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Approaches to the employment of people with disabilities generally fall into two types: the ‘equality of opportunity approach’, based on anti-discrimination laws, and the ‘employment quota approach’, which is based on employment quota systems. The US has adopted an equality of opportunity standard for the employment of people with disabilities, and the defining characteristics of its approach lie in its mandate to provide reasonable accommodations by employers for people with disabilities. In contrast, Japan has adopted an employment quota system. This system is premised on a distinction between people with disabilities and people without disabilities, and mandates the employment of people with disabilities according to established numerical standards. Japan and the US thus have adopted extreme ends of the spectrum of employment protections for the disabled. While the equality of opportunity approach practiced in the US guarantees remedies against discrimination and allows for flexible responses to specific circumstances, it creates problems for employers attempting to predict what constitutes discrimination. The Japanese system, which has adopted an employment quota approach, is able to secure positive effects within certain parameters, but is characterized by an inadequate perspective on the equal treatment of people with disabilities and on prohibitions against their discrimination, and lacks a sense of association between disabilities and job performance.


People with disabilities are defined as people whose disabilities affect them in the workplace and in their daily routines. These disabilities place them at a disadvantage, relative to non-disabled persons, when they seek employment in free markets. From the 20th century onward, many countries have given considerable attention to the question of how to take into account the characteristics of people with disabilities and how to advance their employment. The approaches taken by these countries have varied, however, and we may understand them as falling into two broadly contrasting types. These two types are the ‘equality of opportunity approach’, based on anti-discrimination laws, and the ‘employment quota approach’, which is based on employment quota systems.1

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1. A third approach is also emerging, in which a country institutes a general law relating to labor or the labor environment, and mandates employers to improve the workplace environment for people with disabilities in accordance with their needs. Northern European countries such as Sweden and Norway fall into this category (Japan Association for the Employment of Persons with Disabilities National Institute of Vocational Rehabilitation 1999: 29; Organisation for Economic Cooperation and Development 2004: 111).
Countries favoring the equality of opportunity approach include the US, Australia, England and Canada. These countries attempt to boost the employment of the disabled by prohibiting employment discrimination on the basis of disabilities. With the US in 1990 as the first country to adopt anti-discrimination laws (enforced as of 1991), we can view this as a relatively new approach.

In contrast, many more countries have adopted the employment quota approach, and such policies have been in place for a longer time. For example, Germany started in 1919 with legislation enforcing postwar employment of the disabled. Following several revisions to the laws, a 5% employment mandate and a penalty system are now in place. In addition, other countries including France, Italy, Austria, Poland and Korea have also adopted an employment quota system (Organisation for Economic Co-operation and Development 2004: 110). Japan, as well, has consistently abided by such a system following its 1960 adoption of an employment quota system (mandatory since 1976).

In recent years, there has been a movement, centered mostly among European countries and seen for example in an EC Directive and in general anti-discrimination laws, to balance the two approaches. In Japan and the US, however, there has been no attempt to pursue both approaches. Instead, they are representative of those countries that have chosen to adopt and enforce contrasting approaches. The aim of this article is to compare the two countries, and in so doing, to examine the characteristics of their contrasting approaches, to highlight the considerable and weighty problems associated with each approach and to discuss the employment policies in place to address these problems.


2.1 The Progress of the People with Disabilities Employment Promotion Act

2.1.1 History Leading to the Enactment of the 1960 Employment Promotion Act for the Physically Disabled

Governments in every country formerly understood concerns relating to people with disabilities as the responsibility of their families or of charitable organizations. But following the emergence of vast numbers of the physically disabled in the wake of the two World Wars, there was increasing recognition of the necessity to develop comprehensive national policies to address the needs of the disabled (Hori 1961: 20). Although Japan had policies after World War I to protect disabled veterans, it was
slow to develop policies to assist people with disabilities generally, only enacting such measures after World War II (Tezuka 2000: 111). Moreover, although the policies prioritizing disabled veterans were expanded to the general populace, the impetus behind this change owes much to the policies of the Allied Forces occupying Japan after the war.

It was only after 1952 that the postwar emergency measures adopted to promote the employment of the disabled were taken up, with institutional support, as a separate concern (Yamada 1992: 40). In April 1952, the Central Assembly for Promoting the Employment of Physically Disabled Persons was established in the Ministry of Labor, and by May 1953 a policy for advancing the employment of people with disabilities had been set forth, for example, through the formulation of the outlines of an emergency employment relief measure. However, there was a limit to the bureaucratic provisions, and the employment situation of the disabled in that period remained stagnant (Hori 1961: 53–54; Yamada 1992: 40–42).

Adding to the domestic situation, developments overseas also influenced Japanese legislation. For example, many foreign countries had already instituted job employment acts for the physically disabled, and in 1955 the International Labor Organization (ILO) adopted the ‘Vocational Rehabilitation (Disabled) Recommendation’ (Recommendation No. 99). As a result, Japan came under increasing pressure to initiate legislative proceedings of one kind or another (Soya 1998: 55).

Investigation into concrete legislative bills began in the spring of 1958, and finally, at the end of 1959, the outlines of a bill had been drafted to advance the employment of the physically disabled. This outline was approved by various councils and submitted by the cabinet to the Lower House in February 1960 as a bill to advance the employment of people with physical disabilities (Hori 1961: 110; Yamada 1992: 44). The main points under consideration during the investigation of this bill were as follows: (a) defining people with physical disabilities, (b) the pros and cons of forcing large companies to employ the disabled and (c) how to ensure the efficacy of the bill if there were no compulsion (Soya 1998: 56).

With respect to the first point, the question was whether or not to include those recuperating from tuberculosis and the mentally disabled. It was ultimately decided not to include them, due to the fact that no clear standards of determination existed (Hori 1961: 108–110). With respect to the second and third points, it was resolved that because employment relations are based on human relations, it would not serve the welfare of the physically disabled to force their employment unnecessarily. Furthermore, due to the perspective that promoting the inclusion and employment of the physically disabled would be guaranteed only when their employment was based on the understanding and cooperation of employers, it was decided that private-sector companies would be requested only to make their best efforts toward employment of the disabled (Soya 1998: 56).

Within the Committee on Social and Labor Affairs and other units in the Lower House, the bill underwent practical discussion and debriefing of witnesses; it was then passed on 15 July 1960, promulgated on 25 July, and enforced as of 26 July. This 1960 Employment Promotion Act for the Physically Disabled carried tremendous significance as Japan’s very first employment provision for the disabled. However, there were considerable problems with it. First, with respect to the

8 The bill, submitted in 1959 by the Japan Socialist Party to the Upper House of the Diet, called for compulsory hiring by private-sector employers with over 100 employees. However, the government’s position was that it was unrealistic for the time being to enforce compulsory hiring, given current conditions in the Japanese labor market and in the employment of physically disabled persons (Hori 1961: 105).
employment quota system and its establishment of an employment ratio for the disabled, businesses in the private sector were expected only to demonstrate effort toward the goal (1.1% for blue-collar firms and 1.3% for managerial firms). Second, the definition of the disabled was limited to ‘bodily’ disabilities and failed to take into account the needs of persons with other severe disabilities (Yamada 1992: 46). In the years following, the 1960 Act underwent numerous amendments in order to resolve these and other problems.

2.1.2 History of the Employment Promotion Act through to Its 1976 Amendment: Introducing Compulsory Employment and a Levy System

Following the implementation of 1960 Act, employment conditions for the physically disabled advanced gradually. In addition to the effect of 1960 Act, another significant influence was the youth labor shortage that resulted from the high-speed growth of the economy from 1960 onward. In contrast to the postwar labor surplus, the labor shortage that accompanied the high-speed economic growth caused a turnaround in Japanese employment policies and led to the enactment of the Employment Promotion Law, whose policy objective was ‘the achievement of full employment’.

However, when we examine the employment conditions of the physically disabled by size of firm and by industry, several problems are revealed. For example, the larger the firm, the lower the actual employment rate and the higher the ratio by which it failed to achieve employment rates (nearly 40% of firms failed to meet the recommended goals). Finally, there were notable discrepancies in the employment rates from one industry to the next. These issues resulted in a sense of inequality based on the unbalanced economic burden accompanying the employment of people with disabilities, and together with the economic crisis generated by the 1973 oil shock, propelled the increasingly grave employment problems of the disabled.

As a result, starting in 1975, the state undertook a full-scale investigation into a revision of the Employment Promotion Act for the Physically Disabled. The fundamental aims of the investigation were twofold: the first was to increase the obligation of business owners to employ people with physical disabilities, and the second was to establish a levy system that would bolster that obligation from a financial standpoint. On the basis of a committee report by the Council on the Employment of the Physically Disabled, the Ministry of Labor initiated the project of drafting a bill and submitted it during a regular session of the Diet. Eventually obtaining a resolution from a full session of the Diet, the Council was able to enact the Law Amending the Special Measures Law Concerning the Employment Promotion Act for the Physically Disabled and the Promotion of Employment of the Middle-Aged and the Elderly (promulgated on 28 May 1976 and enforced as of 1 October 1976).

9. Compulsory employment (1.4% for industrial agencies and 1.5% for non-industrial agencies) has been adopted for national and local public entities.

10. With governmental firms, the rates were set at 1.3% and 1.5%, respectively.

11. People with physical disabilities, who until then had rarely been treated as regular workers, were aggressively assimilated into mostly small companies (Yamada 1992: 47–48).

12. With respect to strengthening employment mandates, the principal concerns were the relationship between the freedom to choose an occupation, as guaranteed by Article 22 of the Constitution, and the freedom, understood to be extension of the former, to run a business. Additional investigations were conducted into the substance of the phrase ‘public welfare’ from Article 22 of the Constitution; the purpose and substance of the regulation that would come into effect and the nature, substance and degree of the freedom to run a business that would be regulated. It was concluded that as long as the compulsion was instituted without penalties, there was no problem (Soya 1998: 88).
The fundamental reasoning behind the 1976 amendment was that (a) although it is of course appropriate for the state to implement measures, it is only the business owners who directly monitor the workplace and who can provide the disabled with employment, and therefore that, (b) all business owners should possess a communal sense of responsibility, based on social solidarity, to provide employment to those people with physical disabilities who have the will and capacity to work, and that, (c) people with physical disabilities should make every effort to achieve independence as workers (Endō 1976: 32).

Based on this thinking, certain new features were introduced in the amendment: (a) This pertained to private-sector firms and constituted a change from their obligation to make their best effort to hire people with disabilities to a mandatory employment obligation (the employment rate was raised by 0.2 points to 1.5% for private-sector firms). (b) A levy system for the hiring of people with physical disabilities was implemented, thus refining the essential framework of the employment promotion policies for people with disabilities in Japan. (c) A double-count system was inaugurated in which the hiring of one person with a severe disability (a person belonging to Class 1 or 2 of the Law for the Welfare of Physically Disabled Persons) counted as hiring two employees with disabilities. (d) In order to ensure the execution of employment obligations, a public disclosure system was initiated to name firms that failed to meet quotas.13

2.1.3 Impact of the International Year of Disabled Persons and Further Legislative Reforms: An Expanded Definition of People with Disabilities

Since the institution in 1976 of legislative obligations advancing the employment opportunities of the physically disabled, the employment conditions of people with disabilities have improved year by year. Particularly in the years before and after the International Year of Disabled Persons, tremendous gains were made. However, from 1983 onward, the actual employment rate of people with disabilities made only slight gains, and in 1986 hardly any improvement was seen at all (see Figure 1). Reasons for this included the increased turnover of people with disabilities, as well as the difficulty of continued employment or the return to work for midstream people with disabilities. One result was the recognition that provisions needed to be enhanced in order to stabilize employment rates. Simultaneously, the expansion of employment rate systems to include the mentally disabled became an issue. Due both to such domestic circumstances and to international developments, amendments to the law became unavoidable.14 International developments included the United Nations resolution to name 1981 the International Year of Disabled Persons (Soya 1998: 144 onward), and the adoption at the 69th ILO Convention of the Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159) and the ‘Recommendation’ of the same name (No. 168) (Yamada 1992: 60).

Due to calls internationally and domestically, the state began amending the laws starting in July 1986. The legislative bill submitted the following February to the 108th regular session of the Diet was passed unanimously and was promulgated on 1 June. The main points of amendment in the 1987 law included the following: (a) The expansion of focus of the law from the physical disabilities to any

13. A certification system was also established for terminating people with disabilities.

14. During this time, amendments were implemented in 1980 and 1984. The former amendment expanded the grants derived from the employment levy system, whose purpose was to advance the employment of people with severe disabilities, and increased the unit cost of levies. The latter amendment transferred control of levy-related services and expanded the boundaries of people with disabilities.
kinds of disabilities, including intellectual disabilities and mental disabilities. (b) As a corollary, the name of the law was amended from ‘Employment Promotion Act for the Physically Disabled’ to ‘Law for Employment Promotion, etc. of the Disabled’ (henceforth People with Disabilities Employment Promotion Act). Furthermore, while mandatory employment was postponed, it became possible to count people who have intellectual disabilities in estimates of actual employment rates.

In addition, as a result of a survey conducted in 1986 about the realities of employment for the physically disabled, it was revealed that the ratio for configuring employment rates had gradually increased and would soon undoubtedly surpass 1.6%. Therefore, as of 1 April 1988, a legislative amendment was formulated to raise the legally established employment rates by 0.1 points each (private-sector firms to 1.6%) (Soya 1998: 252 onward).

2.1.4 History through to the 1997 Amendments: The Mandatory Employment of People with Intellectual Disabilities

At the time of the 1987 amendments, the obligation to employ people with intellectual disabilities was not yet enforced. However, with respect to those people with intellectual disabilities who were actually being employed, an exception was instituted to allow them to be counted in actual employment rates, and this began to affect the employment of the physically disabled as well. It became necessary to

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15. However, with respect to the compulsorization of the employment of people with intellectual disabilities and mental disabilities, it was determined that it would be unreasonable to impose an employment rate system immediately. Reasons for this included the difficulty of determining a person’s work capacity, the fact that occupational fields were limited and that considerable time and effort would be required to help people with disabilities adjust to and train for jobs [Report by the Policy Research Association for the Employment of People with Intellectual and Mental Disabilities, ‘Designing Employment Policies for People with Intellectual and Mental Disabilities, Now and in the Future’ (Soya 1998: 202)].

16. An employment continuation grant system was newly established for continuation of employment of people who become midstream disabled.
investigate employment obligations toward those with intellectual disabilities and mental disabilities, and in September 1996 and January 1997 a People with Disabilities Employment Council was convened. According to the position document of this council, employment rates had accelerated due to increased understanding toward people with intellectual disabilities, and it was therefore deemed an appropriate time to include them in the estimated figures for legal employment rates. The history of measures and policies for those with mental disabilities is shorter, and it was considered too early to apply an employment quota system for them.

The Ministry of Labor, having received the Council’s position document, began drafting an amendment. A legislative bill was submitted to the regular session of the Diet, where it was passed and enacted (promulgated on 9 April 1997 and enforced as of 1 July 1998). The key points of the amendment were as follows: (a) the expansion of the mandatory employment system to include people with intellectual disabilities; (b) the raising of legal employment rates at private-sector firms from 1.6% to 1.8% and (c) the inclusion of part-time workers with mental disabilities among the recipients of grants.

2.1.5 History through to the Amendments of 2005: The Strengthening of Employment Policies for People with Mental Disabilities

On 15 December 2004, the Labor Policy Council of the Ministry of Health, Labor and Welfare published ‘Future Enhancements of Employment Measures for People with Disabilities’. This document became the basis for the cabinet’s approval on 10 February 2005 of the People with Disabilities Employment Promotion Act Amendment, which was enacted on 29 June of the same year (with the exception of one section, the Amendment was enforced as of 1 April 2006). The aim of the 2005 amendment was to promote various measures to expand the employment opportunities of the disabled and thereby to support people with disabilities who were employed or expressed a desire to work.

Among the main points of the 2005 amendment were (a) the strengthening of employment measures with respect to the mental disabilities and the inclusion of people with mental disabilities (holders of a Mental Disability Card) among the subjects calculated into employment rates and (b) encouragement of firms that placed orders to support people with disabilities working at home. With respect to (a), many people with mental disabilities tire easily and find it difficult to work long hours. Such persons who work part-time hours of 20–30 hours per week are to be counted as 0.5 people in estimates of actual employment rates. Moreover, because it is still a stretch to claim that firms demonstrate sufficient understanding and employment management know how regarding the employment of people with mental disabilities, the legal employment rate has continued to remain at 1.8%.

2.2 The Substance of the People with Disabilities Employment Promotion Act

The People with Disabilities Employment Promotion Act, which evolved as discussed above, had as its objective the stable employment of people with disabilities. The two pillars supporting the Act are, first, an ‘employment quota system’ that mandates that employers employ a particular ratio of people with disabilities and second, a ‘levy system for the employment of people with disabilities’ that imposes disabled employment levies on employers who fail to employ the designated ratio of people with disabilities.

The first pillar consists of the employment quota system, which is based on the legal employment rate. Currently, the legal employment rate is 1.8% for private-sector firms, 2.1% for governmental
corporations, 2.1% for national and local public entities and 2.0% for designated education commissions.\textsuperscript{17} Private-sector employers must hire people with disabilities at a rate of 1 per 56 employees. The legal employment rate for these businesses is calculated using the following formula:

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\text{Legal employment rate} = \frac{\text{Number of regular workers who have physical disabilities} + \text{Number of people with physical disabilities who are unemployed}}{\text{Number of regular workers} - \text{equivalent to the cull rate} + \text{Number of unemployed workers}}
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The actual employment rate for each firm is calculated as indicated below. As a result of the 2005 amendments, the employment of people with mental disabilities also began to be included in the actual employment rates. The employment of a person with severe physical disabilities or intellectual disabilities is counted as the employment of two persons (double counting), and the part-time employment (20–30 hours per week) of people with mental disabilities counts as the employment of 0.5 persons.

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\text{Employment rate calculations for each firm (Actual Employment Rate)} = \frac{\text{Number of employed people who have physical, intellectual and mental disabilities}}{\text{Number of regular employed employees}}
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The second pillar of the Act consists of the employment levy system. Employers who fail to meet employment rates are levied a set amount per person with a disability they have not employed, and that amount is used to finance the provision of compensatory amounts and various types of grants awarded to employers who employ a higher number of people with disabilities than legally required. The amount of the levy is determined as follows: for every person with a disability less than required by the legally defined employment rate, a firm must pay ¥50,000 per month.\textsuperscript{18,19} The compensatory amount is set, per person with disabilities hired above the employment rate, at ¥27,000 per month. In addition, when firms provide facilities or take measures necessary to employ people with disabilities, they receive grants to cover a portion of those expenses. Moreover, in light of factors such as the debt capacity involved, businesses with fewer than 300 regular employees neither are charged levies nor are eligible for compensatory amounts. However, given that small and midsize firms are employing significant numbers of people with disabilities, business owners who hire particularly large numbers (4% or greater) of people with disabilities receive ¥17,000 per month per person over the legally defined employment rate.

\textsuperscript{17} With respect to private-sector firms, mandated effort was recommended at gradually higher rates, starting at 1.3% in the 1960 Act, 1.5% in the 1976 amendment (which introduced the double-count system), 1.6% in the 1988 cabinet amendment (which increased the ratio of physically disabled workers) and 1.8% in the 1997 amendment (which included people with intellectual disabilities in the calculation of newly mandated employment).

\textsuperscript{18} The levy amount, which in 1976 was ¥30,000 per month, was gradually increased and currently is ¥50,000.

\textsuperscript{19} The objective of the levy system is to adjust the economic burden placed on business owners who employ people with disabilities. For this reason, national and local public entities, public businesses and cabinet-approved governmental firms are exempt from the imposition of levies.
3. A Summary of the American Law: The Americans with Disabilities Act

As discussed above, the US has adopted an equality of opportunity standard that legally prohibits employment discrimination against people with disabilities. The Americans with Disabilities Act (henceforth ADA) was enacted in 1990, ahead of the rest of world, and reflects the unique American culture of cherishing equality.\(^{20}\)

In 1964, the US enacted Title VII of the Civil Rights Act (henceforth Title VII),\(^{21}\) which comprehensively prohibits employment discrimination on the basis of race, color, religion, sex or national origin. As a result, equality of opportunity had already long been put into practice except the area of disabilities.\(^{22}\) In addition, equality of opportunity was permeating the area of disabilities, as well, for example, through the enactment in 1973 of the Rehabilitation Act (amended in 1974) that prohibits employment discrimination by the government, by business entities with government contracts above a set amount and by business entities receiving subsidies.\(^{23}\)

On the basis of these two laws, the government decided to adopt the Title VII standard of equality of opportunity for the disabled, and the ADA was enacted to expand the Rehabilitation Act to include private-sector firms. Section 1 of the ADA comprehensively prohibits discrimination against people with disabilities from hiring to dismissal.\(^{24}\) ADA contains several defining features, including the particularities of the ADA’s handling of issues relating to the term ‘disabilities’.\(^{25}\)

The first salient feature is the ADA’s definition of ‘disability’. Unlike the employment quota approach, which measures disabilities in terms of degree and other measurements, the ADA has adopted a more comprehensive and flexible definition. That is, the ADA views disabilities as either physical or mental impairments\(^{26}\) that substantially limit one or more of the major life activities of individuals [ADA§3(2); hereafter, section numbers only will be noted].

The second characteristic feature is that not every individual with a disability is eligible for protection under the ADA. Only ‘qualified individuals’ for particular job functions are eligible. What the ADA means by a ‘qualified individual with a disability’ is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires [§101(8)]. ‘Reasonable accommodations’ under ADA are different from affirmative action under Title VII. The essential theoretical basis of affirmative action lies in attempting to eliminate the influence of past social prejudices by implementing temporary aid measures that advance the opportunities of a minority. In contrast, reasonable accommodations

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20. For a history of US policies regarding the disabled from the colonial period to the enactment of the ADA, see Feldblum (2000: 94–126).


22. The Age Discrimination and Employment Act was enacted in 1967.

23. We cannot overlook the fact that laws were enacted not only with respect to the employment setting but also to increase the employment opportunities of people with disabilities in the fields of construction, the federal postal service and housing.

24. The ADA prohibits discrimination not only in the area of employment but also in other areas relating to daily life, such as public services (Section 2), the public facilities and services provided by private-sector firms (Section 3), telecommunications (Section 4) (Section 5 contains miscellaneous provisions). In this paper, only Section 1 of the ADA is addressed, unless otherwise specified.

25. For representative accounts of the ADA, see Friedman and Strickler (2001: 793–844) and Rothstein (2000: 298–324).

26. In addition to persons who have such impairments, the ADA regards a record of such an impairment or being regarded as having such an impairment as a disability.
function to adjust and modify the employment conditions of people with disabilities so that they may conquer the limitations placed on them by their impairments.

The third characteristic feature is the definition of what constitutes discrimination. Denying employment to a ‘qualified individual’ with a disability is not the only form of employment discrimination against people with disabilities. Also falling under that category are not making reasonable accommodations to known physical or mental limitations of an otherwise qualified individual with a disability [§102(b)(5)(A)], denying employment opportunities to an otherwise qualified individual with disabilities for requiring reasonable accommodations [§102(b)(5)(B)], and imposing qualification standards, employment tests or other selection criteria that screen out or tend to screen out people with disabilities [§102(6)].27 One of the principal defining characteristics of the ADA can thus be said that it takes into account the fact that a disability may result in barriers that affect an employee’s performance of job functions, and as a result not only prohibits discrimination but also mandates the provision of reasonable accommodations that can eliminate those barriers.

The fourth defining characteristic is that the ADA recognizes several defenses on the part of employers. Thus, reasonable accommodations do not have to be provided when providing them would impose ‘undue hardship’ on an employer [§102(b)(5)(A)]. A second recognized defense is when qualification standards, employment test or other selection criteria are applied that might screen out people with disabilities from consideration, but are shown to be job related for the position in question and is consistent with business necessity [§103(a)]. A third defense is when the employment of an individual with a disability would pose a ‘direct threat’ to the health or safety of other employees, the public or the individual with a disability even if reasonable accommodations are made. In such cases, the employer is allowed to impose qualification standards that may put relevant people with disabilities at a disadvantage [§101(3), §103(b)].

4. Comparing Japan and the US

The US has adopted an equality of opportunity standard for the employment of people with disabilities, and the defining characteristics of its approach lie in its mandate to provide reasonable accommodations by employers for people with disabilities. In contrast, Japan has adopted an employment quota system. This system is premised on a distinction between disabled and non-disabled, and obliges employers to employ people with disabilities according to established numerical standards. Japan and the US thus have adopted extreme ends of the spectrum of employment protections for people with disabilities. By comparing four areas of the two systems—the presence or absence of conceptions of equality, the flexibility of each system, their respective guarantees of efficacy and the results of these guarantees—I clarify the characteristic features and problems associated with each system.

4.1 The Presence or Absence of Conceptions of Equality of Opportunity: Relief against Discrimination

The US, by prohibiting employment discrimination against people with disabilities, sets forth an unambiguous policy of ‘equal employment opportunity’ even in the case of people with disabilities.
Persons who believe they have faced employment discrimination based on a disability can seek relief in accordance with the stipulations of the ADA, by first petitioning the Equal Employment Opportunity Commission (henceforth EEOC)28 to pursue remedies based on mediation between the relevant parties. If at this stage a remedy has not been identified, the individual with a disability may file a suit in court,29 and if the court acknowledges the discrimination, the person may seek compensatory damages, punitive damages, back pay, reinstatement and other compensation.

In contrast, although the Japanese Constitution generally prohibits discrimination [Article 13 (The Dignity of Individuals), Article 14 (Equality under the Law)], no effective law exists to prohibit discrimination against people with disabilities, and not a single court trial has pursued employment discrimination against an individual with a disability as an illegal act.30

The objective of Japan’s People with Disabilities Employment Promotion Act is to provide special employment guidelines for the disabled, and thereby to expand their employment opportunities. Because it is premised on special protections for the disabled, it does not share an affinity with the concepts of ‘prohibiting discrimination’ or of ‘equality of opportunity’. It is possible, when an employer is able to explain that a person with a disability has notably low working capacity because of his/her mental or physical disability, to receive permission from the Prefectural Labor Standards Office to pay that person less than the minimum wage (Minimum Wage Law, Article 8). This, too, suggests the lack of a conception of equality with respect to people with disabilities.

The lack of a conception of equality of opportunity and the non-existence of remedies against discrimination results in the following problems. The first is that moral hazards emerge among some employers, who, for example, employ people with intellectual disabilities in order to secure an easily managed labor force at low salaries, or who employ people with disabilities in order to win grants but then immediately prior to the end of the grant dispensation period force them to resign so that they may hire someone new.31

The second problem is that a stigma has developed regarding people with disabilities as lesser workers, and this has narrowed their employment opportunities (Sekikawa 2000: 208). The third is that cases have surfaced throughout Japan of people with disabilities who have faced repeated acts of physical and mental mistreatment and violence as well as the plunder of their disability pensions (Araki et al. 1999: 206, 239).

However, the Basic Law for Persons with disabilities was amended in 2004 to include Article 3(3), which states that, ‘No person shall discriminate against people with disabilities on the basis of their disability, or otherwise violate their rights and liberties’. Currently, this provision merely imposes on employers a moral duty to endeavor not to discriminate against people with disabilities, but it is believed that the attitude of prohibiting discrimination may well reach towards employment legislation for people with disabilities (Araki 2004: 45).

28. The EEOC is an organization that enforces anti-discrimination laws. It also has the authority to issue guidelines relating to each anti-discrimination law.

29. In cases when the discrimination has been particularly extreme or a large number of victims have been discriminated against, the EEOC itself may step in as prosecutor and sue the employer.

30. However, there have been several cases in which termination on the basis of a disability has been nullified as constituting an abuse of the right to dismiss an employee (HIV-Infected Employee Dismissal Case, Tokyo District Court, 3 July 1995, 667 Rohan 14 and others).

31. Grants are issued to help defray the costs of providing and maintaining equipment necessary for the new employment of a disabled person. Depending on the type of grant, a payment period of 3–10 years applies.
4.2 The Flexibility of Employment Systems

The ADA defines disability comprehensively, and by stipulating the provision of reasonable accommodations allows a flexible response to a number of conditions (including job requirements as well as the nature and severity of disabilities).

In contrast, Japan’s People with Disabilities Employment Promotion Act comprises a more rigid system, and it is applied more uniformly. The principal standard by which the Law for the Welfare of People with Physical Disabilities defines ‘people with physical disabilities’ as persons who are partially capable of carrying out daily routines, and whose impairments limit them to elementary functional abilities (Takenaka 2000: 335). It will be necessary in the future to establish uniform standards in order to grasp clearly the number of people with disabilities affected by the system. In addition, a standard, legally defined employment rate has been set for private-sector firms, regardless of their type of business, and a standard levy system is applied according to whether they meet this standard.

Because the definitions are precise and uniform, it is difficult to respond flexibly, and the following kinds of problems result: the first is that with respect to certifying people with disabilities, their reduced capacity to work and to be employed are not necessarily accurately expressed, and often it can be difficult to grasp adequately the issues surrounding their employment (Takenaka 2000: 336). An employer is considered to have hired a worker with a disability if that person has received disability certification, even when she or he has no trouble carrying out job functions, while a person who has not been granted disability certification is unable to benefit from the current employment system for people with disabilities. Thus, significant differences in treatment can result on the basis of whether a person meets the standard for disability. The second problem is that because people with disabilities are classified in accordance with Card for People with Physical Disabilities, Rehabilitation Card, Mental Disability Card, etc., there is a strong tendency to understand them as a group instead of treating them as individuals. The third problem is that because employers fulfill legal obligations by employing a set ratio of people with disabilities, on occasion they disregard the content, quality and working conditions of their disabled employees.

4.3 Ensuring the Efficacy of Employment Systems for People with Disabilities

The US model embraces a concept of equality of opportunity and is based on a system of flexibility. However, this equality of opportunity also has problems. The first is that, while the ADA is a flexible system, it has a low predictability rate. Employers must determine without precise standards what kind of conditions are included in a disability, what kind of action constitutes discrimination against an individual with a disability and what level of reasonable accommodations must be made. Because these points ultimately are decided in court, there is a chance that a period of uncertainty will ensue.

32. However, in recent years the concept of disability has tended to be interpreted increasingly narrowly. For example, see Sutton v. United Airlines, Inc. (1999) 527 US 471; Murphy v. United Parcel Service Inc. (1999) 527 US 516; Albertson’s Inc. v. Kirkingburg (1999) US 555.

33. With respect to this point, it has been noted that the following procedures should be undertaken: revise the current conception of people with disabilities, which functioned to differentiate people with disabilities according to whether or not they should be provided with welfare benefits and other measures; acknowledge the right of people with disabilities to work and construct a new conception of people with disabilities in accordance with the law’s objective to eliminate social barriers impeding the actualization of this right (Japan Federation of Bar Associations Human Rights Protection Committee 2002: 116).
The second is that, because employers of people with disabilities are responsible for shouldering the cost of providing reasonable accommodations (except in cases of undue hardship), the possibility exists of unequal burdens being placed on employers who hire people with disabilities and those who do not. In addition, hiring a person with a disability can lead to an increased risk of being sued. This may provide incentive to some employers to act irresponsibly to avoid the burden of a lawsuit by concealing violations of the law.

The third is that, because persons who cannot fulfill essential job functions do not receive the protection of the ADA, people with severe disabilities and people with intellectual disabilities have a high probability of falling outside the purview of those protections. One of the limitations of the equality of opportunity standard is that the ADA mandates reasonable accommodations but does not demand equal treatment of people with disabilities who, even with the provision of such accommodations cannot perform the same work as a non-disabled person.

In contrast, while the Japanese system is rigid because it is applied strictly, it is possible to predict whether an action is allowable, and thus within the stipulated boundaries its efficacy is secured. Japan ensures fairness among employers and guarantees the efficacy of its legal policy by framing the employment of people with disabilities as an expression of employers’ social solidarity and by maintaining the people with disabilities employment levy system, whose function is to adjust imbalances in the economic burden of employing people with disabilities.\(^{34}\) In addition, Japan has instituted the double-count system and special treatment of part-time workers to take into account the needs of people with severe disabilities and intellectual disabilities, and in fact there has been an increase in the employment rate of the severely disabled.

### 4.4 Efficacy of the Japanese and American Employment Systems for People with Disabilities

To conclude this comparison, let us examine the results achieved by these contrasting systems. In Japan, subsequent to the mandated employment of people with disabilities, the actual employment rate has shown a nearly consistent rise despite several periods of stagnation (see Figure 1). On this basis, it can be stated that Japan’s employment policies for people with disabilities, centered on employment quota and levy systems, have had a certain amount of success. When employment figures for people with disabilities are compared in the year after and for the year preceding the enactment of an amendment, it is possible to see the considerable influence of these amendments. Significant increases in the employment rate are apparent:\(^{35}\) for example, in 1981, the International Year of Disabled Persons; in 1988, the year that people with intellectual disabilities could be calculated in the employment rates and in 1993, when the double counting of people with severe disabilities and the addition of part-time workers with disabilities were allowed into the calculations of employment rates.\(^{36}\) However, the ratio of businesses that do not meet legally stipulated employment rates has more or less been 50%; in the years following the 1988 increase of the employment rate, the ratio has steadily remained higher than

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34. As noted above, there is also a system in place to publicly name businesses that fail to meet the legally defined employment rate, but it is highly exceptional for these businesses to be named, and thus the system has little effect on advancing the employment of people with disabilities.

35. An increase in 1985 resulted from Nippon Telegraph and Telephone (NTT) and Japan Tobacco, Inc., both large companies, transitioning into private-sector firms.

36. With the 1992 amendment, people with severe disabilities who regularly part-time worked (less than 30 hours per week) also came to be included in employment rate calculations.
and shows a rising trend. The actual employment rate, too, has barely changed since 1995 and indeed shows signs of decreasing.

Focused around the People with Disabilities Employment Promotion Act, Japanese policies pertaining to the employment of people with disabilities can be viewed as having made gradual gains. However, particularly in the last 10 years, almost no new gains have been visible. It is possible to attribute this to unevenness resulting from economic conditions. Another factor may be that the levy amount, which in 1976 was ¥30,000 per month, has not even doubled in the past 30 years (currently ¥50,000). The negligibility of sanctions may well be raising the ratio of non-compliant businesses.

However, the US has even greater problems. As noted above, because the ADA defines people with disabilities comprehensively, it is difficult to grasp accurately the numbers of people with disabilities, and thus a simple comparison with Japan is not possible. Nevertheless, when comparing employment and salary standards between disabled and non-disabled in the wake of the ADA’s enactment, it is possible to observe that a negative effect has arisen for people with disabilities, particularly when it comes to employment standards. Although the salaries of workers with disabilities have not changed relative to the salaries of workers without disabilities, it has been reported, in a comparison of workers aged 21–39 years, that the employment standards of workers with disabilities have dramatically decreased relative to those of workers without disabilities (Acemoglu and Angrist 2001: 929–933). This suggests that the ADA has not advanced the employment of people with disabilities, but rather has impeded it. Furthermore, it can be deduced that this negative effect is due not to the costs necessitated by providing reasonable accommodations, but due to the fact that no effective mechanism exists to regulate the disparities in employment standards for disabled and non-disabled. Even when a person with a disability eligible for reasonable accommodations is illegally denied work by an employer, it is often extremely difficult to prove, and this situation is exacerbated in particular by the fact that people with disabilities form a relatively small group. In addition, it has been noted that an employer who hires someone with mild disabilities may, as a result, deny employment to a person with severe disabilities (Jolls 2000: 274–276).

5. Conclusion and Further Questions

The ADA, with its equality of opportunity standard, prohibits employment discrimination on the basis of disabilities and, by mandating an employer provision of reasonable accommodations, attempts to effect ‘equal employment’ and ‘corrections for disparities due to disabilities’. While this approach guarantees remedies against discrimination and allows for flexible responses to specific circumstances, it creates problems for employers attempting to predict what constitutes discrimination. Furthermore, at least at this time, it has not demonstrated positive effects with respect to the advancement of employment for people with disabilities.

In contrast, the Japanese system, which has adopted an employment quota approach, is able to secure positive effects within certain parameters. However, it is characterized by an inadequate perspective on the equal treatment of people with disabilities and on prohibitions against their discrimination, and lacks a sense of association between disabilities and job performance. Moreover, the effects of the...
Thus, while both approaches have their advantages, they each have serious problems that cannot be ignored, and it is difficult to argue that one system is superior to the other. Are these two approaches mutually exclusive? Or would it be possible to pursue them both simultaneously? Germany and France, for example, believe that it is possible to implement both approaches. Currently they are each attempting to incorporate a new, equality of opportunity approach alongside the employment quota systems they have long adopted. This is a new development, however, and no effects or consequences of the policy shifts are yet apparent. Would it be possible to pursue both systems in Japan? If so, what kind of system should be designed to allow this?

Employment quotas treat people with disabilities as special, and at first glance they may seem to conflict with the equality of opportunity approach. However, the EC Directive states that it does not constitute discrimination if an employer is mandated by domestic law to take appropriate measures to eliminate disadvantages for people with disabilities. The Directive thus affirms the simultaneous pursuit of anti-discrimination and domestic quota systems. In contrast, with respect to affirmative action plans, the US only allows employment quotas as a temporary corrective, viewing long-term measures as constituting reverse discrimination. In the case of Japan, Article 14(1) of the Constitution states that ‘[a]ll of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin’. However, it is understood that differences viewed, according to conventional wisdom, as rational do not rise to the level of the ‘discrimination’ prohibited by Article 14 (Ashibe 2007: 126 onward). Moreover, Article 4 of ILO Convention 159, which Japan ratified in 1993, states that ‘[s]pecial positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other workers’. Based on these statements, it is conceivable that Japan will be able to approach the equality of opportunity and employment quota approaches simultaneously by designing a system in which employment quotas can manage differences based on logical reasons. In actuality, as noted above, the 2004 amendment to the Basic Law for Persons with Disabilities contains articles that prohibit discrimination on the basis of a disability [Article 3(3)], and that charge national and local public entities (Article 4) and the people (Article 6) with the responsibility for prohibiting discrimination. These amendments may serve as the impetus for a synthesis of the two approaches for advancing the employment of people with disabilities.

What is important is that, in synthesizing the equality of opportunity and employment quota approaches, Japan must seek out ways to modify each approach in an attempt to overcome their respective problems. In concrete terms, this means that in conducting an investigation into a system that would allow the concomitant operation of the two approaches, Japan must maximize the potential effect by striving both to remedy the problems involved in adopting the conception of equality associated with the equality of opportunity approach, and to increase the efficacy of mandated employment quotas for advancing the employment of people with disabilities. When implementing an anti-discrimination law like the ADA in Japan, it will be vital for people with disabilities and employers alike to establish concrete standards of determination to indicate what constitutes illegal

discrimination. Because disparate conceptions of disabilities are in operation in Japan’s People with Disabilities Employment Promotion Act and ADA, if Japan does adopt both systems simultaneously, there is a possibility that the system will become overly complicated. In addition, several concerns may emerge, including the question of whether it is permissible to treat people with disabilities differently, based on whether they were hired generally or to meet quotas. Furthermore, with respect to reasonable accommodations, new debates are certain to arise concerning its legal stance and relation to other systems, as well as who will take on the financial burden of implementing the approach. Future research on this matter should take into account these points, as well as developments in Europe, in order to lay out in concrete terms what form this legal policy might take.

References


40. With respect to this point, the role of a ‘supported employment system’ will be invaluable. The notion of a supported employment system was introduced in the US in the 1986 Rehabilitation and Compensation Act, and subsequently implemented in Japan in 2002. Supported employment refers to a wide range of services provided, in particular to people with severe disabilities, to help develop stability in their work life. These services include sending job coaches to the workplace to help with job training and forming relationships with co-workers.


