

# A Legal Study on Equal or Balanced Treatment for Regular and Non-Regular Workers in Japan

With Particular Focus on the Relationship between Anti-Discrimination Principle and Policy-Based Regulations for Equal or Balanced Treatment



Koichi Tominaga

This paper discusses a few questions about the issue of equal or balanced treatment of regular and non-regular workers in Japan. Should equal or balanced treatment only be recognized once a law has been enacted, or should it already be recognized as a general legal principle, without any specific law being enacted? Also, even if intervention based on general provisions or legislation were recognized, how far (to what extent) should the intervention be permitted? Firstly, this paper briefly introduces current case law, statutory law, and scholarly discussions in Japan, and then discusses the first question (whether extrinsic intervention by the anti-discrimination principle to private autonomy should be recognized or not). This paper analyzes the anti-discrimination principle from two different angles, namely (1) power relationships between parties and (2) the nature of anti-discrimination factors, often called “protected classes.” Secondly, this paper discusses how far the anti-discrimination principle should intervene in private autonomy. Even if intervention based on general provisions or legislation were recognized, differences could arise in the content, based on differences in the factor subject to anti-discrimination — specifically, between factors based on human rights, such as gender or beliefs, and factors based not so much on human rights as on social policy, such as employment status. In this paper, this paper examines and classifies factors (protected classes) according to their nature, based on two axes, namely (a) the mobility (selectability) of those factors and (b) their impact on job duties. Differences in those factors would result in whether prohibition is one- or two-sided, and whether the criteria for judging exceptions to prohibition are strict or lenient. Thirdly, this paper analyzes the anti-discrimination principle on employment statuses (forms of employment) within the above-mentioned frame. Here, this paper suggests that the anti-discrimination principle on employment statuses has a rather loose regulatory content compared to that on factors related to human rights. This paper also suggests that it is even possible that anti-discrimination provisions based on employment status, though helping to correct disparity between regular workers and non-regular workers whose actual employment is similar to core employees, may promote a downward revision of treatment for regular workers who actually work in a non-regular capacity.

- I. Introduction
- II. Present status of legal regulation
- III. Analysis of the anti-discrimination principle and employment status discrimination
- IV. Conclusion

---

## I. Introduction

Of the various problems related to wage disparity inside companies, this paper will examine that of legal regulation against wage disparity between regular and non-regular workers, in particular (see the endnote<sup>1</sup> for usage of the terms “employee” and “worker” in this paper).

The term *seiki rōdōsha* or “regular worker” generally refers to workers who are employed full-time, directly, and without a fixed contract term, while *hiseiki rōdōsha* or “non-regular workers” are those who lack at least one of those attributes. For example, they may be part-time rather than full-time workers, workers with fixed-term rather than open-ended contracts, or agency workers who are not directly employed.<sup>2</sup> Henceforth in this paper, I will use the terms “regular workers” and “non-regular workers” as categories based on this difference in legal employment contracts (employment conditions). In general, the terms *seishain* (“core employee”) and *hiseishain* (“non-core employee”) are also used with more or less the same meanings as these. In this paper, however, I will use “core employee” and “non-core employee” as categories based not on contractual arrangements but on the allocation of human resources within a company. Thus, they will be used to distinguish between core workers<sup>3</sup> who are assumed to work in accordance with flexible extensions of working hours (overtime) and broad fluctuation in job duties and the place of work, on the presumption of long-term employment, and other peripheral (non-core) workers who are none of the above. Naturally, these terms will overlap with “regular workers” and “non-regular workers,” respectively, in many (but not all) aspects of actual practice.

In Japan, non-regular workers accounted for some 20% of all workers in 1990, but this number had doubled to just under 40% by 2015, partly due to the impact of long-term economic stagnation since the 1990s.<sup>4</sup> Young workers who entered the employment market and became non-regular workers during this period of economic stagnation could not convert to regular employment, despite subsequent economic cycles.<sup>5</sup> Instead, their immobility has become a serious social problem causing impoverishment of those young people and an increase in future social burdens, due to the large disparity in treatment compared to regular workers.

Given this situation in society, powerful claims were made for the existence and application of a legal principle, which would extrinsically and forcibly constrain the parties involved, and make it mandatory to have equal or balanced treatment between employment statuses (regular and non-regular workers). In response to this movement, a number of laws have been enacted in recent labor legislation. Some of these include provisions designed to increase mobility between employment statuses (mainly the conversion of non-regular workers to regular employment), as in Article 18 of the Labor Contract Act,<sup>6</sup> Article 13 of the Act on Improvement, etc. of Employment Management for Part-Time Workers (Part-Time Workers Act<sup>7</sup>), and Article 40-6 of the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (Worker Dispatching Act<sup>8</sup>). Other provisions prohibit both discrimination and unreasonably differential treatment based on whether workers are employed full- or part-time or whether on fixed-term or open-ended contracts, triggered by the 2007 amendment of the Part-Time Workers Act. These include Article 20 of the Labor Contract Act, and Articles 8 and 9, Article 11 paragraph 1 and Article 12 of the Part-Time Workers Act. Others impose an obligation for mandatory efforts to ensure balanced treatment (Article 11 paragraph 2 of the Part-Time Workers Act, Article 30-3 of the Worker Dispatching Act). In the following, these recently enacted provisions enforcing equal or balanced treatment of non-regular workers will be abbreviated for convenience as “non-regular equality laws.” There are still many points of uncertainty about the basis and content of these legal principles and provisions.

In this paper, therefore, I will very briefly introduce the present status of legal regulation on wage disparity caused by differences in employment status<sup>9</sup> in the form of full- or part-time workers and fixed-term or open-ended contracts. This involves the legal principle of extrinsically and forcibly constraining

---

the parties involved and making it mandatory to have equal or balanced treatment between employment statuses with regard to wage disparity within the same company. Specifically, I will focus on case law and statutory law (II), then study the characteristics and targets of the anti-discrimination principle in employment statuses after considering how the anti-discrimination principle is theoretically affected by the nature of anti-discrimination factors (III). Finally, I will conclude with a brief summary (IV).

## II. Present status of legal regulation

### 1. Case law

Disparity in the treatment of workers (differential treatment in wages, etc.) based on employment statuses decided in labor contracts or agreements has long been contested in courts of law.

Grounds for redress to invalidate this differential treatment could include (i) Articles 13 and 14 of the Constitution,<sup>10</sup> (ii) Article 3 of the Labor Standards Act,<sup>11</sup> (iii) Article 4 of the Labor Standards Act, (iv) international conventions,<sup>12</sup> (v) the provisions of non-regular equality laws (as above), and (vi) general provisions on the legal principle of public policy (e.g. Article 90 of the Civil Code<sup>13</sup>).

In case law, there is a tendency for cases to be treated as lying outside the direct range of the provision in question. The constitutional provisions in (i) above, for example, have been excluded on grounds that they were not intended to apply directly to relationships between individuals, while the application of (iv) international conventions, etc., as direct grounds for redress has been denied because they are not self-executing or lack legal normativeness, among other reasons.<sup>14</sup> The same is true of (ii) Article 3 of the Labor Standards Act, on grounds that employment statuses are not inherently irreversible,<sup>15</sup> or that the factors are not unrelated to labor.<sup>16</sup> With regard to (iii) Article 4 of the Labor Standards Act, similarly, while employment management based on separate courses that used to reinforce gender divisions before the enforcement of the Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment (Equal Employment Opportunity Act) is deemed a violation of public policy,<sup>17</sup> differential treatment that is not regarded as gender division or involves employment statuses or jobs that are advantageous to women tends not to be regarded as a violation of that provision.<sup>18</sup>

In scholarly theory, there have been robust claims that (vi) the principle of public policy, etc., includes the principle of “equal pay for equal work (or work of equal value).” However, no precedents can be found that directly acknowledge the existence, in itself, of a principle of equal pay for equal work (or work of equal value) with specific legal normativeness.<sup>19</sup> Moreover, although room for redress under the public policy principle is recognized, there are hardly any examples of actual redress. One of the rare positive examples was the 1996 *Maruko Keihoki* case,<sup>20</sup> in which, although the existence of “a principle of equal pay for equal work (or work of equal value)” was deemed not to be recognized as “a general legal norm governing labor relationships,” redress was ultimately granted. This was because the significant wage disparity (more than 20%) between core employees and long-serving temporary employees who could be regarded as being virtually identical to core employees was judged to violate public policy on employers’ discretion, in that “the concept of equal treatment” as the basis of this principle could be an important factor for consideration when judging the illegality of wage disparity. In the *Wings Kyoto* case, meanwhile, redress was ultimately denied, but while similarly denying the existence of a principle of equal pay for equal work (or work of equal value) as a general legal norm, room for the establishment of “violation of public policy based on the concept of equilibrium” was recognized in pronounced wage disparity for equal work (or work of equal value).<sup>21</sup>

Since the enactment of non-regular equality laws, the focus of the problem has shifted to the application of (v) specific provisions of non-regular equality laws, and examples of both negative and positive rulings on redress have been seen.<sup>22</sup>

To summarize the foregoing briefly, disregarding the existence of (v) specific legislation that clearly prohibits discriminatory treatment between employment statuses as discussed below, the tendency of judicial

---

precedents is that, if there is no such legislation, the existence of a principle of equal pay for equal work (or work of equal value) is of course not recognized as a specific legal norm. There is, however, room for pronounced wage disparity in cases of equal work (or work of equal value) to be deemed a violation of public policy.

## 2. Statutory law

The scope of recent non-regular equality laws targets wage discrimination against non-regular workers. Conceptually, it is based on the phrase “a balance with ordinary workers” provided in Article 3 paragraph 1 of the 1993 Part-Time Workers Act. For legislation that has specific and coercive legal normativeness, however, we must look elsewhere—for example, Article 8 of the Part-Time Workers Act, which prohibits unreasonable disparity in the treatment of part-time workers compared to ordinary workers, or Article 9 of that Act, which prohibits discriminatory treatment of part-time workers who should be seen as identical to ordinary workers. Another example is Article 20 of the Labor Contract Act, which prohibits unreasonable disparity in the treatment of fixed-term contract workers compared to those on open-ended contracts.

These provisions—for example, Article 8 of the Part-Time Workers Act and Article 20 of the Labor Contract Act—prohibit unreasonable differences in working conditions (differential treatment) between non-regular and regular workers. That is, they prohibit “(unreasonable) differential treatment” of certain workers “by reason of being non-regular workers,” and prohibit the nexus between a specific factor (“non-regular workers”) and discriminatory treatment (“unreasonable differences in working conditions”).<sup>23</sup> In this point, they have the same logical structure as many other anti-discrimination provisions,<sup>24</sup> and could be seen as a kind of anti-discrimination rule in the broad sense.

These non-regular equality laws are slightly different in character from typical anti-discrimination provisions. That is, the various provisions of non-regular equality laws such as Article 8 of the Part-Time Workers Act and Article 20 of the Labor Contract Act, at least in their wording, do not require literally the “same” treatment of non-regular and regular workers in all working conditions; these provisions do not directly prohibit advantageous treatment of non-regular workers (they are one-sided and only partially prohibit discrimination), according to the official interpretation.<sup>25</sup> Moreover, because they only prohibit “unreasonable” differences in “working conditions,” discrimination when hiring is also outside their scope;<sup>26</sup> they allow room for permitting differences in working conditions based on any number of reasonable circumstances, such as differences in job duties, as long as they are considered reasonable grounds. These characteristics show that the various provisions mentioned above have a rather loose regulatory content compared to the prohibition of sexual discrimination that targets both hiring and placement, and has strict exceptions (or does not have expressly stated statutory exceptions), for example. Incidentally, this trend not only affects Japan but is also seen in regulations prohibiting discrimination against non-regular workers in the legal systems of other countries.<sup>27</sup>

## 3. Scholarly theory

Many theories on the equal or balanced treatment of regular and non-regular workers (mainly part-time or fixed-term workers) had been accumulating since before the enactment of these non-regular equality laws, and there have also been some excellent studies since the non-regular equality laws were enacted.<sup>28</sup> Some take a negative stance on the existence of a legal principle concerning equal treatment between non-regular and regular workers (as long as no specific law exists),<sup>29</sup> while others are more positive. Even in the latter case, there have been numerous assertions on the grounds for such a principle, including the principle of equal pay for equal work (or work of equal value) or a relaxed principle of equal pay for equal work,<sup>30</sup> the principle of equal pay for equal obligatory labor,<sup>31</sup> the “notion of equilibrium,”<sup>32</sup> and the principle of equality (the obligation to treat equally),<sup>33</sup> among others.<sup>34</sup>

---

### III. Analysis of the anti-discrimination principle and employment status discrimination

In the following, I will first examine, of elements that affect the content of the anti-discrimination principle, (i) the power relationship between the parties involved, as a trigger for intervention by extrinsic law and (ii) the nature of anti-discrimination factors that affect the method of intervention when such intervention by the law is recognized. I would then like to consider perspectives for regulation on employment statuses based on the anti-discrimination principle.

#### 1. Power relationships between parties (triggering legal intervention in private autonomy)<sup>35</sup>

Unlike relationships between governments and private individuals, which are unidirectional relationships between “decider” and “decided,” it is an unspoken assumption in relationships between private individuals that the parties are equal; the consent of the parties is basically respected when creating rights and obligations borne by them (this is known as private autonomy). Even in relationships between private individuals, however, a degree of correction by the law is naturally required when there is an actual imbalance in the power relationship between the parties that cannot be disregarded. In a labor (contractual) relationship, similarly, corrections are made through regulation by labor law whenever there is an imbalance in the power relationship between the parties, and prohibiting discrimination in employment is one method of such correction. Of course, in relationships between private individuals, unlike public law relationships, there is the possibility of adjustment through markets (i.e. the free choice of the parties involved) even if there is an imbalance, and there could also therefore be differences in the range and content of prohibiting discrimination.<sup>36</sup> Even in labor relationships, if the market is functioning perfectly, workers can theoretically use the labor market to protect themselves from unreasonable discrimination by employers, and anti-discrimination provisions should not be necessary. Of course, the actual market (and the society behind it) cannot be perfect, but as the necessity and content of prohibiting discrimination will differ depending on whether or not any adjustment by the market can be expected,<sup>37</sup> the possibility of adjustment by that market will also differ depending on the very nature of the anti-discrimination factor in question. Therefore, the range and content of employment status discrimination will also be affected by the nature of the anti-discrimination factor, i.e. employment statuses, which form one aspect in the possibility of adjustment by the market (see 2 below).

#### 2. The nature of “protected classes” (anti-discrimination factors)

As prohibiting discrimination means prohibiting “nexus” (“connections”) between certain “anti-discrimination factors” (protected classes) and “discriminatory treatment” (differential treatment or disadvantageous treatment), the nature of anti-discrimination factors also affects the content of the anti-discrimination principle, in terms of the possibility of coordinating the parties’ free volition as mentioned above. From this perspective, two particularly important distinctions are whether anti-discrimination factors (i) are not matters of choice, or the free choice of which is being guaranteed, or (ii) affect the content of contracts.<sup>38</sup>

##### (1) Anti-discrimination related to human rights and policy

##### (a) Factors that cannot be chosen or in which choice is guaranteed (Anti-discrimination related to human rights)

When prohibiting discrimination in factors that cannot be chosen or in which choice (the freedom of choice) is strongly guaranteed under the Constitution, due to their very nature, exceptions in which discrimination is justified are narrow and strictly limited.

For example, let us consider the non-choosable factors of gender and race. Although this is only a hypothetical example, the “tendency” is that, when taking up employment in a certain job, most people

---

will probably not automatically think therefore that discrimination based on gender or race in that job “can be permitted because it is reasonable,” even if it is “statistically” judged to have bias or tendencies based on gender or race. This is because, even if there might be, statistically speaking, a degree of variation in the tendency toward job affinity due to differences in race or gender, the “individual” concerned should only ever be judged as an “individual” who cannot choose this factor for himself or herself and cannot even escape from it. In other words, the individual should not be denied opportunities due to circumstances beyond his or her control (race or gender), and should not be placed at a disadvantage on these grounds. For example, even if there were a degree of statistical variation between men and women in language ability or muscle strength (though only a hypothetical situation), a female individual with superior muscle strength as an individual, or a male individual with superior language ability, should not suffer discrimination when taking up a job that required muscle strength or language ability, respectively. If discrimination were permitted, it would be in cases when the individual’s gender or race itself decisively affected the job duties in question, such as when those job duties could only be performed by a person of a certain gender or race; in the case of sexual discrimination, for example, an exception would be a shrine maiden.<sup>39</sup> These strict exceptions to anti-discrimination laws are known as *bona fide* occupational qualifications (BFOQs). Another permitted exception to anti-discrimination is legitimate positive action permitted in order to meet strong policy requests, but this will not be discussed here.<sup>40</sup>

Meanwhile, discrimination based on factors where choice is strongly guaranteed, such as beliefs and religion, has a character equivalent to that of discrimination based on factors where there is no choice.<sup>41</sup> Although these factors are not inherently unchangeable, they lie at the core of the individual’s existence, and choice is guaranteed under the Constitution. With regard to these, too, individuals should not suffer discrimination on grounds of a mere statistical or trend-related variation, etc.

In other words, as regards anti-discrimination factors that are unchangeable and cannot be chosen (gender, race) or are changeable but choice is guaranteed (beliefs, etc.), the reasonableness of discrimination (or of exceptions to anti-discrimination) is strictly judged within very narrow parameters under *bona fide* occupational qualifications. Moreover, this type of anti-discrimination works from both sides, as a rule (i.e. not only disadvantageous treatment to a certain protected class but also advantageous differential treatment to that class is prohibited, as long as that treatment is based on those factors). This is because, in factors that are unchangeable for “individuals” belonging to any demographic, or factors in which choice is guaranteed to “individuals,” there is no ranking of priority or precedence in the position that they should be judged as individuals and respected as individuals, without prejudice or bias. In relation to these unchangeable factors or factors in which choice is guaranteed, the “right” of individuals to be protected from discrimination should be recognized because they are individuals, or in other words due to “the very fact that they are human beings.” For the time being, therefore, I will use the term “anti-discrimination related to human rights” when referring to anti-discrimination in cases such as these.

(b) Factors that are choosable but in which choice is not guaranteed (Anti-discrimination related to policy)

In contrast to factors based purely on considerations of human rights, anti-discrimination provisions concerning factors that are changeable (choosable) depending on the individual’s free volition, and are not directly guaranteed by the Constitution, have a stronger tone of recognition in view of the policy-based considerations of promoting or protecting choice in that factor.<sup>42</sup> Given that individuals are able to choose these factors, justification of discrimination (unlike in the case of *bona fide* occupational qualifications) is recognized relatively loosely, as long as the disparity is judged reasonable in light of the gist and purpose of the respective anti-discrimination rule. Moreover, one-sided prohibition is tolerated because the anti-discrimination factors are outside the direct scope of guarantees under the Constitution and because policy-related considerations are acceptable (or, even if the prohibition is two-sided, reasonableness may be judged more loosely for one of the sides). In the following, I shall call anti-discrimination based on this kind of factor “anti-discrimination related to policy,” as it has a strong policy-related nature of treating,

---

protecting and promoting (or conversely suppressing) groups with specific factors as groups, rather than being sought directly from the angle of protecting the human rights of individuals.

(2) Impact on job duties, etc.

If the employer is reasonable and there is a factor that impacts job duties, etc. (i.e. rights and obligations under a labor contract), the employee in question should be treated differently in accordance with the level of impact. On the other hand, if there is a factor that is completely unrelated (or has no impact) the employee should be treated in the same way as when that factor does not occur, without considering the factor itself.<sup>43</sup> That is, in a labor contract, treating “equal people equally but unequal people unequally in accordance with the degree of inequality” is the normal (reasonable) “right treatment,” in terms of the impact on job duties, etc. This means that, in the anti-discrimination principle, whether there is a link between anti-discrimination factors and a given treatment (discrimination) — in other words, whether a treatment seen as problematic was applied by reason of an anti-discrimination factor—is judged based on whether that treatment is “the right treatment” in accordance with the impact of the anti-discrimination factors on job duties, etc. If there is no impact, this “right treatment” would be the same treatment as when there is no anti-discrimination factor; if there is an impact, conversely, it would be differential treatment in proportion to the impact. This judgment is normally made through a comparative judgment with a comparison subject (comparator) who is in the same or a similar situation but differs in terms of anti-discrimination factors.

It should be noted that the policy aspects and human rights aspects of prohibiting discrimination are not necessarily linked to whether or not anti-discrimination factors affect job duties, etc. Policy-related characteristics often impact job duties, etc., while human rights characteristics often have no such impact. However, there could be cases in which anti-discrimination factors with a purpose based in human rights might sometimes affect job duties, etc. (e.g. typically pregnancy and disability, and even gender, religion, etc. for jobs with *bona fide* occupational qualifications), or conversely cases in which even those with a policy-based purport do not directly affect job duties, etc. (e.g. whistleblowing).

“Job duties, etc.” basically refers to the rights and obligations set down in a labor contract. While a labor contract is a contract in which ordered labor (the performance of job duties) is exchanged for wages, there are also various incidental obligations, such as an obligation to consider safety. Therefore, not only differential treatment corresponding to an impact on the performance of job duties as the main obligation under a labor contract (e.g. a worker’s ability to perform job duties, or the obligation to perform contractual job duties in the broad sense), but also differential treatment corresponding to an impact on the incidental obligations under a labor contract (e.g. providing reasonable accommodation in accordance with a worker’s vulnerability, such as pregnancy or disability, that impacts the obligation to consider safety) would be permitted as being reasonable.

When an anti-discrimination factor does not affect job duties and this can be substantiated through comparison with a subject in the same situation, the right treatment may be specified in detail, meaning that the same treatment as the “right treatment” should be applied (here, I will call this “the principle of same treatment”). In this case, it should be possible to recognize this “right treatment” as a form of redress.<sup>44</sup>

On the other hand, if an anti-discrimination factor does affect job duties, the treatment should be in equilibrium with the impact on job duties, etc. (I will call this the “principle of balanced treatment”). In this case, since the comparison subject is a person who is (not the same but) similar, yet is in a different situation, there are often no clear standards for judging the proportionality of the degree of differential treatment. In that case, the “balance” will often be judged by applying social norms. With regard to redress, similarly, the right treatment cannot be specified in detail, and can only be recognized in compensation for damages, etc. On the other hand, when there are clear standards for judging the balance between that impact and the degree of differential treatment (e.g. the “no work, no pay” principle), treatment should

---

be applied on this basis even if there is an impact.<sup>45</sup> Since this is a case in which the right treatment can be specified in detail, and it is judged in terms of “whether or not it is the same” as the right treatment, it can essentially be seen as one aspect of the principle of same treatment. Moreover, it is thought that anti-discrimination related to human rights should be judged more strictly than anti-discrimination related to policy, especially if there are clear standards, but even if there are not.<sup>46</sup>

### 3. Anti-discrimination principle on employment statuses

The characteristics of legal provisions in non-regular equality laws highlighted in II 2 reflect the impact made by the nature of (i) power relationships between the parties and (ii) anti-discrimination factors, as discussed above.

#### (1) Power relationships between the parties (opportunities for legal intervention in private autonomy)

When a flexible labor market exists, the need for protection based on the anti-discrimination principle is relatively low. This is because, if workers can change jobs flexibly, employers who resort to unreasonable discrimination will ultimately suffer disadvantage due to the costs associated with their preference for this unreasonable discrimination, and will be weeded out. From this perspective, the need for protection under the anti-discrimination law, with regard to the distinction between employment statuses when their content is decided by the free volition of the parties concerned, would indeed appear at first sight to be low in the case of contracts concluded on the labor market.

The problem, however, is that there is a very wide gulf between the so-called external and internal labor markets in Japan.<sup>47</sup> In the latter, job duties and treatment are decided unilaterally based on the strong personnel-managing authority of Japanese companies, meaning that opportunities for adjustment by the free volition of the two parties are weak. In the case of non-regular workers, moreover, part-time or fixed-term workers in Japanese companies do not only perform limited job duties under part-time or fixed-term (temporary) contracts as purely non-regular workers, as presumed by their contracts. In reality, they may be given overtime work and do the same work as full-time employees (so-called “quasi part-timers”); or they may work as essentially open-ended contract workers via repeated contract renewals (which I shall call “quasi fixed-term contract workers”), or else have become core workers and work without limitation on job duties, etc. (I shall call these “quasi non-regular workers”). Of the above, “quasi fixed-term contract workers” accumulate company-specific skills and knowledge that are hard to evaluate on the external labor market (and which are only properly evaluated by their own company) by repeatedly renewing fixed-term contracts, even if their treatment on the external labor market was decided appropriately at the point of initial hiring (often involving pay based on work evaluation). The situation could arise whereby companies do not evaluate based on abilities, and only pay wages based on the original external labor market. This is in spite of the fact that, because companies employ workers on the assumption of company-specific skills and knowledge, a situation has thereby arisen in which it would be reasonable for the treatment to be the same as that of core employees on the internal labor market (in terms not of job duties but of ability, or in other words ability-based pay). In such situations, quasi fixed-term contract workers are in a kind of monopoly market.

For “quasi part-timers,” similarly, wages are decided on the assumption of part-time labor premised upon routine work, but in reality, the situation could arise whereby workers and others who have family responsibilities are engaged in long-term and core labor, the same as that of regular workers, based on their supposed ability to perform non-routine tasks. On the disparity between purely regular workers (core employees) and pure non-regular workers (non-core employees), correction by the external labor market can be expected to a degree. However, while the external labor market has some power to correct unfair discrimination against these quasi part-timers, quasi fixed-term contract workers and other quasi non-regular workers (i.e. non-regular workers who are treated as non-core employees even though their



---

actual working situation is that of core employees), this power is weak. From that viewpoint, on decisions that are essentially unilateral in internal labor markets with regard to these quasi non-regular workers, at least, opportunities for correction by the law are thought more likely to be permissible than in the case of a non-regular worker with a typical, non-core employee-like work style, based on general provisions (consisting of violation of public policy under Article 90 of the Civil Code, or abuse of rights under Article 1 paragraph 3 of the Civil Code). This would be the case even if special anti-discrimination provisions were not enacted to oppose the exercise of personnel authority, labor command authority and others going beyond the framework of limitation of contractual job duties, etc.<sup>48</sup>

On the other hand, the need for legal correction in the case of decisions on the treatment of typical, non-core employee-type non-regular workers is relatively low, and this correction should probably be achieved by enacting laws. Of course, even if the employment reality of a non-regular worker is purely that of a “non-core employee,” it could come under the scope of the principle of prohibition of indirect discrimination (part-time labor, etc.) if the allocation of family responsibility and occupational responsibility is heavily weighted toward one gender as a result of social discrimination.

## (2) Study of the character of anti-discrimination factors

### (a) Aspects of policy-based character

The employment conditions (employment statuses) of full-time or part-time, fixed-term or open-ended contract, and directly or indirectly employed are not unchangeable and inescapable; if decided by an agreement (labor contract) between the parties, prohibiting employment status discrimination therefore has a strong policy-based character. Of course, although they are changeable and not directly guaranteed under the Constitution, these conditions could affect the content of prohibiting discrimination if they indirectly have a human-rights-based character.

In anti-discrimination related to policy, prohibition of discrimination is often one-sided, and justification of discrimination as an exception is judged not by *bona fide* occupational qualifications but by the proportionality principle; when making a judgment on the proportionality principle, policy-related factors might also be considered. Anti-discrimination provisions in Japan’s non-regular equality laws (in particular, Article 8 of the Part-Time Workers Act and Article 20 of the Labor Contract Act) purport to protect non-regular workers unilaterally in terms of administrative interpretation. Elements in judging the reasonableness of disparity are broad and flexible, in that consideration of “other factors” is permitted besides the content of the work, the level of responsibility associated with this work (the content of job duties), and the scope of change in the content and assignment of said job duties. These characteristics are generally consistent with those of prohibiting discrimination based on policy. Moreover, although the one-sidedness of prohibition in the various provisions is debatable,<sup>49</sup> even if the prohibition is two-sided, an asymmetry could possibly be recognized due to the impact of the policy objective of protecting non-regular workers. Namely, reasonableness could be affirmed more leniently for disparity that is advantageous to non-regular workers than for that which is disadvantageous.

Situations in which employment status discrimination affects anti-discrimination factors based on human rights have been pointed out, such as in (i) the low changeability of employment statuses and (ii) discrimination against the gender that bears family responsibility. With regard to (i), as mentioned in (1) above, the need for correction by the law must be high, even if it cannot be seen in the same light as human-rights-based discrimination. For this is a situation in which non-core employees who have accumulated company-specific skills are in a kind of monopoly market created by that company; it is difficult for them to change their own employment status **in that company** through their own volition alone.<sup>50</sup> Meanwhile, item (ii) above refers particularly to part-time labor. Nevertheless, when an imbalance in burdens of family responsibility or work-related responsibility vis-à-vis a specific gender is recognized, there is room to apply the principle of indirect discrimination (Article 7 of the Equal Employment Opportunity Act).

---

Reasonableness would then be judged relatively strictly when applying anti-discrimination provisions.

(b) Aspects of the impact on job duties, etc.

In connection with employment status discrimination, part-time workers and fixed-term contract workers differ from regular workers in the flexibility of working hours for the former and the continuity of employment contracts for the latter. A feature shared by both types is that they work as non-core employees, and the scope of change in their job duties and place of work differ from those of typical (core employee-type) regular workers. These are differences that affect the scope of obligations under a labor contract, particularly the main obligation, i.e. the ability and obligation to perform job duties; differential treatment in wages and others should be permitted in proportion to this. If the only difference between non-regular and regular workers lay merely in aspects such as working hours and the contract term, it might be possible to make a clear judgment on the reasonableness of treatment by applying the time proportionality principle or duration proportionality principle, for example. Behind the difference in treatment, however, lie differences in the actual working situation, such as the flexibility of working hours and the possibility of reassignment to diverse job duties and places of employment. These are difficult to compare quantitatively, and the reasonableness of treatment often has to be judged by applying the very abstract notion of “balance.”

Another problem in Japan is that there is no uniform or dominant principle for deciding wages common to all employment statuses; there is often a lack of standards for judging the proportionality between differences in obligations under labor contracts and the degree of differential treatment in terms of wages.

Traditionally, core employees of Japanese companies often receive wages commensurate with the assessment of their ability to perform their job duties (ability-based pay), while non-core employees, on the other hand, often receive wages commensurate with job duties (pay based on work evaluation). Regular workers bear an obligation to work in a broad diversity of job duties without limitation on job duties, place of employment, working hours, etc., on the premise of long-term continuous employment. If they are required to have broad-ranging work ability commensurate with this (known as the “membership type”),<sup>51</sup> it is reasonable for them to receive wages that reflect the broadness of their ability to perform job duties and work obligations or responsibility (ability-based pay), rather than wages for **those** job duties which they happen to be currently performing (pay based on work evaluation).

If, on the other hand, they are contracted to work only for limited working hours, limited short periods and in limited job duties and places of employment (called the “job type”),<sup>52</sup> then contractually, it is reasonable that they should receive wages on the premise of work in those limited job duties, given that employers cannot exercise such a flexible commanding authority toward those workers. (The same is true even if their actual ability to respond to broad-ranging demands such as diverse job duties, diverse places of employment and long working hours is the same as that of core employees.)

It is very difficult to judge the unreasonableness of wage disparity between “typical” core employees and “typical” non-core employees, or the “equality (or equality of value)” of their respective work, since they are based on these different but reasonable wage decision principles of ability-based pay and pay based on work evaluation.<sup>53</sup> Anti-discrimination provisions concerning non-regular workers (for example, Article 8 of the Part-Time Workers Act and Article 20 of the Labor Contract Act) are highly abstract, and specific judgments are difficult to predict. This results from the fact that a single provision is broadly targeted to include processing of cases based on broad and completely different wage decision principles (in which there is little possibility of comparison).

Next, I will make a comparative judgment of the reasonableness of differential treatment in the text of those provisions, based on the difference in actual working situations described above, considering each case separately.

Table 1 shows employment contract formats (based on company forecasts) on the horizontal axis and work situations on the vertical axis. As I understand it, A in the table represents people who are regular workers in terms of employment format, while also, in terms of their working situation, carrying a heavy

job responsibility befitting this and being required to meet broad-ranging obligations (typical, core employee-type regular workers). B in the table indicates people who receive relatively low contractual treatment as non-regular workers (pay based on work evaluation), but who in reality work as core employees (with long hours, long contract terms, diverse job duties, etc.) These are non-typical, core employee-type non-regular workers defined as “quasi part-timers,” “quasi fixed-term contract workers” and “quasi non-regular workers” above. C represents people who were hired as regular workers, but in reality (owing to a lack of ability, etc.) work as non-core employees with limited, light responsibility (non-core employee-type regular workers). D represents people who are contractually non-regular workers, and whose actual situation is that they are engaged in part-time or short-term work with limited job duties, etc., befitting this definition (typical, non-core employee-type non-regular workers).

Although the comparison subjects in Article 20 of the Labor Contract Act and Article 8 of the Part-Time Workers Act are very broad, when these provisions are seen in terms of the anti-discrimination principle and the existence or lack of discrimination is judged by a comparative judgment with the comparison subjects, the latter are people with the same or similar situations but who differ in anti-discrimination factors (comparison is not possible when the actual situations are too different). As a result, as seen below, cases in which the possibility of comparison is denied in a detailed judgment could exist even if the scope of the various provisions extends to them.

**Table 1. Classification of workers based on contract format and actual working situation**

Actual working situation	Form of employment (format)	
	Regular worker (open-ended contract, full-time) (prospect of long-term service, broad and flexible (unstable) responsibilities, ability-based pay)	Non-regular worker (= fixed-term contract, part-timer) (no prospect of long-term service, limited and stable responsibilities, pay based on work evaluation)
In reality, long-term service, long hours, broad and flexible work (core employee-type)	A: Core-type regular worker (typical core employee)	B: Core-type but non-regular worker (quasi part-timer, quasi fixed-term contract worker or other quasi non-core employee)
In reality, no long-term service, limited and stable work (non-core employee type)	C: Peripheral regular worker (quasi core employee?)	D: Peripheral non-regular worker (typical part-timer, fixed-term contract)

(i) Comparison between typical regular worker A and typical non-regular worker D

If D, a purely non-regular worker in both contract format and actual working situation, as described above, is compared with typical core employee A, the disparity in treatment between A and D is linked with the difference between them. Specifically, A in reality bears the obligation to fulfil broad-ranging job responsibilities flexibly, while D does not. The question of how much value to place in this broad-ranging flexibility differs from person to person, and each person’s preference should be adjusted in the market; this is not something that can be easily judged by a court of law. In that case, it would seem that the disparity in question often cannot be judged to clearly lack balance or be unreasonable, excluding treatment unrelated to job responsibility (e.g. salaries paid uniformly because they are employees, regardless of the degree of contractual obligation or the size of their contribution).

(ii) Comparison between typical regular worker A and quasi non-regular worker B

As stated in 3 (1) above, the focus in cases of employment status discrimination is not on discrimination against typical non-regular workers but on discrimination against quasi non-regular workers. Quasi non-regular workers are those who receive pay based on work evaluation, for example on the contractual premise that their working hours, contract term and job duties will be limited, yet in reality are expected to work in the same way as core employees, complying with long hours, long contract terms and diverse job

---

duties. These workers should be permitted to seek equal or balanced treatment compared to comparison subjects under the same situation (typical regular worker A).

Article 9 of the Part-Time Workers Act (and its forerunner, the amended Article 8 of 2007) provides for the prohibition of discrimination against part-time workers who can be deemed equivalent to (or are more or less in the same situation as) ordinary workers. When it comes to wages, this provision is indeed thought to prohibit differential treatment in the method of wage decision, i.e. between pay based on work evaluation and ability-based pay, and to demand that the treatment of these workers be decided using the same method of wage decision as core employees (in many cases, ability-based pay). Moreover, even if B is deemed “equivalent,” there must be many cases in which a comparison subject in a similar situation (a situation capable of comparison) can be found in A, and in some cases in C. Therefore, non-regular equality laws are expected to provide an opportunity for improved treatment of this worker B to be demanded of companies, even if noncritical interpretation problems seem to be left in the Part-Time Workers Act.<sup>54</sup>

(iii) Comparison between non-core employee-type regular worker C and typical non-regular worker D

Finally, I will discuss non-core employee-type regular worker C. This is a worker who, though planning to remain in long-term employment and hired as a regular worker contractually bound to bear the obligation to work in broad-ranging and diverse job duties without limitation on duties, place of employment, working hours, etc., in reality is unable to acquire sufficient ability to perform the job duties and cannot comply with employment in these broad-ranging, diverse job duties. Pressure to revise the treatment for worker C is very likely to arise, under employment status anti-discrimination provisions (Article 20 of the Labor Contract Act, etc.), in that the treatment is too high when judging the reasonableness compared to D. As stated above, if treatment with pay based on work evaluation is deemed reasonable for those working as non-core employees with limited job responsibility, it would be reasonable for a company either to apply pay based on work evaluation to C and reduce the treatment to be closer to D, rather than apply ability-based pay to D and increase D’s treatment or make C’s actual working situation heavier and bring it closer to A.<sup>55</sup> Of course, judicial precedents place priority on the contract format; they are negative on recognizing the ability to perform job duties and the limitation of contractual obligations based on the actual situation after the conclusion of the contract,<sup>56</sup> while attempts to downgrade professional qualifications are also subject to rigorous checks.<sup>57</sup> From the companies’ point of view, therefore, they might have no option but to tend toward revising treatment as a whole by introducing results-based pay, or expanding reassignments or relocating C, rather than the measure of simply revising (lowering) C’s pay.

To summarize the above, in a comparative judgment of anti-discrimination provisions related to employment status, wage disparity between A and D is, in many cases, easy to judge as reasonable (or not comparable) disparity, meaning that the main trend in redress is via the labor market. On the other hand, wage disparity and other differences between A and B and between C and D could be within the scope of employment status anti-discrimination provisions. This creates pressure not only to improve B’s treatment but also to lower that of C. In other words, at the same time as promoting a relaxation of wage disparity between employment categories, prohibiting discrimination based on employment status is also thought in reality to promote an expansion of wage disparity between core employee-type and non-core employee-type workers.

#### **IV. Conclusion**

On the equal or balanced treatment of regular and non-regular workers, there is a conflict between whether it should only be recognized once a law has been enacted, or whether it should be recognized as a general legal principle without any law being enacted. As discussed in this paper, if the law is assumed to intervene extrinsically in private autonomy in relationships between private individuals (i.e. the volition of the parties) when there is a pronounced imbalance in the power relationship between the parties and it is difficult for the market to adjust this imbalance, there could be room for intervention by the law to be recognized depending on the situation (flexibility) of the market surrounding non-regular workers. That is, there could

---

be room for recognizing justifiable intervention based on general provisions, etc., without waiting for legislation in the case of non-regular workers who are, in reality, indistinguishable from core employees (i.e. whose employment status exists in name only, but who in reality have a core employee-type actual working situation).

On the other hand, even if intervention by general provisions or legislation were recognized, differences could arise in the content of anti-discrimination, based on differences in the purport of anti-discrimination—specifically, between factors based on human rights, such as gender or beliefs, and factors based on policy, such as employment status (whether prohibition is one- or two-sided, and whether the standards for judging exceptions to prohibition are strict or lenient). Similarly, in terms of the difference in the impact of anti-discrimination factors on job duties, etc., it is often hard to judge whether there has been discrimination against non-regular workers, because their employment status affects their job duties and because there are differences in their actual working situations. Comparative judgment with comparison subjects (regular workers) suggests the possibility that anti-discrimination provisions in non-regular equality laws, though helping to correct disparity between regular workers and non-regular workers whose actual working format is that of the core employee-type, may even promote a downward revision of treatment for regular workers who actually work in a non-regular capacity.

If I may add, the study in this paper also suggests the importance of legal measures other than anti-discrimination provisions as a direct principle for correcting disparity in the form of prohibiting discrimination. In terms of discrimination based on employment status as a choosable factor, measures that would enable the parties to choose employment status flexibly (increased flexibility of the market) would probably be effective in correcting the problem. Regulations designed to “regularize” non-regular workers under existing law (Article 18 of the Labor Contract Act, Article 13 of the Part-Time Workers Act, Article 40-6 of the Worker Dispatching Act, etc.) present one means of addressing this. The opposite direction, namely the “de-regularization” of regular workers, does also exist, particularly when seen from the corporate viewpoint. For example, regular workers can be temporarily converted to fixed-term contracts to cover cases of pre- and postnatal leave, childcare leave, and long-term family care leave, or to part-time employment to cover cases of reduced hour measures and exemption from overtime work, etc. In both cases, regular workers are temporarily permitted to become non-regular to suit their needs in certain life stages, etc. The importance of the former measure (regularization) is self-explanatory, while the latter measure (temporary de-regularization) is commonly cited in the context of criticizing the generosity of protection for regular workers. However, if we consider that they both facilitate flexible movements and choices of actual working situations (the work style of the core employee-type and the non-core employee-type, respectively), we may also positively appraise these measures, in that enhancing them will help to increase the flexibility of movement between employment statuses and level out disparity over the long term.

\* This paper is based on an article commissioned by the editorial committee of *The Japanese Journal of Labour Studies* for inclusion in the special feature “Aspects of Wage Differences Inside Corporations” in its May 2016 issue (vol.58, No.670) with additions and amendments in line with the gist of this journal.

#### Notes

- 1 In some countries, “employee” and “worker” are legally differentiated (for example, in the UK, “employee” tends to mean those who work under an employment contract, whereas “worker” often has the nuance of a self-employed worker). In this paper, however, I will not strictly differentiate those two words. Unless otherwise specified, either “worker” or “employee” shall mean a worker under an employment contract, and these terms are interchangeably used in this article. While apologizing for any confusion because of this usage, I would like to highlight the difference between similar but not identical notions, namely “regular” and “core,” as well as “non-regular” and “non-core.”
- 2 Under existing law, the terms “ordinary workers” and “workers other than ordinary workers” are also found (Act Concerning the Promotion of Measures to Secure, Treatment in Accordance with Workers’ Job Duties). I will not use these terms in this paper, however, since there are numerous examples in which the term “ordinary workers” (regardless of

- whether fixed-term or open-ended contract) is solely used in the context of persons who are not part-time workers (Article 2 of Part-time Workers Act, and Article 39(3) of Labor Standards Act).
- 3 In other words, the term “core employees” refers to those with other elements besides the three requirements of “regular workers” mentioned above (full-time, open-ended contract, direct hiring), namely the possibility of extensive changes in their working hours, job content and place of employment. “Full (-duty) employee” might be more suitable term to call them.
  - 4 See Statistics Bureau, Ministry of Internal Affairs and Communications, “Labour Force Survey Historical Data” <http://www.stat.go.jp/data/roudou/longtime/03roudou.htm>.
  - 5 Soichi Ota, Yuji Genda and Ayako Kondo, 2007, *Tokenai hyōga: Sedai kōka no tenbō* [The Never Ending Ice-age: A Review of Cohort Effects in Japan]. *The Japanese Journal of Labour Studies* 49, No. 12: pp.4-16.
  - 6 Act No. 128 of December 5, 2007 (for original texts and translation of this Act, see <http://www.japaneselawtranslation.go.jp/law/detail/?id=2578&vm=04&re=02>).
  - 7 Act No. 76 of June 18, 1993 (for original texts and translation of this Act, see <http://www.japaneselawtranslation.go.jp/law/detail/?id=84&vm=04&re=02>).
  - 8 Act No. 88 of July 5, 1985 (for original texts and translation of this Act, see <http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=&re=02>).
  - 9 Owing to lack of space and relevant knowledge, worker dispatch will be treated as outside the scope of study by this paper. It will hopefully be dealt with on another occasion.
  - 10 For original texts and translation of Article 13 and 14 of the Constitution of Japan, see: [http://www.japaneselawtranslation.go.jp/law/detail\\_main?id=174](http://www.japaneselawtranslation.go.jp/law/detail_main?id=174).
  - 11 For original texts and translation, see <http://www.japaneselawtranslation.go.jp/law/detail/?id=2236&vm=04&re=01>.
  - 12 Article 7 of the International Covenant on Economic, Social and Cultural Rights and Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women are often referred to.
  - 13 Article 90 of the Civil Code (Act No. 89 of April 27, 1896) states “A juristic act with any purpose which is against public policy is void.” Article 1 paragraph 3, which is often referred to in this context, also states “No abuse of rights is permitted.” (for original texts and translation, see: <http://www.japaneselawtranslation.go.jp/law/detail/?id=2057&vm=04&re=02>).
  - 14 The *Wings Kyoto* case, Osaka High Court (Jul. 16, 2009), 1001 *Rohan* 77, Judgment in the 1st Instance, Kyoto District Court (Jul. 9, 2008), 973 *Rohan* 52. The *Naha City School Temporary Cook* case, Fukuoka High Court Naha Branch (Jan. 16, 2003), 855 *Rohan* (Digest) 93 (First Instance, Naha District Court (Oct. 17, 2001), 834 *Rohan* (Digest) 89, etc.). Similar interpretations are often made in sexual discrimination cases.
  - 15 The *Wings Kyoto* case, *supra* note 14, the *Maruko Keihoki* case, Nagano District Court, Ueda Branch (Mar. 15, 1996), 690 *Rohan* 32, and the *Teikura Niyaku* case, Tokyo High Court (Dec. 13, 1973), 731 *Hanji* 95.
  - 16 The *Harima Shipyard* case, Hiroshima District Court, Kure Branch (Jun. 15, 1949), 4 *Rominshu* 189.
  - 17 For example, the *Nomura Securities* (Gender Discrimination) case, Tokyo District Court (Feb. 20, 2002), 822 *Rohan* 13. The *Okaya & Co., Ltd.* case, Nagoya District Court (Dec. 22, 2004), 888 *Rohan* 28, etc.
  - 18 The *Maruko Keihoki* case, *supra* note 15, The *Toyo Suisan* case, Yokohama District Court, Kawasaki Branch (Dec. 27, 2002), 847 *Rohan* 58.
  - 19 The *Osaka Hatsushiba Gakuen* case, Osaka District Court, Sakai Branch (May 26, 2006), 954 *Rohan* 60 (First Instance), Osaka High Court (Sept. 27, 2007) (Appeal Trial), The *Naha City School Temporary Cook* case, *supra* note 14, The *Nippon Mail Transportation* case, Osaka District Court (May 22, 2002), 830 *Rohan* 22.
  - 20 The *Maruko Keihoki* case, *supra* note 15.
  - 21 The *Wings Kyoto* case, *supra* note 14.
  - 22 As examples of positive rulings on redress, the *Niyaku Corporation* case, Oita District Court (Dec. 10, 2013), 1090 *Rohan* 44, the *Hamakyorex* case, Tokyo High Court (Jul. 26 2016), 1143 *Rohan* 5 (Appeal Trial), the *Metro Commerce* case, Tokyo District Court (Mar. 23 2017), 1154 *Rohan* 5, the *Yamato Transport* case, Sendai District Court (Mar. 30 2017) 1158 *Rohan* 16, etc. As negative examples, the *Hoterasu* (Japan Legal Support Center) case, Nara District Court (Jul. 29, 2014), Dai-Ichi Hoki DB28223521, the *Nagasawa Unyu* case, Tokyo High Court (Nov. 2, 2016), 1144 *Rohan* 16 (Appeal Trial), etc.
  - 23 In academic theory, the scope of these provisions is sometimes construed broadly to mean that they require no cause and effect relationship between the various employment forms and differential treatment. The official interpretation, however, purports to provide for unreasonably differential treatment based on the employment form (on the Act on Improvement, etc. of Employment Management for Part-time Workers, Article 8: July 24, 2014 *Kihatsu* (a notice issued by the Director of the Labor Standards Inspection Office), 0724 No.2 / *Shokuhatsu* 0724 No.5 / *Nōhatsu* 0724 No.1 / *Kōjihatsu* 0724 No. 1 “On the enforcement of a law to amend part of the Act on Improvement, etc. of Employment Management for Part-Time Workers” No. 3-3-(2); and on the Labor Contract Act, Article 20: August 10, 2012 *Kihatsu* 0810 No. 2 “On the enforcement of the Labor Contract Act” No.5-6-(2)-a). In my own opinion, it would seem undesirable, in terms of litigation cost, to go as far as using these provisions to contest the rationality of disparity in treatment that has no connection (cause and effect relationship) with differences in employment form, or in other words, based on completely unrelated factors. This is because it would invite a confusion of arguments and would moreover excessively broaden the range of these provisions.

- 24 The basic structure of anti-discrimination provisions (provisions prohibiting disadvantageous treatment) is a connection (“by reason of”) between anti-discrimination factors (over a broad range including nationality, beliefs, social status, gender, ante- and postnatal leave-taking, and whistleblowing) and “discriminatory treatment” (including disadvantageous treatment). On the concept of anti-discrimination provisions, see Koichi Tominaga, “*Sabetsu kinshi hōri no kihonteki gainen ni kansuru shiron: Seisabetsu kinshi o kihonteki moderu to shite*” [An essay on the basic outline of the anti-discrimination principle: Prohibition of sexual discrimination as a basic model]. *Journal of Labor Law*, No.126, p.116.
- 25 On the 2007 Amended Act on Improvement, etc. of Employment Management for Part-time Workers Article 8 (current Article 9), see Shinichi Takasaki, 2008, *Komentāru pāto taimu rōdō hō* [Commentary on the part-time workers act]. Tokyo: Rodo Chosakai, p.229.
- 26 Conditions for hiring are not considered as “working conditions.” See *Mitsubishi Jushi* case, Supreme Court, Grand Bench (Dec. 12, 1973), 27 *Rominshu* 1536.
- 27 See JILPT, 2011, “Koyō keitai ni yoru kintō shogū ni tsuite no kenkyūkai hōkokusho” [Study group report on equal treatment based on employment forms]. [Study Group on Equal Treatment Based on Employment Forms (chaired by Takashi Araki, Professor at the University of Tokyo), www.jil.go.jp/press/documents/20110714\_02.pdf, etc.
- 28 On the development of theories, details can be found in Yuichiro Mizumachi, 1994, *Hitenkeigata koyō o meguru hō riron: Rinjikō / pāto taimu rōdōsha o megutte* [Law theory concerning atypical employment: Temporary laborers and part-time workers], Quarterly Labor Law No.171, 114; Masatoshi Ohki, 2011, *Hitenkei rōdōsha no kintō taigū o meguru hō riron* [Law theory concerning equal treatment of atypical workers], Quarterly Labor Law, No.234. 223; *id.* 2014, *Kintō kinkō shogū* [Equal or balanced treatment]; Shinya Ouchi, ed. 2014, *Yūki rōdō keiyaku no hōri to seisaku* [Doctrine and policy of fixed-term labor contracts], Tokyo: Kobundo p.74 ff.
- 29 Kazuo Sugeno and Yasuo Suwa, 1998, *Pāto taimu rōdō to kintō taigū gensoku* [Part-time labor and the principle of equal treatment], in *Yamaguchi Toshio sensei koki kinen: Gendai yōroppa no tenbō* [Perspectives on contemporary European law (Toshio Yamaguchi 70th Birthday Commemorative Papers)], edited by Ichiro Kitamura. Tokyo: University of Tokyo Press, pp.113-134.
- 30 Mutsuko Asakura, 1996, *Pāto taimu rōdō to kintō taigū gensoku (gekan)* [Part-time labor and the principle of equal treatment (Part II)], 1387 *Rojun* 38.
- 31 Yuichiro Mizumachi, 1997, *Pāto taimu rōdō no hōritsu seisaku* [Legislative policy on part-time labor]. Tokyo: Yuhikaku.
- 32 See Michio Tsuchida, 1999, *Pāto taimu rōdō to ‘kinkō no rinen’* [Part-time work and the ‘idea of balance’]. *Minshoho Zasshi* 119, No. 4-5, p.543.
- 33 Katsutoshi Kezuka, 2010, *Rōdō hō ni okeru sabetsu kinshi to byōdō toriatsukai* [Anti-discrimination and equal treatment in labor law], in *Rōdōsha jinkaku ken no kenkyū gekan* [Studies on the personal rights of workers Part II, (Kunishige Sumida 70th Birthday Commemorative Papers)], eds. Shozo Yamada and Yasuo Ishii. Tokyo: Shinzansha, p.3.
- 34 For an outline of these theories, see Oki, *supra* note 28.
- 35 For a detailed study on justification (lawfulness) of intervention by laws prohibiting employment discrimination in private autonomy, see Shinya Ouchi ed., FY2008 Labor Research Center Commissioned Research Report, Tokyo, *Koyō byōdō hōsei no hikaku hō teki kenkyū* [Comparative law research on employment equality legislation], Labor Research Center. This paper owes much to the suggestions of this research report.
- 36 For example, Article 14 of the Constitution, which provides for a general principle of equality, does not apply directly between private individuals, and is merely taken into account when interpreting general provisions, etc. in civil laws. Thus, even in a labor relationship, guarantees of the principle of equality are very weak in cases when hiring can be adjusted by the market (The *Mitsubishi Jushi* case, Supreme Court, Grand Bench (Dec. 12, 1973), 27 *Rominshu* 1536). Even after hiring, when adjustment by the market will not be so effective as hiring, guarantees of equality are thought to be looser than those of a public law relationship.
- 37 In typical examples, a general principle of equality exists between governments and individuals as relationships between the unilateral decider and the decided, in the sense that the government has to act reasonably without regard to the nature of the case (the anti-discrimination factors cited in Article 14 of the Constitution are construed as an illustrative list). In relationships between private individuals, on the other hand, the general principle of equality and equal treatment does not normally exist in this sense. The principle under labor contracts is also only partial and the content is relative (for example, the list of anti-discrimination factors in Article 3 of the Labor Standards Act is taken to be a definitive list).
- 38 For more detail on the following discussion, also see Hitomi Nagano, Tamako Hasegawa and Koichi Tominaga, eds., 2016, *Shōsetsu shōgaisha koyō sokushin hō* [Detailed commentary on the Employment of People with Disabilities Promotion Act]. Tokyo: Kobundo. 170 ff.
- 39 Though not specified, the official interpretation also recognizes exceptions to sexual discrimination based on this kind of reasoning (Ministry of Health, Labour and Welfare Notice No. 614 of 2006, No. 2-14 (2)).
- 40 Positive action is thought to entail a combination of multiple justifications (purposes). See Koichi Tominaga, 2013, *Pojitibu akushon no mokuteki / konkyo no saikentō ni kansuru ichi shiron* [A tentative discussion on a reappraisal of the purpose and justification of positive action], in *Kankyō henka no naka deno Rōdō seisaku no yakuwari to shuhō* [Roles and methods of labor policy amid environmental change], ed. Takashi Araki, FY2012 Labor Research Center

---

Commissioned Research Report. Tokyo: Labor Research Center, p.138.

- 41 However, there could still be room for studying whether guarantees are at the same level (have the same content) as those for race and gender. In practical law, a difference also exists in the level of guarantees in relation to anti-discrimination provisions based on the same human rights (e.g. whether or not hiring discrimination can be prohibited).
- 42 In this regard, of course, a stance of emphasizing opportunities of a human rights nature (such as the principle of respect for personal rights in Article 13 of the Constitution) is also shown. As a representative example, see Keiko Ogata, 2011, *Koyō keitai kan ni okeru kintō taigū* [Equal treatment in employment forms], *Journal of Labor Law*, No.117, 32, and others.
- 43 Reasonable employers will, when making unilateral decisions, not take account of circumstances outside job duties (workers' private domains), unless these circumstances have an impact on obligations under the labor contract (performance of job duties), or disturb the order inside the company. Of course, in situations where both labor and management are equal (e.g. when hiring), the employer does not need to be completely reasonable, but in situations where the employer unilaterally imposes disadvantage on the other party (e.g. when disciplining), the employer must be reasonable. E.g. *Kansai Electric Power* case, Supreme Court (Sept. 8, 1983), 415 *Rohan* 29 [discipline]; the *All Nippon Airways* case, Tokyo District Court (Feb. 15, 1999), 760 *Rohan* 46 [suspension]; the *Tanken Seal Seiko* case, Tokyo High Court (Feb. 20, 1991), 592 *Rohan* 77 (Supreme Court (Sept. 19, 1991), 1443 *Rokeisoku* 27)) [hiring], the *Ogawa Kensetsu* case, Tokyo District Court (Nov. 19, 1982), 397 *Rohan* 30 [side-work].
- 44 The *Shiba Shinkin Bank* case, Tokyo District Court (Nov. 27, 1996), 704 *Rohan* 21.
- 45 The *Toho Gakuen* case, Supreme Court, First Petty Bench (Dec. 4, 2003), 862 *Rohan* 14 (a judgment on whether or not there was a violation of public policy under the principle of "no work, no pay").
- 46 The *Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai* case, Supreme Court, First Petty Bench (Oct. 23, 2014), 1100 *Rohan* 5 (a strict judgment on whether or not there was a violation of Article 9 paragraph 3 of the Equal Opportunity Act, in connection with demotion on grounds of a conversion to light duty).
- 47 In Japan, employees (in particular, core employees) are typically hired without specifying particular jobs, positions, or places of work, so it is assumed that employers have legal rights to set or change employees' positions or places of work. Since employers can unilaterally decide and legally change employees' status such as job titles, positions and places to work without any renewals of employment contracts, Japanese companies can simply order employees to legally realize such changes. Therefore, even though I have used the term "internal labor market(s)" here, I doubt that there are any "markets" inside Japanese companies, because there are no free-volition-based dealings between sellers (employees) and buyers (employers).
- 48 One of the rare examples of redress, the *Maruko Keihoki* case, *supra* note 15, is a case pertaining to quasi part-time and quasi fixed-term employment.
- 49 In my view, one-sided protection seems to be stronger in nature, partly because unfairly equal treatment (in many cases, meaning that part-time workers are treated just as advantageously as regular workers) is outside the scope of these provisions.
- 50 I construe discrimination against these "quasi non-core employees" as being more strongly characterized by redress from abuse of command and personnel authority, rather than wage discrimination, in that they are burdened with a heavy labor obligation not commensurate with their wages.
- 51 On the "membership type" and "job type" concepts, see Keiichiro Hamaguchi, *Wakamono to Rōdō: 'Nyūsha' no shikumi kara tokihogusu* [Young people and labor: Unraveling from the mechanism of 'entering a company']. Tokyo: Chuo Koron Shinsha, 2013.
- 52 *Supra* note 51.
- 53 On this point, in countries where job duties and others are restricted for both regular and non-regular workers and job-based pay is the norm, there is a common wage decision principle of job-based pay, and this makes it relatively easy to judge the reasonableness of wage discrimination (job-based pay tables are commonly applied).
- 54 In relation to part-time workers, Articles 9 and 10 of the Part-Time Workers Act could be seen as special legislation (on wages) as opposed to the general legislation of Article 8, in terms of the structure of its phrasing. Nevertheless, a problem in interpretation remains as to whether the direct scope of Article 8 should be seen as applying to wage disparity between regular workers and part-time workers who are not deemed equivalent to them, given that Article 10 only stipulates an obligation to make efforts. The official interpretation is assumed to be that it does apply to them (*supra* note 23) Enforcement Notice (4) (7)), but this is not very clear (the same applies to (6)).
- 55 The argument could be made that C differs from B and D in the strict evaluation and others when hiring, and thus that they lack comparability. However, it may be that the actual working situation is given more emphasis than evaluations when hiring, which amount to no more than future prospects.
- 56 The *Nissan Motor Co. Murayama Plant* case, Supreme Court, First Petty Bench (Dec. 7, 1996), 554 *Rohan* 6.
- 57 The *Arc Securities* (Provisional Ruling) case, Tokyo District Court (Dec. 11, 1996), 711 *Rohan* 57.

#### AUTHOR

**Koichi Tominaga** Professor, Faculty of Law, Sophia University.