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Equality of Opportunity and Japanese Type of Quota System in Employment

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The aim of this article is to investigate whether the quota system for the employment of disabled people can be justified in a normative way from the perspective of equality of opportunity. We focus attention on the possibility of normative justification here because it is not sufficient that the system are actually put into practice. The reason of this is that the system could generate rather negative effects, if it was perceived as deviating from the norms of society, and then it resulted in a stigma being attached to subjects of the policy.

Results of the investigation indicate that within equality of opportunity philosophies based on the level-the-playing-field principle, it is possible to justify a quota employment system drawing on a basis in the conception of Roemer, who adopts a strict position of luck egalitarianism. Through this conception, however, it is clear that there are areas of Japan's employment quota system that are not justified and that need to be revised. Moreover, it is also suggested that there are logical challenges particular to the field of disabilities in the understanding of fundamental concepts supporting equality of opportunity philosophies.
Keywords: equality of opportunity; luck egalitarianism; quota system in employment; labour market

1. Introduction

The focus of attention in the modern capitalist production process was on individuals acting as a workforce, and the human body (in a medical sense) that fit this type of production was taken as the norm. The thesis (Oliver, 1990; 1996) that the disability category was produced in a particular form as a consequence of this 'normalizing' process is one of the most important ideas in the field of disability studies. This thesis suggests that 'disabled people' are a group characterized, in terms of its core elements, by its inadequateness with respect to labour in a market economy. Considering this, issues relating to a labour market have a special significance for disability studies. In seeking to reincorporate disabled persons into a labour market from which they have been historically excluded, to what degree and how can the labour market be reorganized, revised, and regulated? In addition, to what degree is it possible, within the labour market, or within a system that is relatively independent of this market, to seek the 'distribution of goods, rights and dignity' (Ishikawa, 2002) that disabled persons need? Even today, these questions remain central themes in issues of disability.

Focusing on 'quota systems in employment' as one possible means for incorporating disabled persons into the labour market, we consider in this article the possibility that such means can be justified in a normative way. While systems of this kind exist in Europe (in Germany, France, etc.), in Japan there is a quota system for employment that is regulated according to the Law for Employment Promotion, etc. of the Disabled

Persons. This law stipulates that the number of disabled persons hired by employers must exceed a certain minimum proportion, with private corporations currently being required to achieve a legally-designated employment rate of 1.8%.[1] This legally-designated rate is calculated based on the ratio of the number of regularly employed and unemployed people with disabilities out of the total number of regular employees and unemployed people. Unemployed people indicates here people without work who are hunting for jobs, and thus ultimately this figure denotes the proportion of disabled persons among the entire population of people currently willing to work (regardless of whether they are actually working or searching for work). Seen in this way, the fundamental policy objective of this system can be understood as the realization of a situation in which those who are willing to work will be employed at the same rate, regardless of whether they are disabled or not.[2] While there are no penal regulations established for punishing employers who fail to satisfy this obligation, incentives have been offered to encourage fulfilment of employment obligations as a way to realize the policy objective above. These incentives take the form of a fixed-fee scheme under which money is collected from employers who do not achieve the legally-designated employment rate, and through the introduction of a mechanism by which the names of companies failing to attain this minimum level of achievement are released to the public.[3]

The quota employment system in this way has the clear objective to quantitatively increase the employment opportunities of disabled persons, and to substantially promote their participation in society. Considered more closely, however, the basis justifying these measures is weak, which is referred as a special preferential treatment to a particular minority group. For example, in the Law for Employment Promotion, etc. of the Disabled Persons mentioned above, what is actually set forth is the 'obligation to cooperate in efforts of disabled workers to achieve independence as capable professionals based on the principle of social solidarity'; no reference is made to the principle of implementing the guarantee of rights or equal treatment. In addition, there are many who argue that such measures as orientating an 'equitable' result go beyond –or do not conform to–the idea of equality of opportunity at the legal basis of equal employment (Sekikawa, 1999; Hasegawa, 2008).[4]

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[1] A legally-designated employment rate of 2.1% is imposed on national and local goverments.

[2] Due, however, to some professional jobs being excluded from basic calculations, to the adoption of a double-count system which counts the employment of a single severely disabled person as the employment of two persons, and to the number of mentally disabled persons being added only to the calculation of the actual employment rate, even if hypothetically the actual employment rate were to reach the legally-designated rate, this would not strictly imply that employment rates were implemented at the same level.

[3] Actual circumstances regarding fulfilment of obligations indicate that the actual employment rate in 2007 remained at 1.55%, with more than 50% of corporations falling short of achieving the legally-designated employment rate.

[4] The Recommendation (R071) of ILO, which is regarded as leading the quota employment system in Japan, shows that for the purpose of 'insuring equality of employment opportunity' it is possible to be required to employ disabled workers with reasonable proportions. In this way, the quota system seems to be justified by philosophies of equal opportunity. However, in an interpretation by ILO itself, such special measures have been regarded as contemporary means (Matsui 2008). For this, it may be clear that the quota system is situated as a step toward

If, for argument's sake, these views are accepted, then the quota employment system loses one powerful choice of basis for its justification. Is it then actually impossible to situate the quota employment system in the context of equal opportunity policy?

2. Equality of opportunity as a social norm

2.1 Context of inquiry

As a first step in our discussion, let us start by confirming the significance to explore the justifiability for the quota employment system by the principle of equality of opportunity.

In general, in the promotion of specific policy, the question of whether or not a policy conforms to widely-shared social norms holds particular significance. Firstly, in the implementation of political measures in a democratic system, to a certain degree there is a need to reach a consensus among a majority of people, and thus appealing to social norms shared by many people is a potentially effective approach. Secondly, if the connection with social norms is weak, then there is the danger that political measures may produce negative effects, with people subject to the measures being perceived as receiving 'unreasonable' benefits, and facing a stigma as a result, due to deviation of the policy from social norms. These effects include the fostering of stereotypes and hostility toward disabled persons and the triggering of self-contempt or feelings of guilt in disabled persons themselves.

Considering the second point, we could understand the importance of quota employment not only existing as a system, but also being rooted in powerful and widely-shared social norms. The question is then: what are these powerful norms through which, as a basis for the justification of policies aimed at promoting social participation among disabled persons, a broad consensus can be attained? The answer to this question naturally varies depending on differences rooted in cultural and historical context, but there is no doubt that the concept of equality of opportunity is one prominent candidate for such a norm. If this is acknowledged, then one may say that there is significant value in inquiring into the consistency between the philosophy of equality of opportunity and quota employment systems.

2.2 Variation in equality of opportunity

However, there is considerable variation in the meaning of equality of opportunity, and corresponding differences in the normative evaluation of concrete policy. There is thus a need to articulate the concept of the equality of opportunity in more detail, prior to arguing about the possibility of justifications based on this philosophy.

In a very rough sense, equality of opportunity may be described as the demand that people be treated equally in terms of their individual willingness and abilities. A distinction however can be drawn between the two following interpretations:

I: In competition for positions, people should be evaluated in the same way, based on their attributes relevant for the performance demanded. Nothing other than these attributes should be considered in assessment.

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realizing 'true' equality of opportunity, rather than an embodiment of philosophies of equal opportunity. Therefore, the philosophies of equal opportunity are only considered having an indirect link to the quota system.

II: In competition for positions, competitive conditions should be levelled between individuals in such a way that those who have similar potential will be eventually treated in the same way.

We will refer to interpretation I as the 'merit principle', and interpretation II as the 'level-the-playing-field principle' according to a theorist's term (Roemer 2000). What we would like to stress here is that whereas in the merit principle the emphasis is placed on 'performance', in the level-the-playing-field principle it is 'potential' which is the focus. In other words, whereas in the former case only abilities that have actually been realized are considered as a target of evaluation, in the latter case the overall capacity that the individual may potentially exhibit under certain conditions, including those which for whatever reason are latent but not yet actualized, are evaluated.

When thinking about the problems of equal employment of disabled people, which of these two interpretations do we take as our premise? Certainly, the equal opportunity philosophies based on the merit principle have played an important role in historical terms. This demand has been an effective approach in cases of direct discrimination, where employment has been denied on the basis of disabilities alone, regardless of a person having the abilities needed for a particular job. Work environments and employment practices regarded as 'neutral', however, may in fact be difficult for disabled persons to adapt to, and thus disabled persons who, in this environment, are required to exhibit their abilities, may be unable to sufficiently make use of their potential, resulting in a significant disadvantage. Thus, disabled persons actually placed in such environments are unable to actualize their abilities, and are regarded as inferior in the performance required. The pure merit principle is ineffective in this type of situation.

In actual fact, this 'neutral' environment was created based on the assumption that it would be used by non-disabled persons, and in this sense it is biased and imposes unfair conditions. Recognition of this situation constitutes today a major current in discussions of anti-discrimination legislation. In addition, as the development and use of technology have been advanced, the room for technological modification of such unfair working conditions has been expanded, and the social understanding that equivalent competitive conditions among those with or without disabilities are needed to some extent, has also gradually broadened. Given that this is the case, it would seem that there is broad agreement on the need to adopt a philosophy of equal opportunity which takes as its foundation the level-the-playing-field principle in the employment of disabled persons.

The question then becomes: what type of measures does equality of opportunity based on the level-the-playing-field principle justify?

2.3 The scope of reasonable accommodation

The answer to this question that first comes to mind is the obligation to provide 'reasonable accommodation (or reasonable adjustment)', stipulated in Convention on the Rights of Persons with Disabilities and in the anti-discrimination legislation of each country. As is well-known, reasonable accommodation means necessary accommodation not imposing an undue burden, needed in particular cases, in order to enable the exercise of equal rights. The fact that not offering reasonable accommodation is defined as discrimination (and the fact that offering reasonable accommodation is

widely required) is highly significant. It is significant in that, whereas in traditional legal frameworks against discrimination there were no clear provisions demanding measures that go beyond equality of opportunity based on the merit principle, it clearly stipulates the requirement that equality of opportunity based on the level-the-playing-field principle should be realized.

The provision of reasonable accommodation is however not in fact necessarily sufficient in light of demands of the level-the-playing-field principle, which stipulates that individuals with the same potential be treated equally.[5] The approach of reasonable accommodation draws attention to potential which has already been formed but is not able to use due to unfair conditions in setting of competition. It is assumed, in other words, that equal performance can be expected if temporarily latent abilities can be drawn out.

What happens, however, in cases where potential has not been sufficiently developed, due to factors occurring in the ability formation period? Regardless of the degree to which reasonable accommodation is offered in the examination or workplace, in such cases there is no way to demonstrate the required ability, and as a result individuals have no choice but to give up and lament over their misfortune. Many advocates in fact treat this as an area that goes beyond the range of the equal opportunity approach in employment. Does this then mean that measures requiring that reasonable accommodation be offered constitute a critical point in justifications based on the equal opportunity philosophy?

However, arguments that, based on the level-the-playing-field principle, draw attention to potential, are not monolithic. There exist in fact equality of opportunity arguments that treat certain types of inequality in ability formation as areas to be redressed. We investigate this standpoint in the following section.

3. Equality of opportunity as conception: Roemer's luck egalitarianism

In the field of political philosophy, various conceptions have been suggested regarding standards for distinguishing between domains that demand compensation, and domains that do not. One influential standpoint in this context is the idea of 'luck egalitarianism' (Dworkin, 2000; Cohen, 1989; Roemer, 1998). Luck egalitarianism is the normative standpoint according to which advantages and disadvantages arising from arbitrary luck in an ethical way should not be ascribed to the accountability of the individual, and should therefore be equalized. While there is no need to intervene in any way regarding disadvantages associated with the individual's accountability, redress is required in cases of disadvantages arising from areas that go beyond individual accountability.

John E. Roemer adopts a strict position of luck egalitarianism (Roemer, 1998; 2000), drawing a distinction between circumstances outside the control of the individual, and autonomous choices and efforts of the individual, insisting that the scope of individual accountability is limited to the latter.[6] Differences in circumstances come about, in an

[5] The obligation to provide reasonable accommodation takes into consideration the situation of the employer, restricting their applicability to a 'scope within which they do not impose an undue burden', and this can be seen as a limitation from the point of view of equal opportunity. We will not, however, pursue this issue here.

[6] Tohyama (2004) developed an argument based on the similar idea in the context of the employment of disabled persons, but the normative claim presented there was viewed as a

ethical sense, through arbitrary luck, hence it is unfair for individuals to be made to put up with disadvantages that arise as a result of circumstances. These circumstances include not only the physical environment and social system, but also one's genes, family background and culture. In other words, all aspects over which the individual does not have autonomous control are treated as belonging to the circumstances. Having configured the scope of these circumstances in broad terms, the scope of individual accountability, with the influence of circumstances removed from achievement, is limited to efforts chosen freely by individuals.[7] The conception of equality of opportunity presented here is based on a level-the-playing-field principle that demands a form of competition in which the influence of the circumstances is completely excluded, and in which individual's expected level of achievement in question should be decided exclusively on the basis of efforts freely chosen by the individual.

With this conception as his premise, Roemer proposes an equal opportunity implementation using the following method. First, based on the ways in which the achievement of individuals is influenced, the circumstances of various individuals are categorized into several different types, and each individual's circumstances are then specified as belonging a particular type. Based on this definition, individuals who belong to the same type are considered to be affected by their circumstances in the same way, and those who belong to different types are considered to be affected differently by their circumstances. Under these conditions, no active intervention is introduced in competition within the same type, and disparities in achievement arising as a result are permitted. The reason for this is that these differences arise solely from the autonomous efforts of individuals. On the other hand, in competition between individuals belonging to different types, achievement is specified using as a measure the centile of the effort distribution in the type. In other words, if relative positions within the types are the same, then the same results are realized even if the apparent achievement level and amount of effort expended are clearly different. This kind of policy is justified for the reason that differences between individuals of different types in apparent achievement levels are regarded as being produced through the influence of the circumstances.[8]

More concretely, suppose that there are four persons (A, B, C, D) located in relatively advantageous circumstances (type α), and other four persons (E, F, G, H) located in relatively disadvantageous circumstances (type β). Suppose further that an examination is administered to evaluate individuals according to a ranking, and that the scores of the 8 persons are: A: 80 points, B: 70 points, C: 60 points, D: 50 points, E: 50 points, F: 40 points, G: 30 points, H: 20 points. In this case, B and F both sit at the 75th centile within their types, so these two will obtain the same result. On the other hand, while D and E have the same score, their centiles in their types are different (D has the

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distinct principle clearly differentiated from equality of opportunity, and in this sense this view is different from Roemer's.

[7] What should be emphasized here is that what is indicated is not the amount of effort actually expended. The issue of whether effort has been expended or not is also affected by the individual's circumstances, and thus this part should be removed, and only effort resulting purely from individual decisions should be assessed.

[8] In reality, it would appear that there may be differences between types at the level of autonomous effort. If we assume however that there are sufficient numbers of individuals in each type, then in cases in which centiles are the same, it is logically reasonable to expect that the same degree of autonomous effort will be exerted.

25th centile, whereas E has the 100th centile), and thus D and E will obtain different results.

This conception of equality of opportunity has been criticized for being associated with stigmas attached to people taken to belong to a relatively disadvantageous type, and for hurting such individuals'self-esteem (Anderson, 1999). In addition, in cases in which employees are selected using the centile within types, it is quickly noticed that screening invariably ends up resulting, at least within a short period of time, in a reduction of labour productivity. What Roemer is doing here, however, is to set up an algorithm for implementing a policy based on a certain kind of norms of equal opportunity, and there is no implication that this is the only model, or that such a norm should be preferred over all others. Roemer himself admitted that the proper scope of application of equal opportunity policy should be determined in a given society, considering the balance among various social values including efficiency. Given that he is not denying the need to restrict applicability of equal opportunity policy relative to other values or models, these points do not therefore constitute intrinsic criticisms. What we would like to emphasize here is that, at the very least, in cases based on Roemer's conception of equality of opportunity, the measures stated above are justified; even if hypothetically there are difficult aspects of actual implementation, this is not due to there being any conflict with the philosophy of equal opportunity, but rather because implementation of equal opportunity must be abandoned due to its relation with different social norms.

4. Justifiability of the quota employment system

Given the above, if we take Roemer's conception as a starting point, then there arise differences in interpretations of the highly-disputed area of radical positive action (or affirmative action). Drawing on the equal opportunity philosophy based on the level-the-playing-field principle, positive action has been developed widely across various fields as a way to effectively encourage the participation of minority groups in society.[9] However, whether or not radical measures such as the 'quota model' and the 'preference model' (Oppenheimer, 1988) conflict with the equal opportunity principle has been a contentious subject. Nonetheless, if one takes as basis Roemer's own views, then not only is there no problem at all with treating people from different type of circumstances differently, but on the contrary this is precisely what is required of equal opportunity policy. The focal point thus must be shifted from the problem of justifying the implementation of specific preferential treatment itself, to the question of whether a person receiving such treatment really belongs to a disadvantageous type of circumstances or not, and whether conditions being realized through preferable treatment are excessive or not.

It may be possible that this point of view is basically valid in the context of equal opportunity principle and quota employment system of disabled people. That is, it is possible to justify the quota employment system from the perspective of equal opportunity policy, if the following requirements are met. These are: (1) the 'disabled people' to be the subjects of the measures must belong to the same type, in other words it can be assumed that they form a group whose members, due to their circumstances,

[9] Iino and Hoshika (2008) provide a basic overview of the connections between positive action and equality of opportunity.

are hindered to the same degree from making use of their potential, and (2) the target employment rate must be appropriate. If these prerequisites are satisfied, then radical measures attempting to raise the actual employment rate of disabled people to the legally-designated employment rate become situated as a part of overall equality of opportunity measures for levelling the playing field among differing circumstances (according to which individuals of the same centile receive identical treatment).

The question is then: are prerequisites (1) and (2) satisfied? Prerequisite (1) is intuitively unrealistic. In the Japanese quota employment system, all 'disabled persons' are treated together as a group, and this group are not devided into subgroups at all. In addition, there are no established distinctions other than the one between 'disabled person' and 'non-disabled person'. These imply that all disabled persons are affected by their circumstances in the same way, and that variations in circumstances in Japan are distinguished only in terms of this one point of whether or not somebody is disabled. Unless accepted such assumptions, the quota employment system cannot be considered adequately justified responding to demands for equal opportunity policy.[10] In order to adequately situate the quota employment system as an equal opportunity measure, there is thus a need to reorganize the system by incorporating differentiation according to a set of types, where these types take into consideration differences between the various circumstances of disabled people.

We turn next to point (2). As we saw above, considering the political objective of the approach used to calculate the legal employment rate adopted in Japan's quota employment system, the policy aim may be interpreted as one of realizing a situation in which people presently willing to work, regardless of whether they are disabled or non-disabled, are hired at a similar rate. If this interpretation is correct, then this would seem to be precisely the kind of system that satisfies demands for the Roemer's conception of equal of opportunity. Considered in more detail, however, this goal is clearly not sufficient. There are a number of reasons for this, but let us draw attention here to the condition that a person be 'presently willing to work'.[11] Due to the existence of this condition, people not currently job hunting, regardless whether they have the desire to work (or once had the desire to work), are not included at the base of calculations. People of this kind of course exist both among the disabled and among the non-disabled, but considering differences in circumstances such as social environments and impairments, one may assume that the rate is higher among the former group than among the latter group. If this is the case, then in the calculation of the legally-designated employment rate, one can expect that estimates of the number of disabled people with the willingness to work will be relatively low, with the result that the policy objective is not fulfilled. From the perspective of equality of opportunity, therefore, there would appear to be a need for policy aiming to achieve a yet higher employment rate.

However, Roemer's conception as a basis of the arguments above will invoke a more fundamental problem. This is the fact that if the attempt is made to exclude the influence of circumstances, including impairment, then the meaning of the concept of

[10] This of course does not diminish the significance of the current system as a means of gradually equalizing employment opportunities.

[11] In addition, as mentioned in 2), there are also problems regarding the calculation method for the actual employment rate and legally-designated employment rate.

'potential', which is the focus of the level-the-playing-field principle, is weakened. To repeat what was mentioned earlier, what is required in the level-the-playing-field principle is a situation in which 'people with relevant potential end up being treated in the same way'. Generally, the 'potential' mentioned in cases like this indicates ability which can be actualized as long as conditions are in place. However, as a result of circumstances involving impairment and other genetic attributes, it is generally impossible, through later activity, to actualize abilities that have 'become latent'. Roemer's conception does not regard such aspects as differences in potential, but rather narrows the concept of potential to the meaning of 'ability to make autonomous efforts'.

One can of course think of the concept of potential in this way. However, if policies are justified through an equality of opportunity philosophy based on this type of limiting understanding of potential, then there is the danger that the normative power inherent in equality of opportunity will be lost. In fact, even in justifications based on equal opportunity philosophies from positive action in various fields, the potential of individuals are assumed to be essentially equal, either explicitly or implicitly supporting the hypothesis that such potential is actualized through some sort of social action (Salinas, 2003).

Based on the above, one may say that while the quota employment system contributes to the substantial expansion (or in Roemer's conception, 'equalization') of employment opportunities for disabled persons, there is nonetheless a need to establish political measures striking a balance in maintaining the appeal of social norms of equal opportunity.

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