Anti-Discrimination Legislation and Work Placement for Persons with Disabilities. A Comparison Between Italy and Japan

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Abstract

The essay provides a comparative overview of the laws concerning discrimination of disabled workers and the employment of persons with disabilities in Italy and Japan.

Both legal systems combine a quota-levy system with antidiscrimination dispositions. Also, Japan recently embedded a human-rights approach including a prohibition on workplace discrimination in order to comply with the UN Convention on the Rights of Persons with Disabilities.

Notwithstanding these similarities, there exist certain differences concerning not only the detailed provisions or procedures but also the general legal framework and the way in which international standards are arranged in the respective national systems.

The paper analyses the Italian and Japanese legal frameworks in the context of the general outline of the subject and also aims to provide a uniform basis for the future work of experts in the field.

I. Introduction

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) dates back to 2006.[1] Since its adoption, the UNCRPD has triggered the amendment of previous laws in the field of discrimination and employment of disabled people in many countries with important changes occurring in countries with different legal traditions such as, for example, Italy, Japan or New Zealand.

The UNCRP has also been ratified by the European Union (EU) and by each of the member States most of which already had specific laws regulating at least some of the issues that the UNCRPD takes into consideration while the EU itself had already set directives against discrimination as one of its historical pillars.

The UNCRPD is a major step forward in the transition from the conception of disability as a natural condition of physical or psychological impairment to a relational concept, resulting from the interaction between persons with impairments

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[1] United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened to signature 13 December 2006, entered into force 3 May 2008).

and attitudinal and environmental barriers.

This new conception of disabilities has probably been the most difficult directive to implement for national legislators because it affects the legal definition of disabilities in each legal system. Indeed, those definitions commonly developed in continuity with those included in previous legislation that often dates back to the First World War or even further back in time when disability was considered a matter of charity or assistance and, as such, as a financial burden on the State.

Scholars have identified two different policies in the field of employment for disabled persons, namely the '*equality of opportunity approach*' which is based on the recognition of civil rights for disabled people considered as a political minority and the '*employment quota approach*' which considers the disabled person only as a welfare recipient. This distinction reflects the difference between the social model and the medical model of disability with the second model reinforcing the '*separate treatment*' doctrine.[2]

The USA and Japan have long been considered as typical examples of those two ends of the spectrum of employment protections for the disabled.

I argue that this description of the different models which scholars have adopted is too categorical and is indeed difficult to reconcile with both the European model and that of Japan which has been profoundly reformed by recent amendments to the Act on Employment Promotion of Persons with Disabilities (AEPPD) in 2013 inspired by the UNCRPD.

Indeed, on the one hand, one of the issues with a quota system is that it commonly requires a clear-cut definition of disability in order to specify the target of the placement system explicitly, and this often results in the persistence of forms of '*certification*' of disability released by medical commissions or committees of experts.

As a result, also the idea of a disability based on a medical statement tends to endure.

However, on the other hand, all the European countries that first introduced the quota system after the First World War (for example Italy, France or Germany) coupled it with antidiscrimination provisions at a later stage so that the former is nowadays framed as a positive action aiming at boosting the participation of disabled persons in society and the labor market.

In other words, the quota system is a useful tool to rebalance the lack of opportunity that disabled people often have to face in the labor market, giving them a real chance to gain a more equal position in the society.

Moreover, a proper assessment of any legal framework also depends on the way the reasonable accommodation duty has been embedded and on what its function in it is. Indeed this duty plays a key role in the completion of the shift from the medical to the social approach to disability.

[2] Recently see, for example, K. Heyer, *Rights Enabled* (Ann Arbor: University of Michigan Press, 2015), 24-28.

This paper cannot analyze in depth all of these involved questions. However, it can furnish a contribution to the debate by providing an overview of the Japanese and Italian legislation on the matter of discrimination and placement of the disabled at work as a basis for future consideration keeping in mind the general outlines of the subject.

The comparison between Italy and Japan is of interest because the key elements of the most recent amendments introduced in the latter country, such as a broader definition of persons with disabilities under the law, the introduction of the prohibition of discrimination against persons with disabilities and the obligation to provide reasonable accommodation brought the Japan system much closer to a third group of mainly European countries which had already merged the quota system with dispositions against discrimination.

The regulations of the two countries under scrutiny will be presented starting from the interpretation of the Constitutional provisions which enable the legislation on this subject. Some information about other dispositions more broadly related to disabled persons will be furnished although the focus will be on the anti-discrimination law at the workplace as well as on the mechanism of employment for disabled persons (the quota system).[3]

In the case of Japan, some clarifications related to the Japanese labor law peculiarities will be underlined to explain better the rationale underpinning certain provisions which might not be readily intelligible without such elucidations.

II. The Italian Legal Framework

The Italian Constitution is probably the most prominent example of '*Social Constitutionalism*' and therefore it views work as the cornerstone of human development and as the foundation of the Republic.

Art 3 para 1 of the Italian Constitution contains the solemn proclamation of the equal social dignity of all the citizen and the principle of formal equality before the law irrespective of any personal characteristic.[4]

This principle 'has been applied by the Constitutional Court (…) as a complex principle that presupposes an evaluation of different personal and social conditions', so that any law is considered *reasonable* before the Constitutional Court if like cases are treated alike, and different cases are treated differently.[5]

[3] Both the quota systems of Italy and Japan shall be labeled as quota-levy system. Typically in this case a quota is set-and it is required 'that covered employers who do not meet their obligation pay a fine or levy which usually goes into a fund to support the employment of disabled people' (L.B. Waddington, 'Reassessing the Employment of People with Disabilities in Europe: from Quotas to Anti-Discrimination Laws' 18(1) *Comparative Labor Law Journal*, 62 (1996)).

[4] 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social condition'.

[5] See R. Del Punta, 'What Has Equality to Do with Labour Law' 18(2) *The International of*

Moreover para 2 of the same Art 3 places on the Republic the burden of removing

> 'obstacles of an economic and social nature, which constrain the freedom and equality of all citizens, impede the full development of human personality and the effective participation of all workers in the political, economic and social development of the country'.

In this framework, all the labor legislation and the anti-discrimination law are tools to implement Art 3 para 2 of the Italian Constitution and thus reach the substantive equality.[6]

The protection against all forms of discrimination that target persons with disabilities is ensured by two different legislative instruments, namely legge 1 March 2006 no 67, regarding measures for the legal protection of people with disabilities who are victims of discrimination, and decreto legislativo 9 July 2003 no 216 which implemented Directive 2000/78 /EC on equal treatment in employment and working conditions in the national legal system.[7]

Both of these regulatory instruments adopt the same concepts of direct and indirect discrimination as well as of harassment directly inspired by the European Directive.

As is well known, in the European framework, direct discrimination occurs when a person is treated less favorably than another is, has been or would be treated in a comparable situation on one of the protected grounds. Indirect discrimination, on the other hand, occurs where an apparently neutral provision, criterion or practice would put persons who belong to specific groups in which all the people share a particular characteristic at a particular disadvantage compared with other persons.

The above mentioned legge no 67/2006 exclusively addresses people with disabilities but has a wider scope compared to the decreto legislativo no 216/2003 in terms of field of application. The decree is designed to provide disabled persons with the full enjoyment of their civil, political, economic and

Comparative Labor Law and Industrial Relations, 197, 199 (2002).

[6] The Italian Constitution directly deals with disability at Art 38 where the latter is considered as an issue the welfare state has to cope with. In fact, under Art 38 'Every citizen unable to work and without the necessary means of subsistence has a right to welfare support. Workers have the right to be assured adequate means for their needs and necessities in the event of accident, illness, disability, old age and involuntary unemployment. Disabled and handicapped persons have the right to education and vocational training. The duties laid down in this article are provided for by entities and institutions established or supported by the State. Private-sector assistance may be freely provided'. For a correct interpretation of this article in conjunction with Arts 2, 3 and 4 (right to work) of the Italian Constitution refer to P. Digennaro, 'Right to Work and Placement of the Disabled in the Labour Market: The Italian Legal Framework' *Revista derecho social y empresa*, 143, 149-151 Suplemento n.1 Abril (2015).

[7] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

social rights through the prohibition of any discrimination in any field or sphere of social life and relations. Conversely, decreto legislativo no 216/2003 has a broader range of recipients since it regulates equality and the prohibition of discrimination against any individual on the grounds of religion, personal beliefs, disability, age or sexual orientation. However, it targets discrimination exclusively in the employment context from the hiring process and access to employment until the termination of the working relationship and includes any event related to it.[8]

A new article (Art 3-*bis*) has been added to the decreto legislativo no 216/2003[9] in order to guarantee the compliance of the Italian legislation with the European directive after the Court of Justice of the European Union (CJEU) found Italy to have failed in fulfilling its obligation to ensure the correct and full implementation of Art 5 of Council Directive 2000/78/EC.[10]

Therefore Art 3-*bis* decreto legislativo no 216/2003 introduced in the Italian system the reasonable accommodation duty for public and private employers. The provision refers directly to the definition of the reasonable accommodation included in the UNCRPD rather than to the Directive and does no more than implement the general principle without any further or more detailed regulations. As a result, Art 3-*bis* decreto legislativo no 216/2003 provides an ample space for a judge-made implementation law since Courts will need to design boundaries and define the significance of the embedded principle in concrete form by means of interpretation.

Alongside the anti-discrimination law, the system is still founded on the obligation of employers to hire a quota[11] of disabled workers and, in the event of

[8] In order to have a general overview of the state of the implementation of anti-discrimination law and directives in Italy refer to C. Favilli, 'Report on Measures to Combat Discrimination (Directives 2000/43/EC and 2000/78/EC Country Report)', 1 January 2014, available at https://tinyurl.com/y8xabgyd (last visited 15 November 2018).

[9] By means of Art 9, para 4 decreto legge 28 June 2013 no 73, converted into legge 9 August 2013 no 99.

[10] Case C-312/11 *European Commission* v *Italy*, Judgement of 4 July 2013, available at www.eur-lex.europa.eu.

[11] The Constitutional legitimacy of the system of compulsory employment which evolved after in the quota system was challenged already in 1960 in consideration of the assumed restriction of the economic initiative and of the organization and dimensioning of companies protected by Art 41 para 1 Constitution. Moreover, it was assumed that the costs of obligatory employment of persons with disabilities should have been a burden of the State in accordance with the provisions of Art 38 Constitution.

The Constitutional Court stated that the purpose of such kind of provisions are not to provide beneficiaries with charitable maintenance but to conclude a real employment contract which requires the performance of work and to offer disabled persons the way to still play a role according to their abilities. Those provisions are indeed necessary in order to remove the obstacles to the actual participation of all workers in the economical and social development of the country according to Art 3 Constitution and to fulfil the duty of solidarity entrenched in Art 2 Constitution (Corte Costituzionale 15 June 1960 no 38, and 11 July 1961 no 55). The Court clarified also that the quota system does not affect the economic organization of companies in

non-compliance, on the corresponding pecuniary sanctions to be paid to the 'Regional Fund for the Employment of Disabled Persons'. Subsidies are given to employers in order to favor the stable employment of the disabled and above all of those with severe disabilities.

Legge 12 March 1999 no 68 entitled *Standards for the Right to Work of Disabled People* which replaced the previous law on compulsory employment, namely legge 2 April 1968 no 482, led to a significant cultural and regulatory shift in Italy. While the earlier law was essentially based on numerical job placement, legge no 68/1999 introduced the concept of *'targeted'* employment.

The starting point of this legislative scheme is the obligation placed by Art 3 on both public and private employers, to hire disabled workers in a variable amount that depends on the total number of human resources of the company. Thus, if the company employs more than fifty employees, the quota is seven per cent; if it employs from thirty-six to fifty employees, the quota is two workers; finally, if it has between fifteen and thirty-six employees, to hire one disabled person is sufficient to meet the requirements.

Small businesses with fourteen or fewer employees have no obligation, but they receive economic incentives when they hire voluntarily.

The procedure establishes that potential employees who aspire to a job must enroll in appropriate lists held by the 'services for targeting employment'. In those offices, a file is opened for each person recording skills, capabilities, job preference, the kind and degree of disability. Every year, private and public employers will send to the public employment services a prospectus containing all the information related to the fulfillment of the quota such as the total number of the workforce employed, the number of disabled persons employed[12] and job positions and related tasks available to cover the quota if needed.

The idea is to facilitate a match between the effective demand for work and the supply of labor by comparing the information, and at the same time to introduce each disabled person not just to any job, but to an activity suitable for his or her skills and professional qualifications.

According to the previous version of the law, once the employer submits the request for the number of workers needed to meet the quota, the job center would then arrange the placement of the person according to the list-rank.

After the last reform, due to the decreto legislativo 14 September 2015 no 150, the process has changed in that the employer can instead select a group of

consideration of the modest imposition of small quotas compared to the total number of employees.

The Constitutional Court continued to refer faithfully to the above-mentioned reasoning also in the most recent rulings related to the quota system (order 23 December 1994 no 449 and order 21 March 1996 no 86). All the mentioned judgments are available on the official website of the Court (https://www.cortecostituzionale.it/actionPronuncia.do).

[12] A similar provision is included in the Art 43(7) of AEPPD, but the rationale behind the provision of this law differs if compared with the Italian one as will be clear after the comparison.

workers who have the required skills and want to adhere to the job offer from the list mentioned above.

The amendment was criticised by labor unions and associations of disabled persons because it enlarges the discretion of the employer as it sets the possibility to choose among workers as the basic option of the mechanism (while in the previous version it was an exception). This can lead to a marginalization of workers with more severe disabilities. Indeed there will be fewer chances for those people to be selected and the new procedure could create breeding ground for discrimination among disabled candidates.

The fulfillment of the obligation related to the pre-set quota can also be accomplished using a different tool which is available even to those employers wholly excluded from the scope of Art 3 of legge no 68/1999. This mechanism entails, on the one hand, a relationship between companies and Public employment services which sign a framework agreement and, on the other hand, a relationship between the employer and the disabled worker which sign the employment contract and who can enjoy a personalized plan of placement.[13]

The employer benefits from the more favorable management of the circumstances leading to compliance with the quota, planning the entry of disabled workers in its productive system a few at a time without concern about possible sanctions for non-compliance with the quota required by law.

Arts 12 and 12-*bis* legge no 68/1999 provide for different kinds of contracted tools which can be activated under some conditions and only to cover the quota partially.

There is not enough space here to describe the different features[14] of each instrument but what is important to underline is the general scheme which they share. The disabled worker is counted in the quota of the employer who activated the placement agreement even if the worker is placed in a 'hosting' workplace. The 'recipient' can be a social cooperative, a social enterprise or in any case an employer who is considered by the legislator to be more suitable for the employment of disabled persons.

I will comment on these specific tools at the end of the next section comparing them with a distinguishing legal device of the Japanese model.

III. The Japanese Legal Framework

Art 97 of the Japanese Constitution states that fundamental human rights are 'conferred upon this and future generations in trust, to be held for all time inviolate'.

Moreover Art 14 Constitution adds that

[13] Art 11 legge no 68/1999.

[14] For a more detailed explanation refer to P. Digennaro, n 6 above, 159-164.

> 'all 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'.

The Japanese Courts have interpreted this provision over the years with the effect of enlarging its scope.

Hence, for example, the term 'social status' means status gained by birth, the term 'nationality' includes the concept of race, and the term 'creed' has been intended as to include both political and religious beliefs.[15]

At the same time, it is important to underline how the principles contained in Art 14 Japanese Constitution have traditionally been interpreted when in connection with the freedom of contract and hiring.

The prevailing academic view supported by a landmark decision of the Supreme Court[16] held that the latter 'provision does not tackle discriminatory treatment before the formation of labor contracts (ie, at the recruitment and hiring stage)'[17] but instead it has to be read in conjunction with Art 27 of the Japanese Constitution which imposes limitations on the employer only when fixed by law and related to the working condition (so the conditions which apply when an employment relationship already exists) or derived from the necessity to accomplish the right to work.

For this reason, for example, the legislative policy (ie, in particular, the quota system) promoting the employment of a category of persons such as the disabled person who finds more difficulties and barriers in finding jobs has been considered as an exceptional restriction of the hiring freedom based on Art 27, para 1 Japanese Constitution (right to work).

However, the most recent Japanese legislative policies show a trend toward strengthening the limitation on hiring freedom, above all those based on civil rights principles, such as the prohibition of discriminations. Suitable examples of the said trend are both the Equal Opportunity Law and the new amendments to the AEPPD which will be discussed below.

The more this tendency grows, the more difficult it will be to maintain the position that, with only some exceptions, the general rule based on the Constitution of Japan is the absolute freedom to choose the workforce. The ongoing process could lead in the future to reverse the situation, that is to

[15] T.A. Hanami et al, *Labour Law in Japan* (Alphen aan den Rijn: Kluwer Law International BV, 2nd ed, 2015), 147.

[16] Supreme Court, 12 December 1973, *Mitsubishi Jushi* v *Takano*, 27 Minshu 1536, where the Court stated that 'the Constitution's (…) Arts 22 and 29 et seq guarantee, as basic civil rights, the right of a business to exercise its property rights, business freedom, and other freedoms with respect to its broad economic activities. That is why the owner of a business, having the freedom to conclude a contract linked to his or her economic activities, can as a general rule hire any workers and employ them under any conditions for its own business (…)'.

[17] K. Sugeno, *Japanese Employment and Labor Law* (Durham: Carolina Academic Press, 2002), 148.

establish as the broad standard the existence of a general duty not to discriminate, which can be limited by some exceptions (as it is the case in the European legal framework).

As regards the ordinary law, prohibitions against discrimination are scattered in various acts.

Art 3 of the Labor Standard Act (LSA)[18] represents the most general provision mirroring the Constitutional guarantee since it prohibits discrimination by the employer in the workplace on the basis of nationality, creed or social status.

Moreover, Art 4 LSA prohibits discriminatory treatment because of sex with respect to wages.[19]

In 2006 an important amendment to Art 7 of the Employment Opportunity Law (EOL)[20] introduced, for the first time in Japanese labor Law, the concept of indirect discrimination.

There are two factors which limit the scope of this new instrument.

First of all, the EOL is a law explicitly targeting discrimination based on sex only.

Moreover, even within its specific field, the law covers only some practices specified in a decree of the Ministry of the Public Health and Labor which are regulated as forbidden indirect discrimination provided that the employer cannot demonstrate that there is a legitimate reason to take such measures.[21]

The Labor Policy Council Subcommittee on Disabled Employment[22] which was appointed to conduct studies at amending the (AEPPD)[23] discussed whether to introduce a provision also prohibiting the indirect discrimination of disabled workers.

The final opinion was negative because the Subcommittee held that indirect discrimination is a vague concept and also that the cases not falling under direct discrimination could be addressed by providing reasonable accommodation.

This implies that

> 'in other words, indirect discrimination is not considered to be prohibited

[18] Act 7 April 1947 no 49. It states that 'Employers shall not use the nationality, creed or social status of any workers as a basis for engaging in discriminatory treatment with respect to wages, working hours or other working conditions'.

[19] Art 4 LSA states that 'Employers shall not use the fact that a worker is a woman as a basis for engaging in differential treatment in comparison to men with respect to wages'.

[20] Act 1 July 1972 no 113 on Securing Equal Opportunity and Treatment between Men and Women in Employment.

[21] For an overview of the employment discrimination law in Japan see R. Sakuraba, 'Employment Discrimination Law in Japan: Human Rights or employment Policy?', in R. Blanpain et al eds, *New Developments in Discrimination Law* (Alphen aan den Rijn: Kluwer Law International, 2008), 233.

[22] The task of the Subcommittee was to express an opinion based on the content of three different reports released by three different research groups set up inside the Ministry of Health, Labour and Welfare to study the issue of possible revisions.

[23] Law no 123 of 1960.

> in Japan. The AEPPD is construed as adopting the position of distinguishing direct discrimination from indirect discrimination in terms of whether or not there is an 'intention to discriminate', it prohibits direct discrimination as discrimination in which there is an intention to discriminate'.[24]

The amendment of the AEPPD was a part of a broader policy pursued by the Japanese legislators which was aimed at paving the way for the ratification of the UNCRPD in 2013. Therefore this strategy also included the revision of the Service and Support for Persons with Disabilities Act, the enactment of the Act for Eliminating Discrimination against Persons with Disabilities (AEDPD) and, as the first step in 2011, the revision of the Basic Act for Persons with Disabilities (BAPD).

The latter law was conceived as an instrument of particular importance in order to reflect the objective of the UNCRPD as it had been the gate for both a new definition of 'persons with disabilities' able to mark a shift in favor of the social model,[25] and the concept of 'reasonable accommodation' which was established in a domestic law in Japan for the first time. Moreover, a prohibition of discrimination was included in Art 4 BAPD.

The AEDPD, in turn, is intended as a means to realize the provisions of the BAPD. Therefore it classifies discriminations against persons with disabilities in two categories: a) 'unfair discrimination treatment' which occurs in the case of refusing, restricting, or adding conditions to the provision of goods and service simply due to someone's disabilities without justifiable reason and b) a failure to provide a reasonable accommodation when a disabled person asks for it as long as providing reasonable accommodations does not imply an excessive burden.

While the prohibition against discrimination has a general scope, the duty to provide for a reasonable accommodation is imposed only on national and local governments since private businesses have an obligation to make endeavors only (Art 8).[26]

[24] H. Tamako, 'Reasonable Accommodation for Persons with disabilities in Japan' 1 *Japan Labor Review*, 21, 24 (2015). Compare with K. Tominaga, 'Kaisei Shogaisha Koyo Sokushinhono Shogaisha Sabetsu Kinshi to Goriteki Hairyo Teiko Gimu (Prohibition of Discrimination against persons with disabilities and the obligation to provide reasonable accommodation in the Amended Act on Employment Promotion etc of Persons with Disabilities)' 8 *Quarterly Jurist*, 27, 29 (2014).

[25] As far as the definition of disability is concerned Art 2(i) BAPD states that 'Person with a disability refers to a person with a physical disability, a person with an intellectual disability, a person with a mental disability (including developmental disabilities), and other persons with disabilities affecting the functions of the body or mind (hereinafter referred to collectively as 'disabilities'), and *who are in a state of facing substantial limitations in their continuous daily life or social life because of a disability or a social barrier*'. The subsequent letter (ii) specifies that "Social barriers' refers to items, institutions, practices, ideas, and other things in society that stand as obstacles against persons with disabilities engaging in daily life or social life'.

[26] A gradual and soft approach which combines a duty to make efforts (that is the so-called duty to 'endeavour') coupled with administrative guidance has been used often in social policy in Japan and above all in the case of anti discrimination policy as it was, for example, in the case of the equal employment policy concerning the elimination of sex discrimination. This

Notwithstanding this, it is important to point out that Art 13 AEDPD refers to the AEPPD all the competence in governing the measures to be taken by public bodies and private enterprises in order to eliminate discriminatory treatment against workers on the grounds of disability when they are in the position of employers. Therefore, new provisions to prohibit discrimination at the workplace, as well as a real duty to accommodate, were introduced in the AEPPD which became, for this reason, the all-embracing law which regulates all the aspects of employment and the right to work of disabled persons in Japan.

Effectively it is the AEPPD under Art 36 paras 2 and 3 which obliges employers to provide a reasonable accommodation unless it entails a disproportionate burden (so, in this case, it is not just a duty to endeavor).

Moreover Art 35 reinforces the prohibition against discriminatory treatment in terms of 'wages, the implementation of education and training, the utilization of welfare facilities and other treatments' while Art 34 specifies that with regard to the recruitment and employment of workers, employers shall provide equal opportunities for persons with and without disabilities. Therefore, the former article is devoted to avoiding discrimination after hiring while the latter to the recruitment process. The scheme is the same utilized in the Equal Employment Opportunity Act to avoid discrimination between men and women in employment.

For the reasons mentioned above related to the interpretation of the freedom of hiring under Japanese labor law, including in the Act an explicit provision in order to specify that excluding a candidate because of his/her disability is framed as discrimination, and is therefore prohibited, was necessary and of particular importance.

Turning to the analysis of Chapter 3 of the AEPPD dedicated to the employment promotion of disabled persons, the system is based on a quota-levy system.

Private companies, the bodies of State and local authorities are required to employ a legally prescribed minimum percentage of persons with physical intellectual or mental disabilities, the latter category having been included in the mandatory hiring as a result of the last reform in 2013.

The quota for private businesses itself rose from one point one per cent when the system was established in 1960[27] to two per cent in April 2013. From April 2018 the quota increased to two point two per cent, and it has been

particular approach must be considered as 'one of the most significant characteristics of the social policies in Japan' based on the idea that it is more effective than a direct legal intervention. A mandatory form of intervention is instead viewed as useful only in the case that the soft approach failed or when 'society has accepted new norms and direct legal intervention will no longer cause serious confusion' (see T. Araki, 'The impact of fundamental social rights on Japanese law', in B. Hepple ed, *Social and Labour Rights in a Global Context, International and Comparative Perspectives* (Cambridge: Cambridge University Press, 2002), 215, 234-235.

[27] At the time the quota was not mandatory and was limited to persons with physical disabilities.

determined that it will reach two point three per cent by the end of the fiscal year 2020.[28]

Indeed, on the 30 May 2017, the Labor Policy Council approved the decision to raise the quota to two point three per cent for the private sector employers, two point six per cent for national and regional public bodies and specified incorporate administrative agencies and two point five per cent for prefectural and local boards of education starting from 1 April 2018 to the 31 March 2023.

Notwithstanding this, to avoid an excessive burden on enterprises, it was decided to move gradually towards the final target by setting an intermediate step consisting of the following provisional rates: two point two per cent for the private sector employers, two point five per cent for national and regional bodies and specified incorporate administrative agencies and two point four per cent for boards of education. The transitional measure will be abolished by April 2021. As for the scope of application of the duty, the recipients were the employers with fifty or more employees after the last reform in 2013. However, by means of the same decision related to the quota, also the numeric threshold was downgraded to forty-five and half or more employees (with each part-time employee counted as half) from April 2018 with the provision of one more downgrade to fourty-three and half when the employment quota will be raised to two point three per cent.

In 1976 a levy-grant scheme was introduced to encourage the employment of disabled workers. In case of failure in fulfillment of the prescribed quota, enterprises with over one hundred regular employees are required to pay a levy of fifty thousand yen per month for each person under the quota. Conversely, employers that meet the quota receive adjustment subsidies amounting to twenty-seven thousand yen per month for each person over the quota or financial incentives (twenty-one thousand yen per month for each person over the quota for enterprises with one hundred or fewer employees).[29]

No penalty is charged to the government, local authorities and educational boards.

Moreover, the law also provides various kinds of subsidies for employers establishing or arranging working facilities or equipment for disabled workers or taking measures to assist, support or facilitate the disabled workforce.

There are two more features of the Japanese system which it is essential to mention.

[28] The specific timing will be discussed at a later stage by the Labor Policy Council which is an advisory panel to the Minister of Health, Labor and Welfare. Official documents related to the decisions mentioned here and onwards in the paper are available at https://tinyurl.com/y73sonoe (last visited 15 November 2018).

[29] About the levy-grant mechanism and in particular about the economic consequences and effectiveness of the employment quota system refer to Y. Mori and N. Sakamoto, 'Economic consequences of employment quota system for disabled people: Evidence from a regression discontinuity design in Japan' 1 *Journal of Japanese and International Economies*, 1 (2018).

Employers can establish 'special subsidiaries' to employ disabled workers. The workforce employed in the subsidiary is counted as recruited by the parent company for calculating its current employment rate under given requirements.

In this case, as well as with the case of the placement agreements provided for by the Arts 12 and 12-*bis* legge no 68/99 mentioned in the previous paragraph, the legislator of Japan considered that the advantages are considerable on both the sides. Indeed this tool should increase job opportunities for disabled persons and the workers should be surrounded by an ideal work environment while the employer is facilitated not only in fulfilling the quota and arranging the facilities, but should also be able to count on an improvement of the disabled worker's productivity.

In this sense, these tools can be compared with regard to the rationale behind them.

In both legal frameworks, those possibilities left to the employers have the effect of separating or 'segregating' the disabled workers and the workplace made for them from the rest of the workforce. The idea which emerges from these instruments is hardly distinguishable from the one which operated for years in many countries' separate school systems for disabled pupils, ie the needs of the disabled are considered different and better served in separate institutions.[30]

For this reason, these legal arrangments appear to conflict with the prohibition against discrimination and above all against the concept of reasonable accommodation, the philosophy behind which is the idea to make the general environment barrier-free in order to make possible a mutual integration between persons with and without disabilities.

Therefore, the removal of those legal institutions should be considered in order to focus attention and resources on the reasonable accommodation duty and the complete fulfillment of the quotas in the parent enterprises.

The last aspect to briefly present is the 'Hello Work' administrative agency, ie, the Japanese government's Employment Service Center which manages services for job-seekers, administers unemployment benefits and also, as regards the topic of this paper, has a role in introducing careers for disabled workers.

In particular, when a 'person with disabilities using welfare facilities (vocational aid center, small-sized workplace, special-needs school, etc) wishes to work for private companies, Hello Work' can provide support for employment in cooperation with the welfare facilities. In this case, a team provided by this government

[30] Italy has long been at the forefront in the field of inclusive education, as the Republic started to reform the school system to integrate the disabled students with the Legge 30 March 1971 no 118 but the complete abolition of separate schools for the disabled was the result of the Legge 4 August 1977 no 517. Conversely a move towards an inclusive approach to education in Japan is a still ongoing recent development. The Basic Act for Persons with Disability introduced the idea that children and students with disabilities should be able to receive their education together with children and students without disabilities insofar as possible along with the duty to accommodate, but the policy still needs to be fully implemented.

agency supports the person from preparation for employment to the settlement of the workplace.

IV. Concluding Remarks

The comparison between the Italian and Japanese laws related to the employment of persons with disabilities shows that both these countries adopted a quota-levy system which shares a general structure. Both systems are based on economic penalties and incentives albeit with differences regarding the quota and the scope of the employer's obligation to employ persons with disabilities.

These differences are understandable if one compares the scale of the enterprises in the countries under scrutiny. While the production systems in both countries are classified as being dominated by small or medium-size companies, the data shows that the majority of Italian enterprises are smaller than Japanese firms and employ less than ten employees.[31]

Another relevant difference between the two models lies in the role of the Public Employment Service. In the frame of the legge no 68/99, all the process of employment in Italy is carried out under the supervision of public bodies, from enrollment in the list of disabled job-seekers until the placement of the employee, and the quota system is still crafted as an integral part of the Public Employment Service and walfare state. In Japan instead, public employment offices only control the fulfillment of the quota when the employer reports the employment situation of persons with disabilities annually. It can also order the employer to prepare a three-year plan to improve the situation and give guidance for its implementation.

The 'Hello Work' Service is triggered by a personal request of the worker and it is conceived as an additional help provided for disabled workers.

This said, at first glance one might consider that the Italian and the Japanese systems are now very similar since the Japanese legislator adopted reforms aiming at prohibiting discrimination.

The similarity specifically lies in the merging of the quota system with an antidiscrimination approach which is also a feature typical of many other European countries.

The analysis would not be correct if it considers only this external data related to the general scheme adopted on this issue because differences

[31] According to a survey by Istituto Nazionale di Statistica (Italian National Institute of Statistics; ISTAT), 'Struttura e dimensione delle imprese' 1 June 2011, available at https://tinyurl.com/yd6robkm (last visited 15 November 2018) the Italian productive system is characterized, on the whole, by the strong presence of micro enterprises: those with less than ten employees are almost four point three million, represent ninety-five per cent of the total and occupy forty-seven per cent of the employees. Those enterprises have no obligation to hire disabled workers as explained in the second section of this work and this factor hinders the efficacy of the quota system.

emerge as soon as the interpretation of this pattern explores under the surface.

The first differential factor has already been identified in the paragraphs above. Indeed the European countries, including Italy, share the application of the concept of indirect discrimination which does not coincide precisely with the reasonable accommodation duty even if both of those instruments were created to address external sources of discrimination apart from any possibly invidious intent of the employer.

Both the lack of a prohibition against indirect discrimination and the significant factor that under the long-term employment system in Japan, workers are not hired for particular duties or tasks or for particular positions, but are assigned during their career to various types of duties and positions based on the development of their job skills, could give room to a possible marginalization of disabled workers during the employment relationship notwithstanding their being formally accommodated. If such cases occur, the possibility of contrasting unfair employer's internal policy will probably rely on the doctrine of the abuse of rights which the Japanese Supreme Court has often used to protect employees.

The second difference is related to the definition of disability which, as stated in the introduction, is one of the primary tools of the shift from the medical approach to the social approach to disability.

In Italy, notwithstanding the fact that the definition contained in legge no 68/1999 is still entrenched in the old paradigm,[32] both because it preceded the international success of the social model and probably because of the perceived necessity of a clear-cut definition, it applies only for the quota system.

Instead, when a case of possible discrimination is at stake, the national courts are bound by a broad definition of disability with no need to ascertain any status declared by a State body or medical commission.

Indeed, in that case, the national courts have to conform to the CJEU interpretation of the Directives which in turn affirmed that the understanding of '*disability*' set out in the UNCRPD binds the CJEU.[33]

This entails that the disability will refer, in the same words of the CJEU,

> 'to a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various

[32] As the social model is based on criticism of automatic and systematic segregation of the disabled and on the attempt to overcome the separate treatment doctrine, it must be said that in Italy some efforts in this direction date back to the 1970s.

As for the school system, for example, see n 30 above.

Moreover, the quota system has been considered as a form of integration rather than as a form to provide charitable maintenance already in Corte costituzionale, 15 June 1960 no 38 (see n 11 above).

[33] Joined Cases C-335/11 and C-337/11, *HK Danmark* v *Danskalmennyttigt Boligselskab, Dansk Arbejdsgiverforening*, Judgment of 11 April 2013 at para 32, available at www.eur-lex.europa.eu.

> barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers',

in other words, the CJEU retained the same definition of disability under Art 1 UNCRPD.

In the case of Japan, the Employment Promotion Act includes one definition only of disability which is valid in all the aspects related to the application of the law and additionally this definition does not coincide with the one embedded in Art 2 BAPD which was inspired by the social model of disability. According to Art 2 AEPPD, disabled persons are defined as

> 'those who because of physical, intellectual, mental disabilities or other impairments of physical or mental functions (…) are subject to a considerable restriction in vocational life, or have a great difficulty in leading a vocational life'

and insofar as they have a disability listed in an Annex of the law or an intellectual disability specified by the Ministry order.[34] Therefore the definition of persons with disabilities in the AEPPD is the same as the one in the Act on Welfare of Physical Disabilities. 'As a result, whether a person is covered by the Employment Promotion Act is defined by whether that person has a disability passbook'.[35]

Those two factors, namely a definition itself which still seems grounded in a vision of the disability as medical impairment and the link with the disability passbook, could frustrate the reform and drastically reduce its impact as a shield against discrimination.

[34] Art 2 AEPPD.

[35] H. Nagano, 'Recent Trends and Issues in Employment Policy on Persons with Disabilities' 5 *Japan Labor Review*, 5, 13 (2015).