world-wide phenomenon and is linked to the new international division of labour. A 1989 International Labour Organisation (I.L.O.) Report found that

The gender of the 'part-time' work force is also noteworthy. In 1960 less than half of the 'part-time' work force was female.[11] Now, three out of four 'part-time' workers in Japan are women.[12] Of every three women in the work force one is engaged as a 'part-time' worker. Further, the female share of the 'part-timer pie' is increasing over time.[13] The gender factor is thus increasing rather than diminishing.

'Part-time' work is dominated by older women. Indeed, profiles of the 'typical part-time' worker constructed from responses to two surveys[14] indicate that she is a married woman in her early forties. The gender and age gap is illustrated by figure 1 below. Companies were asked to supply numbers of employees differentiated on the basis of sex and work place classification. The graph highlights the extraordinary extent to which the 'part-time' work force is seen within industry and society as being a female option only. 'Part-time' male workers who are labelled as such are few: their numbers are represented by the lowest line which rises from the x-axis only around the age of 60. In fact, the only age when male non-'regular' workers outnumber female non-'regular' workers is in the student years when *arubaito* employment is the most common form of non-'regular' employment for both sexes.[15]

1990 saw the greatest jump in female participation in the work force in Japanese history, and the biggest increase registered was in the age range 40 to 44.[16] Given that the annual rate of increase of the female 'part-time' work force is over twice that of the female 'regular' work force,[17] it is likely that many of these women joined the work force on a 'part-time' basis.

the last decade has seen a 'tendency for part-time employment systems to be expanded and made more flexible over time': Thurman, J. and Trah, G., 'Part-Time Work in International Perspective' (1990) 129 *International Review* 23, 25. Both supply and demand factors have contributed to the increase. Motivating factors on the supply side are numerous and depend on the particular country, its economy and the individual concerned. They may range from the desire for social involvement to dire financial need. The greater demand for 'part-time' workers is a function of the absorption of new technology into industry. Through processes such as: (i) the fragmentation of work skills; (ii) the flexibility in location and hours of work that telework offers; and (iii) the reduced need for reskilling labour, industrial reaction to market forces is enhanced. Industrial productivity is improved because attention spans attendant on shorter periods of labour can be utilized while at the same time operating hours can be extended. In short, comparative advantage ensues. See also Rōdōshō, Fujin-kyoku and Fujin Rōdō-ka, *supra* n.7.

11 Rōdōshō, Fujin-kyoku and Fujin Rōdō-ka, (1990) *op. cit.* n.10, appendix 1, table 1.

12 *Shi-Yatō De Kyōdō Teian e* (Four Opposition Parties Move Towards Joint Submission) in *Asahi Shimbun* (Tokyo), 15 December 1991.

13 Suwa, Y., 'Why Are Part-Time Workers Not Well Unionized?' (1989) 28(2) *Japan Labour Bulletin* 5, 8.

14 Rengō (Japan Private Sector Trade Union Confederation), *Japanese Part-Time Workers and Rengō* (1989) 6; Zenkoku Seikyō Pātotaimu Rōdōsha Kondankai (ed.), *Pāto Rōdō Hakusho* (Part-Time Labour Whitepaper) (1990) 3.

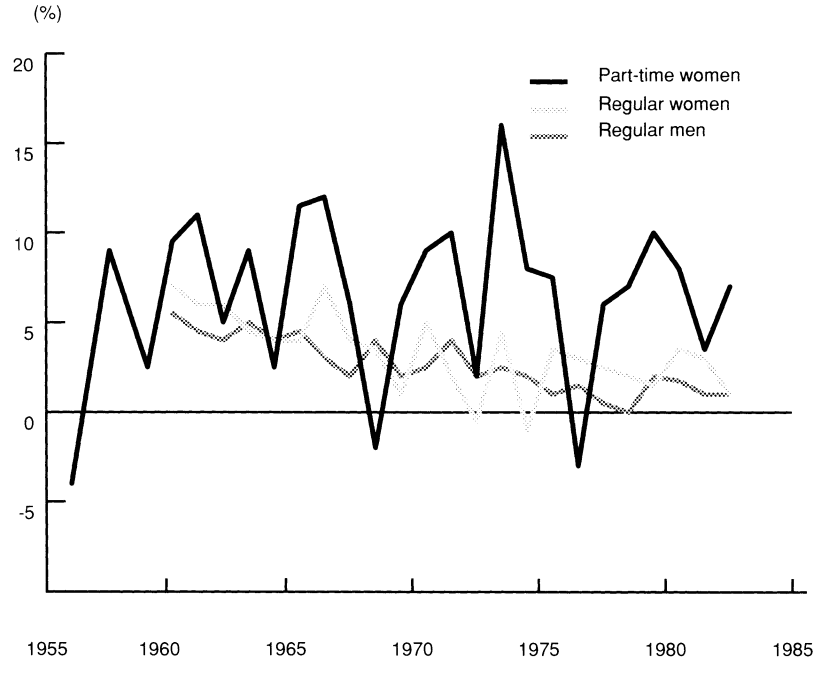
15 For an explanation of '*arubaito*' workers, see *supra* n.4.

16 An increase of 850,000 women or 4.9 percent of the current female workforce. Women now constitute 39.7 percent of the Japanese workforce: Ministry of Labour, *White Paper on Female Labour* (1991) as reported in *Asahi Shimbun* (Tokyo), 10 December 1991, *Josei Koyōsha Saikō No 1834 Mannin* (Women Employees Reach New Height of 18,340,000).

17 1985 statistics in Suwa, Y., 'Policy For Part-Time Workers. A Recent Study Group Report' (1987) 26(11) *Japan Labour Bulletin* 48, 51.

18 The graph is produced from 1988 figures supplied by the Statistics Division of the General Affairs Bureau as a result of its *Extraordinary Workforce Survey*, and is copied from Rōdōshō, Fujin-kyoku and Fujin Rōdō-ka, *supra* n.7, appendix 2, table 1.

Figure 1 Number of 'part-time' and *arubaito* employees according to age groupings.[18]



2.2 *Employment Security*

A feature of 'part-time' employment in Japan is the short-term nature of the contract. A 1988 Ministry of Labour survey found that 58.8 percent of 'part-time' workers were employed on a limited-term contract.[19] The percentage changes according to industry size. Large employers are more likely to ensure the contract is limited in time.[20]

But in a land where life-time employment is a working premise, short-term contracts do not necessarily mean short-term employment relationships. The average length of employment of a 'part-time' worker is 4.6 years.[21] Accordingly, renewal of the contract is common.

In spite of the ongoing employment relationship that frequently exists, 'part-time' workers are not considered part of the permanent work force. In relation to security of tenure, reference is made to figure 2. While the *'regular'* work force remains more static over time, the greater fluctuation in the *'part-time'* work force

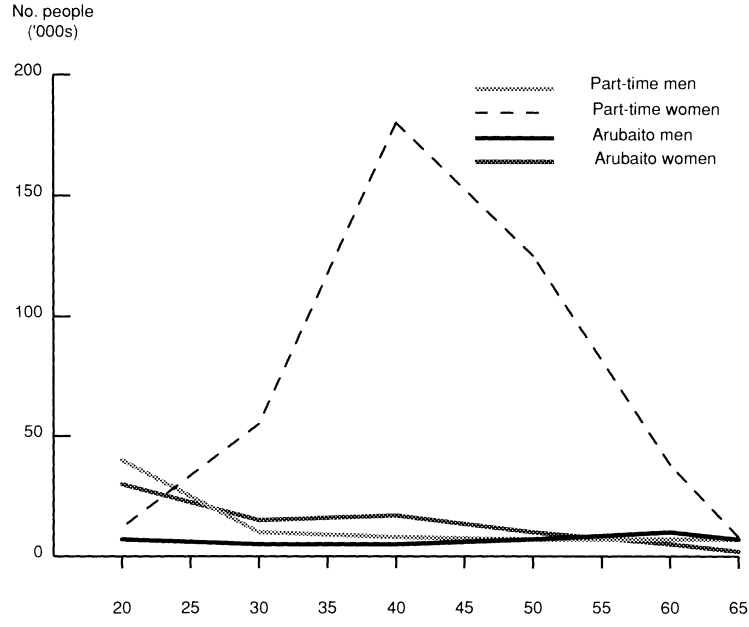
19 Rengō, *supra* n.14, 8.

20 According to one source, 87 percent of large employers contract with 'part-time' workers on a fixed-term basis: Terasawa, K., Deta, K., and Takubo, G., *Pātotaimā no Koshi to Seiri Kaiko no Hōri: Sanyo Denki Jiken, Osaka Chisai Kettei o Megutte* (Legal Doctrine on Individual and Collective Termination of Part-Time Employment: The Decision in the Case of *Sanyo Electric*, Osaka District Court) in (1990) 1236 *Rōdō Hōritsu Junpō* 4, 6.

21 Rengō, *supra* n.14.

reflects the inherent relative insecurity of its employment. The female 'part-time' workers' 'incorporation into the labour market is largely determined by the fluctuating needs of the labour market' and not as their 'inherent right.'[22] Moreover, the female 'regular' work force in Japan serves as a buffer stock of labour, even more than the male 'regular' work force.

Figure 2 Change in the number of non-agricultural employees according to gender and employment type.[23]



2.3 *Hours of Employment*

Just as many 'part-time' workers in fact have a commitment over many years to their employer, so many 'part-time' workers' hours of employment are very long. In the 1991 'Survey on the State of Part-time Employees' it was found that one in five 'part-time' employees work the standard number of hours each week.[24] This group of 'part-time' workers are referred to as 'quasi-part-timers' (*giji pāto*) by Japanese commentators on the subject. A '*Rengō*' (The Japanese Private Sector Trade Union Confederation) survey conducted in 1988 found that the average number of hours worked by a 'part-time' employee is three-quarters that of a 'regular' worker.[25] This figure will vary from industry to industry and age group to age group. In the manufacturing sector hours are longer than in the service industries.

22 Stolcke, V., 'Women's Labours: The Naturalization of Social Inequality and Women's Subordination' in Young, K., Wolkowitz, C., and McCullagh, R. (eds), *Of Marriage and the Market. Women's Subordination Internationally and its Lessons* (2nd ed. 1984) 173, 174.

23 Hon-Kawashima, Y., *Joshi Rōdō To Rōdō Shijō Kōsei No Bunseki* (The Analysis of Female Labour and the Labour Market Structure) (1985) 46.

24 *Asahi Shimbun* (Toyko), *supra* n.12.

25 Rengō, *supra* n.14, 6.

2.4 *Financial Remuneration*

Most part-timers are paid on an hourly basis. In 1987 the average hourly amount was 623 yen.[26] This is less than three quarters of the equivalent hourly rate of pay of 'regular' employees engaged in the same work.[27]

Of further concern is the relative decline in the 'part-time' employee's hourly wage *vis-a-vis* the *pro-rata* hourly wage of 'regular' workers. In 1976, the 'part-time' employee received on average 81 percent of the equivalently engaged 'regular' employee's salary. In the late 1980s the figure was 70 percent.[28] The fact that the gulf between payments made to 'part-time' workers and those made to 'regular' workers is growing has not been addressed by government, employers' organisations or unions.

This gap between the financial remuneration given to the 'regular' and the 'part-time' employee is exacerbated by the practice of paying a base salary to the employee and supplementing it with other discretionary payments or allowances. As is shown in table 1, it is rare for the 'part-time' worker to be provided such allowances over and above the basic wage. Even the travel allowance, so common for the 'regular' employee, is enjoyed by just 73.6 percent of 'part-time' workers.[29] Retirement payments are paid to less than one in six 'part-time' workers.

Table 1 Comparison of allowances paid to 'part-time' and 'regular' workers (percent)[30]

Allowance	Travel	Managerial	Family	Housing	Performance	Retirement
Regular	95.5	92.9	84.7	59.8	41.9	94
Part-Time	73.6	9.4	4.9	2.8	15.2	14.8

Bonuses, a common feature of Japanese salary structure, are paid to 70 percent of 'part-time' employees. However, the average bonus payment to a 'part-time' worker is 16.5 percent of that paid to a 'regular' worker in a similar position.[31]

2.5 *Welfare and Associated Benefits*

Access to welfare benefits and associated other benefits is also more limited for the 'part-time' worker. As the last three columns of the table below indicate, the 'part-time' worker is presumed to have little need to save for tomorrow. The low pension coverage within the 'part-time' work force is surprising as participation in the Public Employment Pension Scheme (*Kōsei Nenkin Seido*) is compulsory for all employees of companies where there are five or more 'regular' employees. The low coverage of 46.8 percent of 'part-time' workers may be accounted for by the tendency for 'part-time' workers to be employed by small firms. Alternatively, 'part-time' workers may fall within the exceptions in the legislation for seasonal and temporary workers.[32]

26 Rōdōshō, *Rōdō Hakusho 1989* (Labour White Paper 1989) 134, tables 2-33.

27 Suwa, Y., '*Pāto Kakusa*' (The Part-Time Workers' Disparity) (1991) *Rōdō Shimbun* (Tokyo), 17 June 1991.

28 Rōdōshō, *supra* n.26, 135.

29 Professor Suwa has noted a trend for 'part-time' workers to work within a 30 minute commute from home but this fact alone does not account for the low figure as the figures in the above table are based on employer norms.

30 *Supra* n.28.

31 Rōdōshō, *supra* n.26, 16.

The table also shows that precautions against unemployment and ill-health were available to approximately half the 'part-timers' surveyed.

Table 2 Comparison of benefits received by 'part-time' and 'regular' workers (percent)[33]

	Empl't Ins.	Health Ins.	Pension	Saving Plan	Private Super
Regular	94.4	98.1	96.2	69.3	50.2
Part-Time	51.5	49.7	46.8	18.8	6.0

2.6 *Unionization of 'Part-Time' Employees*

Union leadership has not been proactive in responding to the plight of 'part-time' workers in Japan. In February 1988, Rengō inaugurated the first committee on 'part-time' work. In 1989, despite this developing concern, 'part-time' work-related issues did not feature amongst a list of 18 issues of greatest concern to the leadership of its constituent unions.[34]

The reason for this relative lack of concern on the part of union leadership is not to be found in the overall low rate of unionization in Japan,[35] nor in any legislative barrier,[36] but rather in the constitutional makeup of the trade unions themselves. A 1989 survey found that 'part-time' workers are excluded from membership of 93.4 percent of Japanese trade unions.[37] In turn, this state of affairs has its roots in history.

The post-war surplus of labour (due to the decimated capacity of industry to absorb returning ex-colonial administrators) meant that the unions formed under the encouragement of the Allied Powers took as their primary concern the preservation of the jobs of their members. Moreover, the poor state of the domestic communications infrastructure hindered nation-wide and industry-based negotiations during the crucial formation period. Enterprise unions which advocated lifetime employment for their members were the result.[38] The post-war demands of enterprise unions for secure employment and seniority-based wages were less able to be satisfied by smaller companies. Hence different labour practices developed in large companies from small.

Japanese literature emphasises that employees of large companies in Japan operate within an internal labour market. In a large enterprise, the worker receives job security, 'regular' wage increases, union representation, a variety of welfare

32 Kuwahara, M., 'Employee Pension Schemes' in Kitagawa, Z. (ed.), *Doing Business in Japan* (1991) section 3.02.

33 Rōdōshō, *supra* n.26, 136.

34 Rōdō Hanrei Kyōkai, 'Pāto Rōdōsha o Kumiaiin To Suru Rōdō Kumiai 6.6%' (6.6 percent of Unions Allow Part-Time Workers as Members) in (1989) 42(10) *Rōdō Hanrei Tsūshin* 12.

35 The rate of unionization is 25.2 percent (1990 figure) and dropping. *Cf.* the U.K. where the rate is 45.9 percent (1988 figure which includes overseas branch office membership), the Federal Republic of Germany where the rate is 40.9 percent (1988 figure), and the U.S.A. where the rate is 16.4 percent (1989 figures): *Japan 1992 An International Comparison* (1991) 72.

36 Trade Union Law (T.U.L.) art.3. *Rōdō Kumiai Hō* (Law No.174 of 1 June 1949) defines 'workers' (*i.e.* eligible union members) as those 'persons who live on their wages, salaries or other renumeration assimilable thereto, regardless of the kind of occupation.' Somewhat ironically, this definition is so broad as to include the unemployed.

37 Rōdō Hanrei Kyōkai, *op. cit.* n.34, 8. See also Rengō, *op. cit.* n.14, 12, where it is stated that the lack of interest in organising 'part-time' workers is particularly severe in the manufacturing sector.

38 Clark, *op. cit.* n.2, 45.

services and the opportunity of advancement according to the firm's career structure. Seen from without, the 'internal labour market' operating within large companies is an autonomous unit with a single point of entry on completion of schooling. Seen from within, it is a formal set of rules regulating the costs and rewards for labour, a progressive escalator of privilege.

In contrast, the external market, made up of the self-employed and employees of smaller enterprises, is characterised by less-organised employment practices, lower wages and little structured promotion opportunity. Unlike in the internal market, in the external market wages are determined not by the custom of the enterprise involved, but rather by the individual characteristics of the employee. This tendency, in conjunction with the inherent instability of smaller firms in comparison with large enterprises, means the external labour market allows for greater job mobility. The greater job mobility, in turn, accentuates the likelihood of exclusion from the internal market and inclusion in the external market.

In 1988, 47 percent of 'part-time' workers in non-agricultural industries were employed in companies with fewer than 30 employees.[39] The high incidence of 'part-time' employment in smaller enterprises is evidence of the connection between the 'part-time' phenomenon and the external market. Having missed the post-graduate entry point to the internal market, the majority of 'part-time' workers are subject to the conditions of employment of the external market. They are denied access to the superior conditions in the internal market.

But to infer that there is a rigid dividing line between the two markets would be incorrect. Movement between the two markets does exist. For example, workers recruited to the internal market generally forfeit their access to it should they exit the work force. They are relegated to the vagaries of the external market. Moreover, the Japanese labour economy is at present undergoing a process of diversification.[40] Implementation of new technology and the growing influence of the tertiary sector fuel the search for new management structures. The labour shortage combined with workers' changing perceptions regarding job satisfaction force further flexibility in employment form onto employers. The 'part-time' option offers such flexibility. Indeed, in the opinion of Professor Suwa,[41] diversification has given rise to a growing overlap between the two markets, although this 'grey' area is not widely recognised. 'Part-time' employees are increasingly becoming members of an overlap between the internal and external markets.[42]

Since the mid-1980s, in many large companies a tiered career structure has been developed for older female employees: the 'part-timers'. Having fulfilled the relevant internal requirements, promotion in a series of steps to section head is often available. The development of promotion ladders for 'part-time' workers is a significant development for it points to the incorporation into

[39] The survey defined 'part-time workers' as short-hour workers: *supra* n.6.

[40] See, *e.g.*, Kameyama, N., 'Diversification of Employment and Job Patterns in Japan' (1990) 29(10) *Japan Labour Bulletin* 5; Inagami, T., 'Changing Japanese Employment Practices' (1985) 25(10) *Japan Labour Bulletin* 4.

[41] Professor Suwa is a labour lawyer associated with the Japan Labour Institute and an expert on the law relating to 'part-time' workers.

[42] Interview with Professor Suwa in June 1991. See also, Suwa, Y., 'What Strongly Affects Part-Timers' Hourly Wages?' (1991) 30(10) *Japan Labour Bulletin* 5.

the internal labour market of that section of the 'part-time', supposedly external, work force that is employed by large food retailers. Other statistics indicating a lengthening average period of employment for 'part-time' workers, and an increase in their average level of responsibility, would support this trend towards internalization.[43]

Nonetheless, despite the apparent internalization of a segment of the 'part-time' work force, it is clear that 'part-time' workers have not been incorporated entirely into the internal market. For example, a survey of three food distribution and retail companies which employ approximately 7,000 people in total, showed that access to membership in the company union remains highly restricted.[44] Rather, there appears to be an internalization of discriminatory practices at the same time as an internalization of the 'part-time' workers.

Further, none of the three companies had mechanisms in place whereby 'part-time' employees could become 'regular' employees. At a national level, a similar gulf between 'part-time' and 'regular' exists. A 1988 Ministry of Labour survey found that only 20.5 percent of companies allowed a status switch to a 'regular' employee.[45] The labelling of employment may change according to the employee's position on the ladder, but their status as 'part-timers' does not.[46]

The gulf between the internal organised work force and the external work force cannot be overestimated. 'Part-time' workers, because of their re-entry into the work force later in life, are part of the external labour market.

As for the future, in spite of a decreasing national unionization rate, the majority of trade unions that constitute Rengō are still not considering future policy on 'part-time' workers.[47] Few 'part-time' workers are interested in membership of organisations they perceive as irrelevant. The recent initiative by the federal trade union body, Rengō, is the first step in a long process of changing entrenched attitudes. For now, it would appear that the opportunity and desire for 'part-time' workers' participation in the extant union movement is minimal.

43 Rōdō Hanrei Kyōkai, '*Seishain Ni Kurabe "Jikan Wa Mijikaku, Nissu Ga Onaji" Ga Roku Wari*' (One in Six Part-Time Workers Work 'Less Hours, Same Number of Days' as Regular Workers) in (1991) 44(14) *Rōdō Hanrei Tsūshin* 25.

44 Union membership was unavailable to all 'part-time' workers in company C. In companies B and A, union membership was available only to 'part-time' women who had advanced to the upper levels of responsibility. In company B this amounted to just 7.9 percent of the total 'part-time' workforce. In company A the 'part-time' unionists were a mere 3.1 percent of their 'part-time' colleagues. Most 'part-time' workers remain bunched in the lower, less responsible and more temporary levels of employment where union membership was not an option. Furthermore, none of the companies had a policy of consultation with non-union representatives. Over half the total workforce therefore would not be consulted in the case of work-rule or management changes.

45 Rengō, *op. cit.* n.14, 11.

46 Company C divides its female 'part-time' staff into 'friends' (*furendo*) and 'mates' (*meito*), the former being more senior and working longer hours than the latter. Company A calls its older women employees 'associate employees' (*jun-shain*) and 'fixed term employees' (*teiji-shain*). The 'fixed term employees' are further divided into 'Orange Partner,' 'Orange Senior' and 'Orange Master' groupings.

A further characteristic of the external market is that salary, in all three companies, remained on an hourly basis even for women in management positions. This is despite the fact that women in management would be working similar hours *per* day as 'regular' workers.

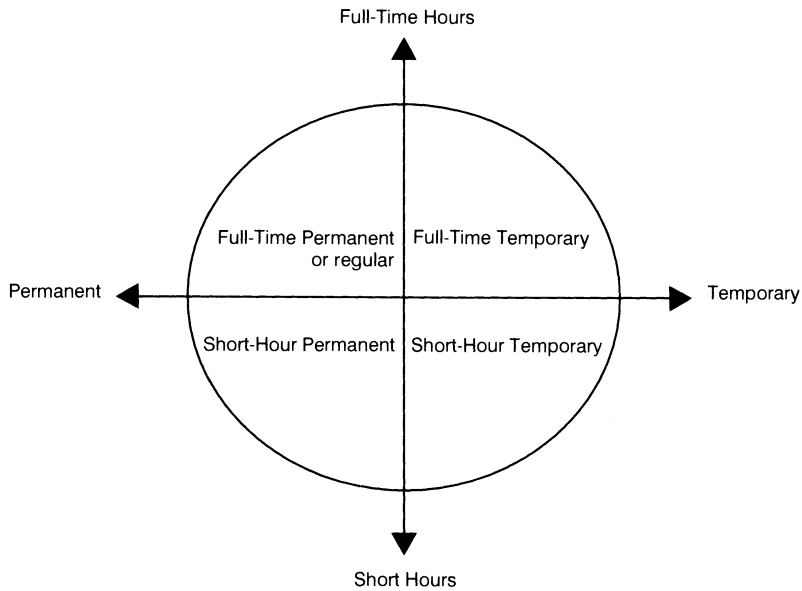
47 Suwa, *op. cit.* n.42, 8.

3. *THE JAPANESE 'PART-TIME' WORKER*

3.1 *Terminology*

Any study of 'part-time' employment must deal with two variables: the permanency of the position, and the number of hours worked. Each variable is represented in the model as an axis (figure 3 below).

Figure 3 Types of 'part-time' employment



Firstly, there are those 'part-time' employees whose contract is maintained on a temporary rather than permanent basis. Such potentially short-term and flexible employees are commonly labelled casual or temporary employees. They are represented in quadrants two and four in figure 3. In Australia, these employees differ from their permanent counterparts in that each hiring is perceived as a discrete contract of employment. They 'are what their name implies, employees who are employed as and when required.'[48]

In this classification, the number of hours worked is unimportant. A temporary employee may work the same number of hours *per* week as a 'regular' employee, however it is frequently the case that they work less.[49] The key distinction between permanent and temporary employees in practice is the period of notice required to terminate the employment relationship.[50]

[48] *Per* De Baun, J., *Re Shop Assistants Metropolitan and Newcastle Award* (1957) A.R. (N.S.W.) 337, 344.

[49] In 1989, 71 percent of casual employees were engaged to work on a 'part-time' basis in Australia: Dawkins, P. and Norris, K., 'Casual Employment in Australia' in (1990) 16 *Australian Bulletin of Labour* 157, 163.

[50] Brooks, B., 'Aspects of Casual and Part-Time Employment' in (1985) *Journal of Industrial Relations* 158, 166.

It is in the vertical axis that the number of hours worked is crucial. A definition of 'part-time' work using this criterion would correspond to the definition used by the International Labour Organisation: 'regular' wage employment with the number of hours of work substantially shorter than is normal in the establishment concerned.'[51] In other words, despite the fact that the hours *per* week are less than is standard in the particular enterprise, the employment is nonetheless 'regular' in that a 'formal, continuing employment relationship exists.'[52]

In summary, the customary methods of classifying workers yield three possible permutations of 'part-time' employment: full-time temporary work (quadrant two), short-hour permanent work (quadrant three), and short-hour temporary work (quadrant four).

In the jurisprudence of Australia and the U.K., a 'part-time' worker refers either to a quadrant three or quadrant four employee. An employee is 'part-time' in the sense that he or she is engaged for fewer hours *per* week than is normal in the industry concerned. Moreover, there is no legal connection between hours worked and degree of permanency. That is to say, a 'part-time' worker can either be employed permanently or temporarily. What then is the legal definition of a 'part-time' worker in Japan?

3.2 *Legislation*

The Labour Standards Law[53] (L.S.L.) is the basic act regulating the contractual terms and conditions of the bulk of employment contracts in Japan. Introduced after the Second World War, it was the central element in the 'labour package' designed to strengthen the position of workers *vis-a-vis* their employers. Its 134 articles deal *inter alia* with general workers' rights, the labour contract, wages, working hours, safety and health, minors, women, training, accident compensation, employment rules, dormitories, inspection authorities, and sanctions. Employees not brought within the ambit of the L.S.L. must then find the basis for their employment in the provisions of the Civil Code which dates from 1898. They are denied access to what one Japanese academic calls the 'more stringent regulatory scheme' offered under the L.S.L.[54]

Article 9 of the L.S.L. defines a 'worker' *(rōdōsha)* to whom the Law applies, as 'one who is employed at an enterprise . . . and receives wages therefrom.' The two stipulated criteria are therefore employment and receipt of wages. However, as the latter often points to the former, it is the collection of financial remuneration that is the greater catalyst for the application of the L.S.L. to the individual worker. Accordingly, any worker who receives payment for labour which is

51 Thurman and Trah, *op. cit.* n.10, 23.

52 *Ibid.*

53 *Rōdō Kijun Hō* (Law No.49 of 7 April 1947).

54 Nishimura, K., in Kitagawa, *op. cit.* n.32, part 12, 76. For example, whereas the period of notice required prior to termination in the case of a contract under the L.S.L. is 30 days, under the Civil Code the equivalent period is two weeks. The fact that in the 1990s domestic employees are excluded from the benefits of minimum terms and conditions is curious. The lack of formal regulation means not only that many of the South-East Asian women who are employed in the homes and hostels of Japan's new rich are illegal foreign workers, but that they are unprotected, unlike their fellow country*men* who work as labourers in Japan.

independent of the number of hours worked, is a 'worker' under the terms of the Act. As such, he or she is entitled to the protection offered by the L.S.L.

There are some standard exceptions to this general coverage. Independent contractors are excluded.[55] Also, article 8 of L.S.L. excludes from the ambit of L.S.L. coverage workers who are either domestic employees or employees in a family business. A further group of workers is distinguished by its employer. The standing, rights and duties of most local government employees and all national government employees are regulated by the National Government Employee Law[56] and the Local Government Employee Law,[57] not by the L.S.L.

Putting these exceptions and other broader statutory definitions of the term 'worker' aside, there exists no further subdivision of the employee work force. According to the L.S.L., a worker is a worker. An examination of the statute books therefore brings us no closer to discovering the meaning imposed on, and infused into the term 'part-time employment' in Japan.

The omission of specific mention of 'part-time' and other 'irregular' workers in legislation is not, of course, peculiar to Japan. The general concern of Australian legislation also is with 'employees.' However, at common law the distinction between categories of employee and between employee and an independent contractor is often an arbitrary one.[58] In order to drive home their intent and thereby cover those 'part-time' workers liable to be omitted under the common law definition, Australian drafters have taken to introducing deeming clauses into legislation. Thus, for example, section 3 of the New South Wales Long Service Leave Act (1955) extends the definition of employees to include milk vendors, cleaners and other workers who would not otherwise be so characterised at common law. In so doing, the Australian Legislatures have recognised the non-'regular' work force in a way that the Japanese Legislature has not.

Indeed, in Japan there is evidence pointing to the reverse trend. Rather than drafting inclusive clauses, small groups of workers are actually excluded from basic legislative provisions. The exception for domestic employees in article 8 of the L.S.L. mentioned above is one such example. A further example is in article 8 of the Minimum Wages Law (M.W.L.).[59] This article provides for the possible exception from its application in the case of certain classes of workers including trainee or probationary workers, workers with mental or physical handicaps, and short-term or short-hour workers.

In Japan, other than the exception for short-term or short-hour workers in the M.W.L., there is no attempt to deal at a statutory level with the large numbers of workers who are engaged for shorter than normal hours or on a temporary basis.

55 Note, however, that distinguishing a true contractor from an employee is often a difficult question of fact — see *e.g.*, *Ostuka Inka*, Tokyo District Court, 6 February 1970, as discussed in Nishimura, K., '*Rōdōsha*' (Workers) in Kataoka, N. (ed.), *Shin Rōdō Kijun Hōron* (Legal Theories of New Labour Standards) (1982) 76.

56 *Kokka Kōmuin Hō* (Law No.120 of 21 October 1947).

57 *Chihō Kōmuin Hō* (Law No.261 of 13 December 1949) based on the National Government Employee Law above.

58 Hepple gives the example of a bass player in an orchestra for 13 years. He was held to be self employed whereas musicians instructing for 16 weeks at a summer camp were found to be employees under a contract of employment : Hepple, 'Restructuring Employment Rights' (1986) 15 *Industrial Law Journal* 69, 70.

59 *Chingin Saitei Hō* (Law No.137 of 15 April 1959).

3.3 *Judicial Precedent*

The Japanese courts have developed *two* tests in relation to the 'part-time' work force: one (referred to below as the *Toshiba* test) which determines permanency in the case of short-term workers; the other (referred to below as the *Tōyō Seiki* test) which determines permanency in the case of short-*hour* workers.

3.3.1 *Standing of Short-Term Workers*

A traditional distinction made by the Japanese courts since the enactment of the L.S.L. in 1947 is between those workers employed for a prescribed contractual period and those for whom the contract is of an indefinite length. The basis for this distinction is found in article 14 of the L.S.L. Article 14 stipulates that where a contractual term is fixed, it can be for no longer than one year.[60] In Japan one cannot find contracts for two, three or more years. Article 14 creates a natural cleavage between workers whose contract is for one year or less, and workers under contracts for an unlimited period. The relatively short-term nature of workers in the article 14 fixed-term category has allowed Japanese industry easily to manage economic difficulties by shedding these more temporary workers. However, a simple distinction based on contractual length was not to remain.

In the 1970s the combined employment effect of the two oil shocks and structural adjustment within Japanese industry, particularly in the manufacturing sector, was severe. Work forces were cut and article 14 fixed-term workers were amongst those who bore the brunt of the cutbacks.[61] In response to this situation, and with a view to providing a form of review of decisions to sack temporary workers, the Japanese judiciary developed a 'doctrine of transformation' (*tenkaron*) of limited-term contracts to unlimited-term contracts. By recognising that a sufficient number of renewals of a fixed-term contract served to transform it into one similar to a contract for an indefinite term, the courts have extended protection against dismissal to the article 14 short-term workers.[62]

When is the 'doctrine of transformation' applied for the benefit of the employee concerned? When is a fixed-term contract viewed similarly to an unlimited term contract? In 1974 the Supreme Court held in the case of *Toshiba Temporary Workers*[63] that 'in the case where repeated renewal has brought about circum-

[60] This provision does not apply to contracts for a specified project. One author suggests that this article was introduced to avoid permanently indentured labour: Yamamoto, Y., *Joshi Rōdō Hōsei* (The Legal System and Female Labour) (1987) 341. Note also that in the same article an exception is granted in the case of employment for a specific project.

[61] See Dore, R., *Flexible Rigidities* (1986) for a detailed examination of this period. Dore suggests that male workers near retirement age were the main group targeted during this period.

[62] Within academic and judicial circles in Japan, the means and timing of this transformation are contentious. Was the worker employed under an indefinite contract *ab initio*? Such an interpretation denies the freedom of contract traditionally so highly valued in Japan. If the worker was not employed under an indefinite contract *ab initio*, when did the transformation occur? In practice these questions are not considered. The issue is side-stepped by a legal fiction adopted by the majority of legal professionals. In this majority view, a contract for a fixed term cannot become one for an unlimited period. Rather, it becomes 'like' a contract for an unlimited period. A Japanese writer describes the transformation thus: 'the fact that [the contract] has been repeatedly renewed gives rise to a certain mutual trust relationship under which an employer is expected not to refuse renewal of the contract without a fair and just reason': Hokao, K., quoted in Gould, W., *Japan's Reshaping of America's Labour Law* (1984) 107.

[63] *Toshiba Rinjikō Jiken* (the '*Toshiba* case'), Supreme Court, 21 July 1974, in 28(5) *Minji Hanreishū* 927.

stances which do not differ from unlimited term contracts' the worker should be treated as a worker on a contract of unlimited term.[64] Contractual renewal is stated to be the means whereby this transformation occurs.

Under the *Toshiba* test for short-term workers, length of employment comes to play a significant role in distinguishing the 'real' and less protected temporary worker from the more secure 'regular' worker. The circumstances of employment are considered. But to the extent that length of service is a factor, the effects of the lifetime employment system of the internal market are observable. Clearly, protection against dismissal is a reward for company loyalty.

The effect of this doctrine is to blur the division of workers based on contractual term. Even if the contract is *prima facie* for a fixed term, in reality it may be found to have been converted to one of unlimited duration. The short-term worker may in fact be a long-term employee. Thus, the mere classification of workers into those contracted for fixed and indefinite terms does not *ipso facto* provide a definition of the 'part-time' employee.

The logical question, consequent on finding that length of employment is important in the judges' determination of a given worker's status, is how many renewals are deemed sufficient to merit the status switch? The answer to this question could provide the definitive amount of worker 'loyalty' required of the Japanese worker. Worker expectations could thereby be brought into line with legal standards — thereby providing consistency between theory and practice and some objectively measured standard for the worker.

However, the approach of the courts has not been to specify the number of renewals nor the length of employment required. Judicial opinion is that the worker's status is to be determined by the facts and 'trust relationship' of each case. In one recent case considered in detail below, the fact that a one year contract had been renewed *once* was sufficient.[65] In a 1986 case, the decision by employers to terminate the employment of workers whose contracts had been renewed five times over, was held to be valid. The *five* renewals were not sufficient to transform the contract and relationship into one similar to an unlimited term contract.[66]

Here then is a ruling in relation to 'part-time' work. In Japan, regardless of contract length, a distinction is drawn between those workers who are in fact long-term and whose relationships with the company are analogous to those of unlimited term workers, and those workers who, it is envisaged, will be temporary workers. In other words, the horizontal axis in figure 3 above is of significance.

3.3.2 *Standing of short-hour workers*

But what consequence, if any, is the distinction between short-*hour* and long-*hour* workers, the vertical axis in figure 3? The Nagoya District Court in the case of *Tōyō Seiki*[67] considered this distinction.

64 Terasawa, Deta and Takubo, *op. cit.* n.20, 5.

65 *Sanyo Electric* case, *supra* n.20.

66 *Hitachi Medeiko Jiken* (the '*Hitachi Medical* case'), Supreme Court, 4 December 1986, in (1986) 486 *Rōdōhanreishū* 8.

67 *Tōyō Seiki Jiken* (the '*Tōyō Seiki* case'), Nagoya District Court, 30 September 1974, summarized in *1989 Pāto Koyō Tokuhon* (1989 Reader in Part-Time Employment) (1989) 336.

The task of the Court in the *Tōyō Seiki* case was to rule on the status of a woman 'part-time' worker employed on a contract of unlimited term.[68] She had been employed for three years in a position with duties similar to other 'regular' workers. In this case the District Court held that in determining her status the appropriate test was the 'degree of the worker's connection with the company (*kaisha to no musubitsuki no doai-tō*).' If the involvement is weak (*kihaku*) the employee will be evaluated as temporary, whereas if the links with the company are strong then the worker will have 'regular' status. After a consideration of:

(1) the stated contractual period;
(2) the plaintiff's actual length of service; and
(3) the circumstances of engagement,

the Court held in favour of the plaintiff, according her status similar to a 'regular' worker and the corresponding protection against dismissal. This judgment has been upheld since then.

A comparison of the two tests described above (*Toshiba* dealing with short-term workers and *Tōyō Seiki* covering short-hour workers) reveal important commonalities. Significantly, both tests draw a distinction between the temporary and the permanent employee. In doing so, they show an awareness that 'temporary workers are not always temporary workers in real life (*Rinji koyōsha wa kanarazu shi mo jitai ni suguwanai mono de aru*).'[69] Both tests are highly flexible and require consideration of the whole arrangement of employment, the employment 'relationship'. Both tests, however, feature length of employment as a significant determinant of the 'relationship'. In fact, the substantial overlap between the tests has led some practitioners to confuse the two.

Figure 4 Types of 'part-time' employment in Japan

Permanent	Temporary
Regular	Full-time worker on fixed term contract OR Short-hour worker with unlimited term contract OR Short-hour worker with fixed term contract

The effect of the similarity in the two tests could not be more dramatic. In Australia and the U.K. the vertical axis in figure 3 (*i.e.*, number of hours worked) is of minor import in determining employee status. In Japan however, the vertical axis is significant. Indeed, it is made to depend on the same criterion as the horizontal axis: the worker's relationship with the company. The number of hours

[68] Despite her notional 'part-time'status, she worked the same number of hours as 'regular' employees. The sole difference was that her starting and finishing times had been shifted an hour later to accommodate her family responsibilities. The case has, however, been applied to genuine short-hour workers in subsequent decisions.

[69] *Tōyō Seiki* case, *supra* n.67.

an employee works calls into question their status as an employee. If figure 3 were to be redrawn to represent current Japanese legal reasoning it would resemble figure 4 above.

3.4 *Consequences of the Japanese Categorisation of the Work Force*

We have seen that in Japan, as in Australia and the U.K., the work force is divided into the 'regular' and the 'temporary.' While the division is between identical poles in the three countries the similarities end there. In Japan, a temporary worker is a worker whose involvement in the company is limited, *either* temporally *or* qualitatively.

The consequence of defining a temporary worker as one whose connection with the enterprise is tenuous is to spread the net of temporary work wide. Any worker who receives different treatment from the norm fulfils the requirement for a temporary worker. A worker who works in geographically removed locations (*e.g.*, the homeworker in traditional or teleworker industries[70]) naturally has less connection with the company. A short-hour worker may also be a temporary worker on the ground that the shorter number of hours worked restricts total participation in the company.

In Japan, the method of measurement of company involvement is not addressed. While a well-known Japanese lawyer claims that the distinction between 'regular' and temporary workers bears no relationship to that between white-collar and blue-collar workers,[71] the limited number of 'part-time' professional employees in Japan shows that some connection between blue-collar workers and the temporary work force does exist. This notion is further reinforced by the inclusion of the employees' 'duties' as a factor for judicial consideration in many cases.[72] Thus the degree of management/responsibility within the company is treated as an indicator of company involvement. Perhaps 'regular' status and the associated benefits are only for the putatively responsible, company-oriented employee. The employment security of low-skilled workers is thereby minimized.[73]

The problem is compounded for women. Japanese women, in common with women of other cultures, are prevented by the lifestyle demands of marriage and family life from both continuous participation in, and full-time commitment to, the work force. Their interrupted participation in the work force is a hindrance to the development of the requisite length of service for permanent status. Further, their inability to spend the standard numbers of hours on the job is a hindrance to the receipt of permanent status.

Under Japanese law, a separate category of short-hour yet permanent worker, the 'part-time' employee of Australia and the U.K., does not exist. Short-hour workers are subsumed within the temporary category. The absence of a legal definition means that the label 'part-time worker' is freed to take on other, non-

70 *Naishoku* in Japanese.

71 Hanami, T., *Labour Law and Industrial Relations in Japan* (1985) 55.

72 *E.g.*, the *Sanyo Electric* case, *supra* n.20.

73 The Australian situation where ten percent of all short-hour workers are professionals, and over five percent of short-hour workers are in management, is rendered impossible in Japan: Lewis, H. *Part-Time Work: Trends and Issues* (1990) A.G.P.S. table 3, 84.

legal meanings. Reference to a 'part-time worker' in common parlance in Japan says less about the worker's hours of work than about the worker's age and sex; their social standing. Thus both their deviation from the norm and their inferior status are reinforced.

4. *THE RHETORIC OF GOVERNMENT POLICY*

The consequence of the apparent social labelling and work-place discrimination against the 'part-time' sector of the Japanese labour market have important consequences for government. If women beyond their 'Christmas-cake years' are unable to compete for 'regular' positions, policies aimed at countering or at least minimizing the negative effect of such discrimination become appropriate. Policy devices such as union regulation, income support, unemployment insurance and maximum staffing levels for temporary staff, all are relevant. The two steps taken by the Japanese Government have been in the form of ministerial administrative guidance.

4.1 *1984 Outline of Policies Relating to 'Part-Time' Work*

The first official statement concerning 'part-time' workers was issued by the Ministry of Labour in 1984.[74] Entitled 'Outline of Policies Relating to 'Part-Time' Work (*Pātotaimu Rōdō Taisaku Yōkō*)' its stated two-fold aim was to clarify the definition of 'part-time' work, and to establish procedures whereby 'part-time' workers were informed at the earliest possible moment of the terms of their employment.

In accordance with its first aim, a definition of 'part-time' workers was provided. 'Part-time' workers were those workers 'whose daily, weekly, or monthly prescribed hours are considerably less than ordinary workers engaged in the same work in the same location.'[75]

This definition provided by the Ministry of Labour is strangely unrelated to other interpretations of 'part-time' work. Unlike Japanese judicial dealings with 'part-time' employment, subjective determinations of 'relationship with the company' and length of employment are no longer material. Unlike the Japanese public's view of 'part-time' employees, the definition ignores gender. Rather, the definition takes the position somewhat similar to a common law view of 'part-time' work, that hours worked determine standing as a 'part-time' worker.

However, the definition provided in the '1984 Outline of Policies' is deficient in that the scope of the 'part-time' worker is only narrowed slightly. While it excludes the so-called 'part-time' workers who may actually work full-time hours, it is still broad in that it includes contractual, seasonal and casual or temporary workers. Under the Ministry of Labour definition, the 'part-time' worker remains

[74] Rōdōshō, (1984) 59 *Hatsuki*. '*Hatsuki*' is the Ministry of Labour abbreviation for an administrative notice usually promulgated by the Labour Standards Office: '*Honsho Ryakugorei Nado*' (List of Abbreviations Used) (1988) 917 *Jurisuto* 4. The notice is referred to below as 'Outline of Policies (1984)'.

[75] Outline of Policies (1984) art.2.

indistinguishable from the short-hour but temporary worker. Furthermore, it makes no statement regarding the permanency of 'part-time' work.

The second aim of the Ministry of Labour's '1984 Outline of Policies' was to encourage employers to provide full information regarding the job to potential 'part-time' employees at the interview stage. Whereas work rules covered mainstream 'regular' employment, they too frequently omitted the terms and conditions of 'part-time' employees. Thus, until 1984 'part-time' workers were entering employment without having the terms of their employment specified. 'Part-time' workers were placed in a weak position *vis-a-vis* their basic rights. To curtail these practices and encourage the provision of information, the Ministry of Labour drafted a model contract for use by industry. This measure met with limited success.[76] The '1984 Outline of Policies' suggestions are not binding.

In any case, the mere provision of information to 'part-time' workers does not change their status from workers within the external labour market. Informing workers of frequently inferior contractual terms which they have had no part in drafting is to treat the symptom and not the disease.

4.2 *1989 Guidelines Covering Matters for Consideration in Setting Working Conditions and Treatment of 'Part-Time' Workers.*

Both aims of the '1984 Outline of Policies' were recently repeated in the second official statement on 'part-time' work issued by the Ministry of Labour. This document is entitled 'Guidelines covering matters for consideration in setting working conditions and treatment of ''part-time'' workers'[77] (abbreviated to *'Pātotaimu rōdō shishin'*).

The development of governmental policy can clearly be seen in a comparison of the 1984 and 1989 statements. Six significant additions were made in the '1989 Guidelines':

(1) it was officially acknowledged that 'part-time' workers are 'workers' within the ambit of article 9 of the L.S.L. and that they therefore possess as a matter of course rights to the benefits contained in Japan's labour legislation;[78]
(2) a broad principle of equality of treatment as between 'part-time' and 'full-time' workers was established. In particular, such equality was to be borne in mind when evaluating remuneration levels and access to company facilities;[79]
(3) it was established that training should be given to 'part-time' workers to equip them for the proper execution of their duties;[80]
(4) it was established that endeavours towards a lengthened contractual period should be made by employers;[81]
(5) the employer was recognised as having a responsibility to consider individual workers' private circumstances when contemplating setting or changing working hours or days;[82] and
(6) it was established that overtime work should be avoided where possible.[83]

76 *E.g.*, in violation of L.S.L. art.15, 8.3 percent of 'part-time' workers in 1988 did not have their wages specified in writing: Rengō, *op. cit.* n.14, 8.

77 Rōdōshō, Notice No.39 (1989), referred to below as the '1989 Guidelines'.

78 While this applicability was previously admitted by experts in the area and publicity by the Women's bureau in the Ministry of Labour had served to make it a more generally known fact, the inclusion of this statement in art.3 of the 1989 Guidelines has placed the issue beyond doubt.

79 Arts 3.2.4, 3.2.5 and 4.

80 Art. 3.3.3.

81 Art. 3.2.3.

82 Art. 3.2.1.

83 Art. 3.2.1.

The above six additions together with the earlier recommendations are positive moves aimed at overcoming some of the institutional and cultural discriminatory trends in the labour market mentioned in part two above. But both the '1984 Outline of Policies' and the '1989 Guidelines' are recommendations only. They carry no sanction-endorsed weight, and have been disregarded by courts and businesses alike.

On 7 December 1992, the Study Group Dealing with 'Part-Time' Labour Issues submitted a report to the Ministry of Labour in which two recommendations were made. The first recommendation was that the 1989 Guidelines be legalised. Secondly, it was recommended that prefectural 'part-time' Labour Centres be established to offer counselling and assistance to 'part-time' workers.[84]

Government policy is being developed in response to the marginalised position of the 'part-time' worker, but it has yet to be effective. The question remains whether the response by the Ministry of Labour is sufficient given the extent of marginalization of the 'part-time' worker as seen in part two, and the strength of judicial bias as shown in the following section.

5. *THE RHETORIC OF PROTECTIVE JUDICIAL DOCTRINE*

In Japan, most of the legal standards relating to 'part-time' workers originate in courts. Rather than implying a wealth of judicial opinion on the subject, this indicates the dearth of legislation dealing with the issues raised by 'part-time' employment. Nonetheless there is one area where a substantial body of judicial doctrine has evolved independently of any legislative base. This relative oasis is dismissal doctrine.

Dismissal doctrine is in fact the only area of law where the distinction between the 'part-time' or temporary work force and the 'regular' work force is debated. Thus, the cases referred to in part two above are all cases challenging the employer's unilateral termination of the employment relationship of a 'part-time' employee. As a result of this activity in the area of dismissal, protection for the 'part-time' worker against abuse of the dismissal right has also been extended over time.[85]

5.1 *History of the Right to Dismiss*

In the legal reforms after the Second World War, an employer's basic right to terminate the employment contract of any worker was modified. Under the Japanese Civil Code (1898) the employer could dismiss workers with two weeks notice, at the conclusion of their contract, or for unavoidable cause.[86] Since 1947, however, the fundamental position has been contained in article 20 of the L.S.L. Under this provision, employers are to give 30 days notice, or the equivalent period's wages, to workers selected for dismissal.[87]

84 These centres, called 'Ladies Hello Work', are targeted specifically at women who want to return to the workforce: (1993) 32(2) *Japan Labour Bulletin* 4.

85 Litigants in other areas are encouraged.

86 Arts 627 and 628. The interpretation of 'unavoidable cause' in Japan is similar to the concept of 'act of God' in the common law.

87 Interestingly, the statute is silent in relation to worker obligations to provide notice in the reverse situation.

Further general conditions on dismissal of employees are found scattered throughout labour legislation. These extra restraints are threefold. Firstly, discriminatory treatment on the basis of nationality, creed, or social status of the worker is outlawed.[88] Secondly, there is a prohibition of dismissal of a worker who is convalescing after medical treatment or childbirth.[89] Lastly, the discharge of a worker on the grounds of his or her involvement in a trade union is prohibited.[90] Where a collective agreement or work rules are operative between management and union, further conditions on the discharge of workers may exist.[91]

In seeking to challenge a sacking on the grounds of one of the above provisions, the worker ('part-time' or otherwise) was initially hampered by the lack of compulsion on the employer to provide reasons for the decision. Indeed, academic criticism of the legislative system over this omission was severe in the 1950s and 1960s. Over time, judicial sympathy aligned itself with the majority view of academics, and by the mid-1970s the weight of case law was in favour of a test of the employer's reasons for dismissal. The doctrine developed is known as the doctrine against abusive dismissal (*kaiko kenri ranyō*).[92] Today this doctrine, still without a statutory basis, is an established part of Japan's labour law.

Under the doctrine against abusive dismissal, strict conditions are placed on the employer's right to dismiss in the case both of individual dismissal and collective dismissal. The employer must show 'just cause' (*gōriteki na riyū* or *seitō na riyū*) for his or her decision in order to refute the claim of illegal dismissal.[93] The components of 'justice' or 'reasonableness' differ according to whether the termination is of an individual worker or whether the decision was forced by economic necessity.

In general, in the case of an *individual* employee, dismissal is reasonable in the following circumstances: as a disciplinary measure in a situation where the employment rules are persistently broken; when the union calls for the sacking (for example, where a union shop exists); under the urgent necessity of management; or in the situation where the employee consistently under-performs, or lacks the skills for which he or she was employed.[94] In the case of a *collective* dismissal on economic grounds, a series of judicial decisions during the recession of the 1970s established a compulsory procedure to be followed prior to making a valid personnel cut. Four aspects are considered in turn by the courts:

(1) whether the company's financial circumstances necessitated any kind of personnel cut;
(2) the necessity of dismissal as opposed to less severe cost-effective measures (for example,

88 L.S.L. art. 3.
89 L.S.L. art. 19.
90 T.U.L. art. 7(1).
91 *E.g.*, the obligation to consult with union leadership before making a decision. But the low unionization rate of Japan and the lower rate for Japan's 'part-time' workers means that often the collective agreements will not cover non-'regular' workers.
92 The doctrine finds its roots in the civil law's abuse of rights formula. In Japan the formula is given form in the Civil Code art. 1(3): 'No abusing of rights is permissible.' See also the case of *Nihon Shokuen Seizō*, Supreme Court, 25 April 1975, in 29(4) *Minji Hanreishū* 456.
93 While theoretically the employee has the full burden of proof of the illegal act, he or she is only required to satisfy the evidentiary burden. The court will then ask the employer to prove his or her act had just cause: Hanami, T., 'A Guide to Personnel Management in Japan: Law and Practice Part IV, Term of Employment' in (1989) 4 *Labour Issues Quarterly* 25.
94 Sugeno, K., *Rōdōhō* (2nd ed. 1989) 356.

soliciting voluntary resignation, relocating workers, and reducing overtime and compulsory paid leave);
(3) the appropriateness of the criteria applied in selecting staff for redundancy; and
(4) the appropriateness of the means used by the company to achieve their goal (for example, the extent of worker consultation prior to notification).[95]

In the case of a dismissal of an individual '*part-time*' worker, protection against abusive dismissal has increased significantly in the last two decades in Japan. Originally, provided the familiar two conditions were satisfied (*i.e.*, the 'part-time' worker's connection with the company was sufficiently great and, if a contract for a fixed term existed, that the contract had been transformed by renewal into one analogous to a non-fixed-term contract) the employer was obliged to show 'just' or 'reasonable' cause in a like way as to a 'regular' worker.

However, the situation was less certain in relation to the collective dismissal of a group of 'part-time' workers. The above four-step investigation was instituted in relation to the 'regular' work force. In cases as recent as 1988[96] the courts had left ambiguous the question of whether the same efforts to avoid dismissal were expected of employers when dismissing the 'part-time' work force. In academic circles, the assumption appeared unquestioned that 'part-time' and temporary workers should be the first class of worker targetted for redundancy in economic difficulties. In 1990 this assumption received a jolt in the form of an Osaka District Court decision.

5.2 *The Case of* Sanyo Electric

The plaintiffs' claim arose when, on 18 February 1987, 1,180 'part-time' employees of Sanyo Electric company's four manufacturing divisions in the Osaka district were given notice of the termination of their employment. Sanyo's grounds for the decision to dismiss were the business slump (including losses incurred by the manufacturing divisions of 15 billion yen in 1986) caused by the effect of the high yen on exports.

The group of employees selected comprised almost all the company's 'fixed term' staff. These workers were all women who were engaged for one yearly periods. In addition to the 'fixed term' staff, there were 'regular' and 'temporary' employees. The former were on an unlimited term contract, while the latter were employed on contracts requiring renewal every two months. Differences in working hours between the three types of workers were insignificant. 'Regular' workers worked eight hours daily. The hours of work of 'fixed term' staff began one hour later than those of the 'regular' worker, but finished at the same time. 'Temporary' employees both started work one hour later than the 'regular' employees (together with the 'fixed term' workers) and finished one hour earlier. The duties of the 'fixed term' employees were mainly on the assembly line, but so were those of the 'regular' workers in the manufacturing division.

In considering the validity or otherwise of the personnel cut, the Court had to decide two issues. As a threshold issue, the status of the plaintiffs had to be settled. The Court had to deal with the fact that the plaintiffs were 'part-timers'

[95] *Ibid.* 362-4.
[96] *Hitachi Medical* case, *supra* n.66.

on fixed-term contracts. Secondly, if the plaintiffs were to be treated akin to 'regular' employees, what, if any, were the standards of 'just cause' required of the employer?

In relation to the status of the employees, the test for short-hour employees used in the *Tōyō Seiki* case (see part three above) required the Court to evaluate the nature of the plaintiffs' 'connection with the company.' Before the Court was evidence that the older women 'fixed term' employees were employed to do basically the same assembly-line work as the 'regular' female staff. It was concluded that if 'part-time' workers' duties and 'regular' workers' duties could be mixed interchangeably, then the connection linking the workers to the company was sufficiently strong. The submission, by the defendant company, that there was a material difference between the workers because of the unavailability of a means for a 'fixed term' worker to become a 'regular' worker and take on the benefits of that more secure status was rejected.

But the determination that the plaintiffs had similar standing to 'regular' workers (in relation to hours) did not pre-empt the answer to the question of whether the *fixed-term contract* had been transformed into an *unlimited term contract.* Before the workers' status could be decided conclusively, the contractual hurdle had to be negotiated. Had the relationship been renewed sufficiently to make the employees indistinguishable from unlimited term employees? Based on the facts that:

(i) the positions of 'part-time' staff were obtained only after two years successive service as temporary staff;
(ii) the contracts' renewal had never been refused until the termination at issue;
(iii) all the 'fixed term' staff had their contracts renewed at least once; and
(iv) they were engaged in the indispensable work of the company's manufacturing process,

the Court held that the contract should be viewed as similar to an unlimited term contract.[97]

Having deftly applied doctrine to the facts to hurdle the two usual barriers of employment for a short term and short hours, the Court arrived breathless in unfamiliar territory. If the case had been one of the dismissal of an individual 'part-time' worker, at this point the Court would have proceeded to an examination of the reasonableness of Sanyo's grounds. If unreasonable, an order to void the dismissal and reinstate the worker would have been made. However, this case involved not a single worker, but 1,180 workers. There was no previous ruling on the application of 'just cause' in the case of a personnel cut of nearly 1,200 'part-time' workers.

The District Court in the *Sanyo Electric* case broke new ground in requiring the four-fold procedure for personnel cuts of 'regular' staff to be applied in the case of 'part-time' staff. Only if Sanyo could satisfy the Court that it had exhausted the four measures would the sacking of the 'part-time' workers be valid.

Dealing with the four points in order, the Court firstly considered the financial imperative forcing the company's manufacturing divisions to cut employee num-

[97] Sugeno, K., 'Management Flexibility in an Era of Changes: the Courts' Balancing of Employer and Employee Interests' (1991) 30(10) *Japan Labour Bulletin* 5, 7.

bers ((1) above). The extent of loss was judged by the Court to be sufficient for preventative action.

The second obligation ((2) above) entailed the company pursuing all means less disruptive to the workers' lives prior to embarking on a course of collective redundancy. In the instant case Sanyo had: (i) relocated 84 'regular' staff; (ii) accorded paid leave to all staff; (iii) reduced the working hours of non-'regular' staff; and (iv) terminated the employment of the 'temporary' staff. In spite of these measures, management considered the cutting of its 'fixed term' employees appropriate. The Court, however, had to be convinced that the company took all reasonable steps in the circumstances to avoid the sacking of 'fixed term' employees. In reaching a conclusion it not only considered the status of the employee, but also external factors including:

(1) the company's overall profit margin in the previous fiscal year of 10,100 million yen;
(2) the company's employment of 527 new female graduates in the same year as the sacking of the 'fixed term' workers and 884 new female graduates in the following year; and
(3) the fact that wage levels were the fourth highest in the industry at the time of the sacking and that they remained high after sacking.

Moreover, the Court reasoned, Sanyo's overall capital was ranked 61 on a list of Japanese companies. Given this relative position, in the Court's opinion the company should have had sufficient reserve capital to endure the worst of the economic downturn. Further strengthening their resolve was Sanyo's allotment of unsecured company bonds near the time of the sacking.

Reasonableness sufficient to satisfy 'just cause' was not found. The Court held that the steps the company ought to have taken prior to engaging in a personnel cut on such a scale were to ascertain the number of redundant personnel required, then to call for voluntary resignation. In omitting to exhaust step (2), the defendants failed to justify with reasonable grounds the termination of its 'fixed term' staff. Reinstatement was ordered.

Subsequently, the reinstatement order was stayed pending an appeal to the High Court. The appeal, however, was abandoned as an out of court agreement was negotiated and signed in December 1991. Under the terms of the settlement the women were to return to their employment.[98]

5.3 *Comment on the Case of* Sanyo Electric

Repercussions from this case are various and will assuredly become clearer with the passage of time. For 'part-time' workers, however, the judgment has both a positive effect and poses new problems.

5.3.1 *Positive Effect of the Decision in the Case of* Sanyo Electric

This decision should be welcomed as an addition to the case law protecting Japanese 'part-time' workers from abusive dismissal for two reasons. Firstly, employers must satisfy a more onerous set of requirements before they can dismiss 'part-time' workers, where these workers are more or less identical to 'regular' workers. As stated above, previous cases involving the reduction of

[98] Nakayama Kazuhisa, letter to the author dated 26 February 1992.

large numbers of 'part-time' employees were dismissed by the courts at the threshold question of status, and the issue of the extent of measures to be taken by the employer to avoid the sacking had not been decided. Now it appears that 'part-time' workers whose status is similar to that of 'regular' workers are, in fact, to be given the same protection as 'regular' workers in collective redundancies.[99]

A second point of interest is that in the *Sanyo Electric* case, the Court looked at the broader economic climate in determining whether or not the steps taken by the company to avoid redundancy were sufficient. Despite the four manufacturing divisions operating as distinct financial entities, the situation and profit margin of the company as a whole was the relevant consideration.[100] The lines within the company were blurred, with responsibility being attributed to the larger economic unit. Indeed, the extent of protection granted in the 1990 judgment undoubtedly rang bells of alarm throughout large industry in Japan. Its effect, if followed in future cases, would be to make employment adjustment by large employers significantly more difficult.[101]

5.3.2 *Criticism of the Decision in the Case of* Sanyo Electric

For the 'part-time' worker the *Sanyo Electric* decision also poses problems. In the first place, the threshold issue of status remains a minefield for the 'part-time' worker. The central problem arises from the two-tiered nature of the test. The question of status is raised wherever there is a contract for a specific term or whenever the worker works shorter hours than a 'regular' worker. If the worker works both a specific term and shorter hours then the question must be answered twice, with double the opportunity for an adverse holding. The possibility exists that while the duties of a particular 'part-time' worker may be similar to those of a full-time employee, the length of employment may not have been sufficient to allow renewal of the contract. This situation would arise, for example, where a 'part-time' teacher is employed on a yearly contract but after the initial appointment the contract, is not renewed. Under Japan's two-tiered test, the teacher is likely to fail on the fixed-term leg: the contract will not have been renewed sufficiently to transform it into a contract of unlimited term. This is despite the work content and other connections with the employer being as strong as those of a regularly employed teacher.

Secondly, the logic of placing length of employment as a major factor determining whether the worker is a temporary worker on the one hand, or to be treated as a 'regular' worker on the other, must be questioned. The 'part-time' worker must earn the benefits and protection by loyalty to the company. The longer one stays, the more benefits accrue. In Australian courts, the emphasis on the length of employment as being key to the question of status was specifically rejected in the case of *Hackshalls v. Pritchard.*[102] In addition, while the expected length of

[99] Arguably this is an obvious corollary. The fact that it was not considered so by the Japanese Court and academics shows the extent of the gulf separating 'part-time' workers from regular workers.

[100] *Cf.* the *Hitachi Medical* case, where the division's financial independence was sufficient for it to be treated as a separate entity from the parent company.

[101] Note that in the *Sanyo Electric* case, the dismissal of the temporary workers engaged on two monthly contracts was not the subject of challenge. The response by industry to the increasing restraint on the dismissal of part-time workers contracted for one year may be to shorten contracts further to require renewal every two months.

employment of a 'part-time' worker is a relevant consideration in the question of status, the actual length of employment is not.[103] For the woman returning to the work force, the centrality of length of employment in the test of status is highly discriminatory. She faces this loyalty testing time, whereas 'regular' recruits straight from university and school do not. 'Regular' recruits join the ranks of the internal or secure work force straight away.

The existence of article 14 of the L.S.L. restricting stipulated contract length to a maximum of one year adds an unnecessary complication to the 'part-time' worker's situation. Employers are required by law, in form at least, to restrict their employment obligations to one year. The repeal of this legislative provision would grant the opportunity for a gradual strengthening of ties with the company to be represented in contractual form: security of sorts for the 'part-time' worker. At least the gap between form and expectation would thereby be reduced. A corollary of the repeal of article 14 of the L.S.L. would be increased competition between employers, as women workers' loyalties are more clearly delineated. Women returning to the work force would lose their automatic classification as members of the external market. The opportunity for a market based on skill to develop would thereby be created.

Thirdly, it is a feature of Japanese labour law that the doctrine of abusive dismissal is entirely based on judicial 'precedent'. The fact that no legislation provides objective standards or guidelines in the exercise of judicial discretion gives the doctrine, in its civil law setting, particular flexibility. The court can balance management interests and the job security of workers on a case by case basis. On the other hand, precisely because the status of workers is decided on a case by case basis, 'part-time' workers are provided with no overall guide as to status. 'Part-time' workers are required to engage in the arduously slow and expensive process of litigation in Japan prior to learning of the application of principles in their particular case. This is a prohibitive barrier for many 'part-time' workers who may not have significant savings of their own to draw on. Furthermore, 'part-time' workers may not want to subject themselves, or their family, to the significant social pressures which litigation in Japan can induce.[104] Moreover, given the prevalence of discriminatory employment practices (as discussed in part two), women are liable to be treated in ways other than their connection with the company would suggest.

Fourthly and finally, just as we have seen that the 'part-time' worker can rarely become a full-time worker in practice, so too in judicial doctrine the 'regular' worker and 'part-time' worker are never really accorded similar status. While the courts have extended the principles of 'just cause' to 'part-time' workers, they have not challenged the assumption that 'part-time' workers should be the first to

102 (1934) 33 A.R. (N.S.W.) 290.

103 This is the standard in the European Union also: Rōdōshō, Fujin-kyoku and Fujin Rōdō-ka, *op. cit.* n.7, 10.

104 The 'part-time' plaintiffs in a case dealing with wage discrimination on the grounds of sex were the recipients of nuisance telephone calls urging them to 'forget about the court case' and threatening the life of family members: Owaki, M., '*Dōichi Rōdō To Fujin Pāto No Chingin Sabetsu Soshō*' (Litigation Over Wage Discrimination Against Part-Time Women For Equal Work) (1983) 1076 *Rōdō Hōritsu Junpō* 31, 36.

be dismissed in times of economic hardship. The Court in *Sanyo Electric*, for example, held that it was legitimate to cut the 'part-time' work force first. Thus the fundamental divide between the temporary and the 'regular' remains. The sole reason that the 'fixed term' women escaped the guillotine in this case was because the defendant company had made insufficient efforts to avoid the layoffs, not because the 'part-time' workers enjoyed inherently secure positions.

In conclusion, the approach of the Court in *Sanyo Electric* conforms to a pattern noted by Professor John Haley in family law, rural tenancy laws and some early pollution cases.[105] That is, rather than deal with the rights of the parties, the solution preferred by the Japanese Court was a community-oriented one. The Court did not prioritize the rights of the parties in dispute. It did not develop or apply universal norms which would keep the parties at arm's length. Rather, the Court extended the duty of the party in the stronger position. In this case the duty of the employer was to exhaust all other cost-cutting measures prior to dismissing the 'part-time' work force. The duty imposed was a procedural one, aimed at drawing the parties together in information exchange, consultation and negotiation. Community consensus appeared paramount.[106]

Curiously, however, it is community consensus at a cost to both parties. Firstly, 'part-time' workers pay a price because they return to the negotiating table still stigmatized as members of a marginalized work force. For the plaintiff 'part-time' workers in this case, the negotiation was successful. They maintained their jobs. But that is of little comfort for the next group of 'part-time' workers who are made redundant. Secondly, employers pay a price; they lose autonomy over management decisions. Indeed, the Court in *Sanyo Electric* intimated that redundancy measures of any sort by any company with significant assets will be severely scrutinized.

Thus the Court engaged in an astute balancing act, the key element of which was community consensus. But in picking community consensus as the key feature, the courts do not suffer the corresponding loss of power one would expect thereby. As Haley remarks, 'the role of the state is more altered than diminished.'[107] At the same time as the courts are pushing the parties out of the court room and into bilateral consensus, they are also extending their own powers of review. On this view, the winners in the *Sanyo Electric* case were first the courts, second the employers, and third the 'part-time' workers. The *status quo* remains.

6. *THE RHETORIC OF LEGISLATIVE PROTECTION*

Japan's legislative provision both ameliorates and contributes to the 'part-time' worker's poorer working conditions.

6.1 *Wages Legislation*

Japan has a Minimum Wages Law (M.W.L.) but, in fact, has no minimum wage specified in that law. It has no minimum wage applicable across industries,

[105] Haley, J., *Authority Without Power: Law and the Japanese Paradox* (1991) 85.

[106] This point has also been well-made in relation to administrative law doctrine. See Young, M., 'Administrative Guidance in the Courts: A Case Study in Doctrinal Adaptation' in (1984) 17 *Law in Japan* 120.

[107] Haley, *op. cit.* n.105, 200.

nor a formal, central wage-fixing mechanism. Rather, the function of the M.W.L. is to provide two means for setting wages. The first is primarily a procedural device. An industry-wide collective agreement may be brought before the Ministry of Labour (or the Chief of the Prefectural Labour Standards Office) and its wage levels recognised as a minimum wage. A second authority for fixing a minimum wage is given to the Central and Local Minimum Wage Councils set up under the the same Act.[108] At the instigation of the Ministry of Labour (or the Chief of the Prefectural Labour Standards Office) the Councils may research and approve minimum wages in a given industry, occupation or region.

The use of the above wage fixing mechanisms for the benefit of 'part-time' workers has been limited. The mechanisms are rarely used: 'As yet minimum wages have mainly been decided for the traditionally low wage industries . . . mining (for example).'[109] In other sectors, wages are determined by collective agreements between unions, where they exist, or between workers' representatives and employers. However, even where minimum wages are established *via* this means in an industry employing 'part-time' workers, there is no guarantee of a result advantageous to the 'part-time' employee.

Firstly, in Japan minimum wages are set at daily rates. In the case of 'part-time' workers who work less than a full day, the question of how (in a competitive environment) to calculate the reduced rate is left to the employers' discretion. Avenues of appeal do not exist.[110]

The second barrier to be overcome by the 'part-time' worker can be found in a provision of the Trade Union Law (T.U.L.). Under article 17, collective agreements in Japan will bind all workers 'of the same kind' if they are agreed to by three-quarters or more of workers regularly employed in a particular enterprise. 'Part-time' employees are usually deemed workers of the same kind as 'regular' workers.[111] The consequence of article 17 is particularly severe for 'part-time' workers in light of the low rate of unionization of the 'part-time' work force. The interests of 'part-time' workers are rarely represented in union negotiations, and hence in the outcome of negotiations. Yet under article 17 of the T.U.L., despite having been denied participatory rights in its drafting, short-hour or short-term workers can be bound by the terms of a collective agreement agreed to by three-quarters of the 'regular' work force. Given that employer-union bargaining may not only cover minimum wages, but also such diverse topics as grounds for dismissal, pension schemes, and retirement allowance levels amongst other matters, the general binding power of article 17 arguably is a significant hindrance to equality of employment for the 'part-time' worker.[112]

[108] M.W.L. art.16 and ch. IV. Members of Council represent in equal numbers the workers, employers and the public: M.W.L. art.28.

[109] Hanami, *op. cit.* n.93, 80.

[110] Suwa, *op. cit.* n.42, 49.

[111] In the absence of a 'major difference.' Sugeno, *op. cit.* n.97, 468.

[112] Note also that further authority to extend the application of the collective agreement is found in the M.W.L. art.11. The Ministry of Labour (or the Chief of the Prefectural Labour Standards Office) has the authority to extend the reach of the minimum wage to all workers of the same kind employed in establishments within the region. Should this power be used then the potential for the a corresponding injustice to 'part-time' workers also increases. Commentators, however, state that art.11 is infrequently used.

Thirdly, the M.W.L. provides for exceptions to its operation. 'Part-time' workers find themselves one of five targeted groups.[113] In the case where the employer obtains the permission of the Chief of the Prefectural Labour Standards Office, 'workers whose prescribed working hours are especially short' may be excluded from the application of the minimum wage.

The preferred interpretation of 'especially' short hours is where the hours worked are less than two-thirds of those of other 'regular' workers under the same minimum wage.[114] On average, Japanese 'part-time' workers work three-quarters of the prescribed hours of a 'regular' worker. But, in the manufacturing sector hours are longer than in the service industries. In the service sector it is within reason that 'part-time' workers work less than two-thirds of the hours of 'regular' workers.

Finally, the M.W.L. has minimal penalty provisions. Payments to labour in breach of a minimum wage are liable to a maximum fine of 10,000 yen.[115] This sum does not amount to a deterrent.

From the above analysis, it becomes clear that the simple implementation of a minimum wage will not reduce the imbalance in overall pay rates between 'part-time' and 'regular' workers. Political will is required to revise the current minimum wages, legislative exceptions and penalty provisions. To date, evidence of this will has been difficult to find.

6.2 *Tax Legislation*

Formal, yet indirect, restraint on the earning capacity of 'part-time' workers is divulged in an examination of Japan's tax laws. Taxes are imposed on the employment income of individual workers under provisions of the Income Tax Law.[116]

In early December 1989, the tax-free threshold was raised from 920,000 yen to one million yen.[117] A 'part-time' worker earning less than this amount annually remains untaxed. Should a 'part-time' worker choose to earn more than the threshold figure, her or his earnings become the subject of not one, but two tax regimes. Municipal tax (*jūminzei*) as well as income tax is due.

The same threshold figure of one million yen is important for other purposes. Under this annual sum, not only is the 'part-time' worker's own income tax-free, but if the worker concerned is not the main income earner in the household, a dependent spouse deduction is available to reduce the amount of total tax paid by the partner. In 1989 this tax deduction available to the spouse amounted to 350,000 yen. This is a tax deduction effectively increasing the secondary salary by a third or more.

Taken together, the tax and the loss of the tax deduction provide a large incentive to 'part-time' workers to limit their earnings to under the one million yen mark. One survey shows that 65 percent of 'part-time' workers aimed at staying under the equivalent threshold in 1989.[118]

113 M.W.L. art.8(4).
114 Sugeno, *op. cit.* n.97, 175.
115 Art.44.
116 *Shotokuzei Hō* (Law No.33 of 31 March 1965) arts 28(1) and (29).
117 The law was made retrospectively operational from January 1989: Zenkoku Seikyō Pātotaimu Rōdōsha Kondankai (ed.), *op. cit.* n.14, 12.
118 *Ibid.* 12, 13.

Further non-legal restraint leading to the decision to limit one's earnings may also be imposed by the involvement of the spouse which is induced by the dependent spouse's deduction. In Japanese society it has been noted that 'part-time' workers will at times keep their work life a secret from other associates, including spouses, for fear of loss of face.[119] Even where there is acknowledgement and consent to the fact of working, a more subtle restraint is imposed by gender relations when the 'part-time' worker is the wife. The fact that the husband's income is affected, would tend towards the question of gross earnings of the dependant spouse being taken out of the individual's hands and placed in joint custody. Thus a woman has sole control of her decision to work as long as she earns under one million yen a year. A job providing remuneration beyond that amount, by affecting more the husband's income, calls into question wifely and family responsibilities.

For the numerous 'part-time' workers who decide to remain within the tax-free band, the next issue is of implementation. Limiting the 'part-time' worker's earnings in the context of hourly pay and the ubiquitous 'group consciousness' of the work place may be harder than first thought. Methods used to limit salary towards the end of the financial year involve either intentionally missing work or not marking down overtime hours earned. Needless to say, when employers already complain about 'part-time' women workers' lax attitude to their employment, neither of the above approaches is, in the long term, helpful to raising the levels of responsibility or respect accorded Japanese 'part-time' workers.[120]

It is submitted further that there is an underlying discourse involved in the restraint on income imposed by the tax system. On the average 'part-timer's' hourly salary of 623 yen, the 'part-time' worker can work up to 1605 hours *per* year before incurring tax liabilities. 1605 hours *per annum* equates with 32 hours *per* week of tax-free earnings.[121] Thus the 'part-time' worker is not being encouraged to stay out of the work force — her work is necessary to sustain economic growth. However, the sheer extent of the financial disadvantage should one exceed the tax-free limit, would tend to indicate that she is being encouraged indirectly to keep to her place within the work force, and within the home.

6.3 *Employment Insurance Legislation*

Finally, we consider the availability of unemployment benefits for 'part-time' workers in Japan. In general, Japan's social welfare network is based on the principle of insurance rather than benefit, and unemployment benefits are no exception. Entitlement to payments is based on length of employer and employee contributions. The Employment Insurance Law (E.I.L.)[122] regulates the scheme and determines the extent of contributions. The parts of the E.I.L. affecting 'part-time' workers were amended in 1989.[123]

119 *E.g.*, protection of her husband's pride is incentive enough for some Japanese women to hide their employment from associates and at times from the husband himself. For a male, if the 'part-time' employment is a second job it may be in breach of the conditions of work agreed with the primary employer: 1987 Japanese television documentary on home workers.

120 'Company Needs More Part-Time Workers' in *Daily Yomiuri* (Tokyo), 23 July 1990.

121 Calculations are based on the figure of 51 working weeks *per* year.

122 *Koyō Hoken Hō* (Law No.116 of 28 December 1974).

123 *Koyō Hoken Hō Kaisei Hō* (Employment Insurance Law Amendment Law) (Law No.36 of 28

Under the post-1989 E.I.L., 'part-time' workers are divided into three groups:

(1) 'part-time' workers whose prescribed hours *per* week are over 33 hours;
(2) 'part-time' workers who work between 22 and 33 hours inclusive *per* week; and
(3) 'part-time' workers whose contracted hours are less than 22 hours *per* week.

The 1989 E.I.L. makes it easier for the first group to receive benefits. Workers who are 'part-time' but nonetheless work over 33 hours *per* week are to be automatically registered within the scheme, and to have contributions made on their behalf. Under the previous law, 'part-time' workers engaged for even this number of hours had to prove they were working under 'conditions approximating those of a full-time worker' (*tsūjō no rōdōsha to ōmune dōyō to iu jōken*) to be eligible for inclusion in the scheme. The discarding of the need for such subjective evaluation is an advantage for the 'part-time' worker.

Similarly, the 'part-time' worker whose prescribed hours are between 22 and 33 hours a week has no subjective evaluation involved in the assessment of their right to contributory insurance payments. However, unlike the 'part-timer' working a longer week, the 'part-time' worker in this second category must fulfil two objective criteria before having standing to join the insurance scheme. In the first place, they must have been employed for more than one year. Secondly, their gross annual salary must be more than 900,000 yen a year.

'Part-timers' in the third category, those who are contracted for less than 22 hours *per* week, are not eligible for employment insurance. This information is presented in table form below.

Table 3 Eligibility of 'part-time' workers for employment insurance

Hours worked	33 or more	22–33	22 or less
Conditions of eligibility	eligible	eligible if: (a) employed for more than one year; and (b) gross annual salary is greater than 900,000 yen	not eligible

The last two columns are of interest and concern for the following reason. On the average salary of a 'part-time' worker, to earn over the required minimum annual salary would require a contract stipulating 28 or 29 hours work *per* week. In average terms, the effect of this hurdle is to deny unemployment insurance payments to 'part-time' workers who work less than 28 hours *per* week. For the majority of female 'part-time' workers this may not be a significant loss because their salary is considered a secondary one, but for the 'part-time' worker without such support, and without the opportunity or time to compete in the core sector of the labour market (*e.g.*, a divorcee or single mother), the effect of the 900,000 yen *per* year barrier to benefits could be severe.

June 1989), as discussed in Nishimura, K. (ed.), *Rōdōhō Kōgi 3: Rōdōsha Hogohō* (Lectures on Labour Law 3: The Legal Protection of Workers) (1990) 276, 277.

From the Japanese employment insurance legislation above, one would assume that 'part-time' workers are a homogeneous group of workers who all have an alternative income source to their own salary. Thus, many 'part-time' workers could be excluded from benefits because they work insufficient hours – *i.e.*, less than 28 hours *per* week. While this assumption *may* reflect reality, it also *creates* its own reality, as 'part-time' workers who can only work a short week are denied income support (insurance) in the long term and must therefore rely on more traditional sources. The 'part-time' worker's 'community' takes on added meaning as her livelihood. For those 'part-time' workers who *do* conform to the assumption, the tax regime as it relates to them invites further limitation of their freedom to earn more than one million yen. The married woman is encouraged, *via* legislative means, to conform to community norms. Those norms are of a patriarchal ideal.

7. *THE RHETORIC OF ANTI-DISCRIMINATION PRINCIPLES*

There is a plethora of support within the Japanese legal system for principles of equal treatment of workers. Prohibitions against various forms of discrimination are found at three levels: as international obligations, constitutional principles, and statutory provisions.

7.1 *International Obligations*

At the international level Japan is a signatory to the International Labour Organisation's Convention Concerning the Equal Remuneration for Men and Women Workers for Work of Equal Value.[124] In so being, a commitment is made towards 'the application to all workers of the principles of equal remuneration for men and women workers for work of equal value.'[125] Obligations of a similar nature were incurred in 1985 when Japan ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979). Specific reference is made to 'part-time' workers in another I.L.O. recommendation in 1981.[126] In that statement it was advised that, 'to the extent possible', the entitlement of these workers should be on a *pro-rata* basis to that of 'regular' workers.

The binding power of international agreements is enhanced when article 98 of Japan's constitution is considered. Article 98 reads, *inter alia*:

> The treaties concluded by Japan and established laws of nations shall be faithfully observed.

Scholarly opinion is divided over the interpretation of this article. Are treaty obligations to be given automatic legal force domestically? In practice, the majority of treaty obligations are legislated before being given the full weight of domestic law.

[124] I.L.O. Convention No.100, 23 May 1953.
[125] Owaki, *op. cit.* n.104, 33.
[126] I.L.O., *Workers With Family Responsibilities Recommendation* (1981)

7.2 *Constitutional Principles*

Japan's Constitution enshrines a right to equality. Article 14 (paragraph 1) provides that:

> All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

If the legal consciousness of the Japanese people was similar to that in the U.S.A., this article would keep large numbers of lawyers in business. But the Japanese Supreme Court's interpretation of the article has, in effect, prohibited such a use. In a 1964 case the Supreme Court held as follows:

> Article 14 paragraph 1 does not guarantee absolute equality to all people. It is to be construed as prohibiting differentiation without reasonable ground therefor. It does not prohibit some differential treatment being regarded as reasonable in view of the nature of the matter.[127]

In Japan, therefore, it is only unreasonable differentiation that is constitutionally prohibited. This interpretation effectively creates a class of discrimination which is acceptable to the social majority. It is into this category that 'part-time' workers slot.

Further weakening of the constitutional principle of equality occurs in the debate over the application of article 14. A group of scholars hold the opinion that this article, like others in the Constitution, should have indirect application only. That is, further subordinate legislation is required to bring article 14 into play. This theory has found judicial favour in some cases.[128]

7.3 *Subordinate Legislative Principles*

Principles of equality within the subordinate legislation relating to labour however are readily found. The third and fourth articles of the Labour Standards Law (L.S.L.) are the two most prominent examples. They promise, respectively, equal treatment of all workers and equal wages for men and women. These two articles flesh out the guarantee against discrimination contained in the Constitution.

7.3.1 *Article 4 of the Labour Standards Law*

Article 4 of the L.S.L. states:

> An employer shall not engage in discriminatory treatment of a woman as compared with a man with respect to wages by reason of the worker being a woman.

Prima facie, this is a strong basis for challenging discriminatory treatment in relation to wages on the basis of a worker's sex. But, surprisingly perhaps, this article can rarely be used to uphold the principle of equal pay between the sexes in Japan. The difficulty in harnessing this article to the purposes of women 'part-time' workers arises because of the numerous valid criteria used in determining wage levels: years of service, position, performance, and hours of work *per* week, amongst others. Since discrimination on the basis of hours worked is not expressly prohibited under article 4 academic opinion suggests that article 4 will only be

127 Tanaka, H., *The Japanese Legal System: Introductory Cases and Materials* (1976) 722.
128 Yamamoto, *op. cit.* n.60, 330.

effective to the ends of 'part-time' female employees when the following conditions are met:

(1) all full-time workers are men and all 'part-time' workers are women;
(2) both men and women are engaged in the same duties for the same hours and with the same experience; and
(3) there exists a significant difference in wage levels.

Article 4 is given an very narrow interpretation.[129]

7.3.2 *Article 3 of the Labour Standards Law*

Article 3's principle of equal treatment is phrased in the following manner:

> An employer shall not engage in discriminatory treatment with respect to wages, working hours, or any other working conditions by reason of the nationality, creed, or social status of any worker.

This statement is broader than the above article 4 of the L.S.L. in that it is concerned with discrimination seen in conditions and hours and on the basis of nationality, creed, or social status. However, it too has had its cutting edge for 'part-time' workers blunted. The leading text in labour law in Japan states that the mere hours or term one works does not determine one's 'social status' (*shakai mibun).* 'Social status' refers to an innate quality, to an indelible stigma (the example given is a criminal conviction), or to a disabilty received after birth.[130]

The effect of articles 3 and 4 of the L.S.L. is to prohibit direct discrimination. Read together with article 14 of the Constitution the prohibition is weakened further. Only those direct discriminatory practices which are unreasonable will be prohibited. But judicial opinion regarding the interpretation of the above three articles is shifting. This shift is evident in the 1990 Tokyo District Court judgment in the case of *Shakai Hoken Shinryō Hōshū Shiharai Kikin.*[131]

In the judgment in *Shakai Hoken* the Court, for the first time in Japanese jurisprudence, went beyond the traditional discrete interpretation of the fundamental rights contained in article 14 of the Constitution and the L.S..L., and looked at the provisions *as a whole* to find their purport. Its conclusions were expansive. According to the District Court:

> the purport of the above three articles is to prohibit unreasonable discriminatory behaviour on the basis of sex in areas including, *but not limited to*, wages.[132]

The difficulty in the judgment for the purposes of 'part-time' workers is twofold. Firstly, the Court declined to comment on the circumstances, if any, in which the inference will be raised that the discrimination is on the basis of sex. In the instant case the only difference between the workers treated separately was their gender, but that will not always be the case.

Secondly, and perhaps more controversially, is the Court's further consideration of other grounds for the plaintiffs' claim. The Court equated the newly broadened unreasonable discriminatory practices (under articles 3 and 4 of the

129 Sugeno, *op. cit.* n.97, 145.
130 *Ibid.* 114.
131 The *Social Insurance Medical Treatment Compensation Fund* case (the '*Shakai Hoken* case'), Tokyo District Court, 4 July 1990 in (1990) 1244 *Rōdō Hōritsu Junpō* 54.
132 Emphasis added. The case involved a dispute over the promotion practices of the defendant company. See the case note and comment in Obata, F., '*Seibetsu o Riyū To Suru Shokaku Sabetsu*' (Sex as Grounds For Wage Discrimination) (1991) 77 *Nihon Rōdōhō Gakkai Shi* 277.

L.S.L.) with acts contrary to public policy (article 90 of the Civil Code) and with an unlawful act or tort (article 709 of the Civil Code).[133] Thus, having prepared the ground for a decision on the basis of a breach of fundamental rights, the Court changed direction, clambering to a position of tried and true safety in the form of article 90 and article 709 of the Civil Code (1898). The *mens rea* requirements of article 709 were implied by the Court, overriding the defendants argument that it did not have the requisite intention or negligence.

The approach taken by the Court is a fascinating one. In practice, the Court threw open wider than ever before the doors of interpretation on not only the fundamental rights in Japan's Labour Laws, but also the public policy grounds for invalidating discriminatory action. But, it proceeded to walk through the key-hole sized tort provisions of article 709, the only relevant provision which inquires as to the defendant's mental state. The open doors appear to invite further litigation. The possibility, however, exists that in future litigation the 'key' of requisite intent will be turned and the doors slammed shut as quickly.

The judgment of *Shakai Hoken* has parallels with the decision in the case of *Sanyo Electric* discussed in part five above. It is a further example of the exercise in fine-tuning preferred by the Japanese Court. The judgment has been balanced to encourage further litigation in cases of discrimination, thereby allowing the courts to be seen to do justice. Simultaneously, it provides a bevy of legal devices to analyse the discrimination, thereby enhancing judicial control over the recognition of that discrimination. 'Part-time' workers seeking a judicial remedy to problems they face in the work place should be encouraged, and be warned.

8. *CONCLUSION*

The main legal barriers to the equal treatment of 'part-time' and 'regular' workers in Japan may be summarized as follows.

The first barrier is the 'nature of the relationship' test used to determine an employee's status.The test of worker status is the 'nature of the relationship' with the company. As a device used in isolation (*e.g.*, without a framework of objective standards) this test plays into employers' hands. By providing poorer working conditions for a group of workers, and optimal conditions for other workers, employers create a natural division in the work place. A worker who is hired to be part of the group with poorer conditions has little opportunity to prove a closer relationship with the company other than by company loyalty over time. The initial opportunity of negotiating a longer contractual period is denied by article 14 of the L.S.L. Further, organised action is denied because membership of trade unions is strictly regulated. The temporary worker must 'sit out' his or her inferior status.

The second barrier is the limitation imposed on contract length by article 14 of the L.S.L. The continued existence of the statutory limitation on the employment contract to one year or less by article 14 of the L.S.L. is a barrier to equal treatment of 'part-time' workers. By raising inferences that the employment will be short-

[133] Article 709 of the Civil Code states that a person who 'violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom'.

term, it muffles the expression of expected length of employment by employers. Thereby, it exacerbates the gap that exists in practice between the two markets of the Japanese labour economy. It inhibits the growth of a competitive market based on skill.

The third barrier is the length of employment emphasis in the test of employee status. The focus on length of employment in both the *Toshiba* and *Tōyō Seiki* tests which are used to determine the status of a worker as either permanent or temporary is a discriminatory factor because most of the 'part-time' employees are returnees to the work force. Accordingly, they have fewer years of service to the work force and fewer years in which to build up the requisite length of service.

Fourthly, 'part-time' workers fall through exceptions in the legislative system of minimum standards in Japan. Their lack of coverage by minimum wages, pension schemes, and employment insurance is partly attributable to those exceptions.

The fifth barrier is the indirect restraint imposed by the tax system. A 'part-time' worker can earn up to one million yen *per* year without being liable for income tax. Should annual income exceed this amount then the worker forfeits the tax-free status and, in the case where the employee is not the main income earner for the household, the household forfeits the spousal tax deduction. This overlap of both regimes at the one million yen mark effectively denies the middle ground of earnings to 'part-time' workers.

The sixth barrier is the narrow interpretation given to anti-discrimination principles.The interpretation given to article 14 of the Japanese Constitution and articles 3 and 4 of the L.S.L. does not prohibit discrimination on the basis of hours worked. In relation to discrimination on the grounds of gender, in the 1990 case of *Shakai Hoken* the Tokyo District Court broke new ground in deciding to read the three articles together to deny discrimination. However, it simultaneously limited the effect of that new interpretation by equating discrimination with an unlawful act under article 709 of the Civil Code.

Finally, the method of setting daily minimum wages operates against 'part-time' workers. Where a minimum wage is applicable to a 'part-time' work category, its expression is as a daily rate. Calculation of the *pro-rata* hourly wage is at the discretion of the employer.

But Japanese society is changing at the level of individual expectations and in corporate practices. Women are no longer Christmas cakes, but are returning to the work force after marriage in increasing numbers. Women are, in fact, challenging the *salariiman* with the blessing of industry in that, in some industrial sectors at least, they are now able to see the inside of the internal market twice in a life-time. 'Part-time' women and 'regular' workers can share the same office space and lunch hours.

The policy response of the Japanese Ministry of Labour to this societal change has been slow, non-mandatory and therefore, in practice, somewhat irrelevant. The response of the Japanese Legislature has been to improve access to insurance, and to raise the tax-free threshold. But the reforms have been minor. Access to insurance is still limited to 'part-time' workers who work long hours, and the tax-free threshold in fact acts to restrict the earnings of the majority of 'part-time'

workers. The presumption that older married women have as their primary concern the family unit is still reflected in, and perpetuated by, legislation. Legislative inactivity means that response is concentrated in the judicial arena where a legal solution can be tailored to the parties' individual needs more readily. This case by case approach will also slow the pace of change.

We have seen the approaches of the Japanese courts in response to the increase in the 'part-time' work force. Firstly, the District Court in the case of *Sanyo Electric* extended its powers of review of management decisions. Using this increase in authority the Court has extended the availability of protection to 'part-time' workers. However, litigation has not changed the inherent status of 'part-time' workers. Protection has increased, status has not. Protection is not the same as equality. A 'part-time' worker can never be permanent; she or he can only be 'like' a worker on an unlimited term contract. The result is to disallow challenge to the *salariiman* by the 'part-time' worker. Japanese courts have shown no willingness to adopt multi-faceted notions of a 'regular' employee. There is judicial acquiescence to employers' labelling of the work force, even if not to its decisions. In the Court's approach it is assumed that the employers are the decision makers, the workers are the labelled.

Secondly, in the case of *Shakai Hoken* the approach of the Court was to extend its tools of review. Its capacity to dispense justice increases commensurately. Again, the authority of the Court was increased, but little changed in substance for future litigants.

As 'part-time' women take on positions of responsibility it is increasingly likely that they will be supervisors of 'regular' workers. In such a mixed work force, litigation will undoubtedly result from the contradictions inherent in the clash of the internal and external markets. This litigation is important in Japan because it manifests social change to a wider audience that is otherwise difficult to contact. But the real battle over equal treatment for equal work will be engaged in at company level by many more 'part-time' workers than are needed simply to file a court action. In the meantime, Japanese industry can only benefit from having a skilled and efficient work force in its lower echelons.