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SDD/EGM/CRPD/INF.1

22 May 2009

ENGLISH ONLY

ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC
OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Expert Group Meeting on the Harmonization of National Legislations with the
Convention on the Rights of Persons with Disabilities in Asia and the Pacific

8-10 June 2009

Bangkok

**PROHIBITIONS OF DISCRIMINATION AND THREE TYPES OF
DISCRIMINATION IDENTIFIED IN THE CONVENTION ON
THE RIGHTS OF PERSONS WITH DISABILITIES***

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PROHIBITIONS OF DISCRIMINATION AND THREE TYPES OF DISCRIMINATION IDENTIFIED IN THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

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ABSTRACT

The purpose of this paper is to clarify the states parties' obligations to prohibit discrimination under CRPD, and the three types of discrimination prohibited by the CRPD: (1) direct discrimination, (2) indirect discrimination, and (3) denial of reasonable accommodation.

In this paper, I will first outline the types of discrimination prohibited by CRPD, and also discuss why and how CRPD's calls for prohibition of discrimination and protection from discrimination are stronger than other conventions that have anti-discrimination provisions. Next, I will discuss, in detail, the denial of reasonable accommodation and indirect discrimination, and further discuss the relationships between the three types of discrimination.

At present, there is no established theory about the relationships between the three types of discrimination. One purpose of discussing the relationships is to further understanding of each distinct type of discrimination. Another purpose of this discussion is to analyze facts from different angles so that an appropriate remedy can be found.

Lastly, I emphasize that CRPD, if properly implemented, should bring about immediate (as opposed to progressive) and broad changes in law to ensure non-discrimination against persons with disabilities, and that successful implementation will have enormous positive impact on the lives of people with disabilities.

I. INTRODUCTION

The Convention on the Rights of Persons with disabilities (CRPD) entered into force on 3 May 2008, almost sixty years after the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations.

CRPD is the first United Nations human rights convention that has a non-discrimination provision that prohibits discrimination based on disability. This is particularly important because explicit non-discrimination provisions regarding disability were lacking from previous United Nations human rights instruments, such as the Universal Declaration of Human Rights¹(UDHR) and the International Covenant on Civil and Political Rights²(ICCPR). While there is explicit prohibition of discrimination based on disability in the Convention on the Rights of the Child³ (CRC), in that convention disability was only one of several grounds on which discrimination was prohibited.

¹ Article 2 of UDHR provides that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

² Article 26 of ICCPR provides that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

³ Article 2 of CRC prohibits discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

This paper will (1) provide an overview of the non-discrimination provisions of CRPD, (2) discuss the three types of discrimination addressed by CRPD, and (3) clarify the concepts and significance of the three types of discrimination under CRPD, and the interrelationships of those concepts of discrimination.

II. OVERVIEW: CRPD'S PROHIBITIONS OF DISCRIMINATION

A. Discrimination on the basis of disability (Article 2)

(1) *A broad definition of discrimination*

CRPD provides that discrimination on the basis of disability means not only "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on any equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field"⁴ but also "all forms of discrimination, including denial of reasonable accommodation."⁵

(2) *Three types of discrimination*

The first and most obvious form of discrimination is direct discrimination. The term of "any distinction, exclusion or restriction"⁶ originally meant direct discrimination. Direct discrimination is treating persons with disabilities and persons without disabilities in a different way.

The second type of discrimination is indirect discrimination. Indirect discrimination is a form of discrimination that arises when "any distinction, exclusion or restriction"⁷ results in undue "effect."⁸ The words "indirect discrimination" do not appear in CRPD because some countries opposed insertion of these words. However, during the process of deliberations, no country denied that indirect discrimination should be prohibited by CRPD. CRPD is not unique in prohibition of indirect discrimination. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has a definition article⁹ similar to that of the CRPD, and it is generally understood that CEDAW prohibits indirect discrimination¹⁰.

⁴ Article 2, paragraph 3, CRPD.

⁵ *ibid.*

⁶ *ibid.*

⁷ *ibid.*

⁸ *ibid.*

⁹ Article 1 of CEDAW provides that the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

¹⁰ See, The Committee on the Elimination of Discrimination against Women. *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, paras.7.

Paras.7 provides that firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws. It is based on the interpretation that CEDAW prohibits indirect discrimination. The article provides, in a footnote that "Indirect discrimination against women may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women. Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modeled on male lifestyles and thus fail to take into account aspects of women's life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men."

The third type of discrimination is denial of reasonable accommodation. This is the first time that denial of reasonable accommodation is defined as discrimination in an international human rights instrument, and for that reason, CRPD warrants due attention. It can also be said that CRPD is noteworthy for providing, in comparison to other conventions, an unusually clear timeline for reaching its goals.

(3) *Scope of CRPD*

CRPD's scope is broad. Its non-discrimination principle covers every aspect of human life whether it is of public nature or private nature. Given this broad application, the first question to be asked is, "what is included in 'disability?'" CRPD does not limit disability to having a present functional impairment, but instead recognizes that "disability is an evolving concept,"¹¹ and that "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments."¹² It is reasonable to assume that "disability" in the context of non-discrimination should be viewed from the Social Model Approach (discussed below). Also, because CRPD prohibits "all discrimination on the basis of disability,"¹³ CRPD prohibits not only discrimination based on the presence of disability but also discrimination based on the degree and/or type of disability.

It should be further noted that CRPD not only prohibits discrimination against persons with disabilities, but also discrimination against anyone, so long as the discrimination is considered to be based on disability. This is because CRPD prohibits "discrimination on the basis of disability" and does not limit its scope only to persons with disabilities¹⁴.

The second question to be asked is in what fields the non-discrimination principle is applicable. CRPD prohibits discrimination "in the political, economic, social, cultural, civil or any other field."¹⁵ This wording is the same as in CEDAW, but slightly different from that in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). CERD limits its scope of prohibition to "... or any other field of public life," in addition to "in the political, economic, social, cultural"¹⁶ fields. In contrast, CRPD contains no language suggesting its provisions should be limited to "field[s] of public life,"¹⁷ and, when read with the interpretation of CERD by the Ministry of Foreign Affairs of Japan, which explains that "public life"¹⁸ is "not limited to actions by states or regional public bodies"¹⁹, it is fair to say that CRPD is applicable to "actions classified with the freedom of purely private individuals which affect members of specific minority groups."²⁰ It is, therefore, clear that CRPD forbids any and all discrimination against individuals on the basis of disability.

¹¹ Preamble (e), CRPD.

¹² Article 1, paragraph 2, CRPD.

¹³ Article 5, paragraph 2, CRPD.

¹⁴ Incidentally, the European Court of Justice has passed judgment that prohibition of discrimination of Council Directive 2000/78/EC also applies in a case where a mother in gave birth to a son with disability and suffered discrimination related the care received following the birth. <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnrec=alldocnrec&docnoj=docnoj&docnoor=docnoor&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=PSOC&mots=&resmax=100>, last visited 12 Mar 2009.

¹⁵ Article 2, paragraph 3, CRPD.

¹⁶ Article 1, paragraph 1, CERD.

¹⁷ *ibid.*

¹⁸ Japan. A3 to Q3 "What does 'public life' mean in the definition of racial discrimination found in Article 1?"

"Q&A on the International Convention on the Elimination of All Forms of Racial Discrimination" (Tokyo, Ministry of Foreign Affairs), accessed from <http://www.mofa.go.jp/mofaj/gaiko/jinshu/top.html> on 3 May 2009.

¹⁹ *ibid.*

²⁰ *ibid.*

In this way, the scope of CRPD extends to all fields, including non-governmental (purely private) sectors.

B. States Parties' obligation to ensure non-discrimination (Article 5)

(1) Obligations to prohibit discrimination and protect persons with disabilities from discrimination

The States Parties to CRPD have (a) the obligation to prohibit discrimination on the basis of disability as well as (b) the obligation to protect persons with disabilities from any discrimination. These are stipulated in Paragraphs 1 and 2 of Article 5 of CRPD. In Paragraph 1 of Article 5, CRPD ensures that all persons, with or without disability, are equal before the law and are entitled to equal protection of the law. In Paragraph 2 of the same Article, CRPD stipulates “States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.”

These two obligations are the primary obligations of States Parties in the context of non-discrimination. As these two obligations are general provisions, they are applicable to all circumstances. In particular fields, CRPD extends these obligations to suit the particular situations and additionally stipulates specific forms to prohibit discrimination and/or require reasonable accommodations.

(2) The natures of the obligations to prohibit discrimination and protect persons with disabilities from discrimination

The States Parties to CRPD have the obligation to prohibit discrimination against persons with disabilities and to protect persons with disabilities from discrimination immediately - not progressively. Non-discrimination is included in the right of individuals to be treated equally. In addition, the equality right is one of the core rights of modern constitutionalism, just like the right of individuals to be free from the nation. The States Parties' obligation to ensure the equality right and obligation to prohibit discrimination to support the equality rights, are to be implemented immediately, as one of civil and political rights (as opposed to economic, social, and cultural rights).

In CEDAW and CERD, non-discrimination provisions are found in the provisions for elimination of discrimination. In their chapeaus to their provisions related to elimination of discrimination, CEDAW and CERD stipulate that States Parties agree to “pursue by all appropriate means and without delay a policy of eliminating discrimination.”^{21,22} The words such as “all appropriate means” and “without delay” suggest that non-discrimination should be realized immediately. However, the words “pursue” and “policy” above suggest that implementation may be progressive. In CRPD, words such as “without delay” or “pursue” do not appear in provisions regarding prohibition of discrimination and protection from discrimination. These provisions are found in Article 5, “Equality and Non-Discrimination,” and straightforwardly prohibit discrimination. Prohibition of discrimination and protection from discrimination under CRPD are not a policy or a measure that States Parties are to take progressively. They must be realized immediately.

²¹ Article 2, CEDAW.

²² Article 2, CERD.

(3) *How to meet non-discrimination and protection obligations*

CEDAW and CERD allow States Parties to use their discretion in meeting the obligations by saying “all appropriate means.” CRPD, however, does not have such wording. How then should States Parties meet their obligations under CRPD? It has to be done by law—and by law only from a viewpoint of Rule of Law. Non-discrimination principles oblige individuals not to discriminate against others, which thereby constrains individuals’ deeds. Such constraints can only be possible by law that is duly made through the democratic process. States Parties that currently do not have laws to prohibit direct discrimination based on disability, or do not incorporate the concepts of indirect discrimination, or denial of reasonable accommodation in anti-discrimination legislation, must establish new laws or revise existing laws to meet these obligations under CRPD.

C. States Parties’ obligation to eliminate discrimination (Articles 4 and 5)

(1) *Measures to eliminate discrimination*

CRPD starts with the assumption that States Parties have prohibited discrimination, but then, in order to actually bring about elimination of discrimination, CRPD obligates the States Parties to take additional, separate, specific measures to eliminate discrimination.

Some of the elimination provisions are found in the General provisions such as Articles 4 and 5 as follows:

(i) States Parties undertake “[T]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities” (Article 4, paragraph 1 (b)),

(ii) State Parties undertake “[T]o take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise” (Article 4, paragraph 1 (e)),

(iii) “In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided” (Article 5, paragraph 3).

(2) *The nature and implementation of prohibition of discrimination*

What are the natures of these provisions above? What are their purposes and what do they call for? And in what timeline should these provisions be implemented? Each of the above provisions is discussed below:

(i) Article 4, paragraph 1 (b) calls for modification or abolition of existing laws, regulations, customs and practices that constitute discrimination. When laws, regulations, customs and/or practices are discriminatory, they affect many individuals. CRPD calls for modification or abolition of such systematic or structural discrimination due to its extensive effect and seriousness. Without modification or abolition of discriminatory laws, regulations, customs and/or practices, no prohibition of discrimination can effectively prevent discrimination. States Parties must create new laws and/or regulations or revise the existing ones in order to modify or abolish discriminatory laws and regulations.

Customs and practices, however, cannot be eliminated immediately because they are rooted deeply in society and they do not target specific individuals. Addressing individual discrimination issues that stem from discriminatory customs and/or practices alone cannot eliminate the underlying customs and/or practices that are of discriminatory nature. Such fundamental change takes time. This does not, however, prevent States Parties from taking measures to correct or eliminate discriminatory customs and/or practices, and such measures should be taken immediately as discriminatory customs and/or practices affect lives of many people in serious ways.

(ii) Article 4, paragraph 1 (e) goes beyond calling for mere elimination of discrimination on the basis of disability. This subparagraph calls for measures to eliminate discrimination in private enterprises and organizations. The word “private” is key here, as laws prohibiting discrimination alone cannot effectively eliminate discrimination in private entities. This specific reference to private entities makes the spirit of CRPD more effective. Due to its significance, such measures should be taken immediately.

(iii) Article 5, paragraph 3 calls for States Parties’ assistance to public and private entities in providing reasonable accommodation. Reasonable accommodation can incur economic or technical burden on the provider. The States Parties’ giving assistance in providing reasonable accommodation is one way to prevent denial or lack of reasonable accommodation, which is one of the three types of discrimination. This is why this provision is set forth and this provision partly overlaps with Article 4, paragraph 1 (e) of CRPD (ii).

The Social Model takes the view that persons with disabilities have been put in a situation where they need reasonable accommodation because society has not integrated persons with disabilities in building and developing social systems that are the foundation for anyone to live and take roles in society. The government has the obligation to actively address this exclusion of persons with disabilities from the social systems because the exclusion would not have been possible without the government’s failure to address the issue. When States Parties prohibit individuals and corporations from denying reasonable accommodation, the States Parties themselves also have the obligation to take measures to ensure reasonable accommodation.

III. DENIAL OF REASONABLE ACCOMODATION

A. Definition (Article 2)

Denial of reasonable accommodation is one of the three types of discrimination prohibited by CRPD. Reasonable accommodation is defined as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”²³

B. Reasonable accommodation determined by individual needs and circumstances

Reasonable accommodation is defined as something that is “needed in a particular case.”²⁴ Because needs and circumstances of persons with disabilities vary greatly from individual to individual, reasonable accommodation should be determined based on individual needs and circumstances.

²³ Article 2, paragraph 4, CRPD.

²⁴ *bid.*

C. On an equal basis with others

Reasonable accommodation is defined as something that is “to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”²⁵ This means that CRPD intends to ensure effectively equal opportunities in enjoying or exercising all human rights and fundamental freedoms as seen in the spirit of CRPD to eliminate effective gaps in enjoyment of human rights between persons with disabilities and persons without disabilities.

D. Necessary and appropriate modification and adjustments

In order to ensure what I mentioned above, CRPD calls for “necessary and appropriate modification and adjustments.”²⁶ What are necessary and appropriate as modifications and/or adjustments differ greatly depending on the types of disabilities and the needs and circumstances of individuals. Determination of “necessary and appropriate modification and adjustments” should be done on an individual basis as opposed to setting a standard.

E. Accommodation must not impose a disproportionate or undue burden

The reasonable accommodation provision comes with a caveat that the modification and adjustments should be provided only when it does not impose a disproportionate or undue burden upon the provider. How, then, does one determine if particular modifications and/or adjustments do not impose a disproportionate or undue burden in a particular case? The general rule used in justifying limitation to human rights is to consider the balance of rights. In this case, the balance between the human rights of the person with disability and the human rights of the provider should be balanced. On the side of the person with disability, one must consider factors such as (1) the importance and nature of the human rights at stake, (2) the necessity of the modification and/or adjustments, (3) availability of alternative modification and/or adjustments, and (4) the degree of human rights violation inflicted by lack of the modification and/or adjustments in question. On the side of the provider, one must consider factors such as (1) the type of provider (e.g., an individual, a group, or a public entity), (2) the nature of the provider’s activity, operation and/or services, (3) size of the provider, (4) to what extent the provider is involved in public or state action, (5) the degree of the burden in proportion to the size of the provider, and (6) the impact the reasonable accommodation may have on the provider’s activity.

Note, however, that CRPD does not call for a simple balancing of these two conflicting rights. Rather CRPD calls for determination of whether the reasonable accommodation would pose a disproportionate or undue burden on the provider.

According to the Enforcement Guidance on the Americans with Disabilities Act provided by the United States Equal Employment Opportunity Commission, “‘Undue hardship’ means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.”²⁷

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ The United States Equal Employment Opportunity Commission (2002). *Enforcement Guidance: Reasonable*

The question then arises as to which party bears the burden of proof. More specifically, which party has the burden of proof that the modification or adjustments would (or would not) impose disproportionate or undue hardship? It is the party that claims that providing the accommodation is disproportionate or undue, because CRPD assumes that any modification or adjustments would incur some burden on the provider. For reference, we note that in the case of ADA, the employer bears the burden of proof.

F. Non-discrimination as a right

It should be noted that CRPD defines denial of reasonable accommodation as discrimination, thereby not leaving the obligation to provide reasonable accommodation as a right to be progressively realized.

In other words, the provider's failure to take the action specified as reasonable accommodation is considered to be discrimination, and consequently the provider has a duty to act, and the person with a disability has a right to demand action by the provider. This expands the legal remedies available to persons with disabilities, and helps to bridge the gap between civil and political rights and economic, social, and cultural rights.

IV. DEFINITION OF INDIRECT DISCRIMINATION

The words "indirect discrimination" appeared in the Working Text presented by the CRPD's Working Group.²⁸ The Japanese government, however, opposed inclusion of the words during the Ad Hoc Committee, resulting in the eventual deletion of these words. Nonetheless, no country contested the idea that indirect discrimination was implicitly included in the definition of discrimination.

The concept of indirect discrimination first appeared in the legal field when the United States Supreme Court ruled that not only Disparate Treatment but also Disparate Impact is discrimination (*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)).

The most easily understood definition of indirect discrimination against persons with disabilities can be found in the Directive "Establishing a General Framework for Equal Treatment in Employment in Occupation" adopted by the European Union Council of Ministers in November 2000. Article 2, paragraph 2 (b) of the Directive provides: "[I]ndirect discrimination shall be taken to occur where an apparently neutral provision, criterion, or practice would put persons having a particular religion or belief, a particular disability, a particular age, a particular sexual orientation at a particular disadvantage compared with other persons ..."²⁹

This European Union's (EU) definition is the most appropriate definition to help us understand the indirect disability implied in CRPD as it specifically refers to disability, and does not limit its scope only to employment and work, but is instead rather broad and general. Also, the EU definition was well understood by the delegations attending the Ad Hoc Committee. Therefore, for the purpose of this paper, I will use the EU definition, excluding reference to attributes other than disability, as a definition of indirect discrimination.

Accommodation and Undue Hardship Under the Americans with Disabilities Act (EEOC NOTICE Number 915.002), Washington D.C..

²⁸ United Nations (2004). *Report of the third session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 9 June 2004, Annex II, Article 7 (A/AC.265/2004/5). See also Footnote 24 of the same document.

²⁹ European Union (2000). *Establishing a General Framework for Equal Treatment in Employment and Occupation*, Council Directive 2000/78/EC, *Official Journal of the European Communities*. (Brussels).

V. SCOPES & INTERRELATIONSHIPS OF THE THREE TYPES OF DISCRIMINATION

A. Introduction to the issues related to the three types of discrimination

There is no uniform opinion as to the interrelationships of the three types of discrimination (direct discrimination, indirect discrimination and denial of reasonable accommodation). Some argue that reasonable accommodation is *sui generis*, covering a completely different sphere from that of direct and indirect discrimination.³⁰ Others argue that denial of reasonable accommodation is similar to, or overlaps with, both direct and indirect discrimination.³¹ Yet others argue that denial of reasonable accommodation is a form of direct discrimination.³²

One goal of this paper is to more clearly define these three types of discrimination, specifically with regard to how they are similar to and different from each other. I believe this logical challenge has to be resolved to establish criteria for determining if any laws or regulations are appropriate when they require provision of reasonable accommodation, in order to justify indirect discrimination in exceptional cases.³³

B. Evolution of the concepts of discrimination and disability

(1) Our understanding of the concept of discrimination has evolved over time (as have our understandings of the related concepts of disability and equality). For the purposes of this paper, I recap here how the concept of discrimination, particularly the concept of the three types of discrimination, developed.

What were the backgrounds and contexts in which the concept of these three types of discrimination evolved? I believe that in assessing the evolution of the concepts of these three types, it is important to take note of the evolution of the concept of discrimination/equality as well as that of disability. The concept of equality, in early days, merely meant equality of opportunity. Today, the concept of, and discussion of, equality have evolved to include equality of conditions and/or outcomes without guaranteeing which the situation can be extremely unreasonable. Also, it should be noted that the evolution of the concept of disability has brought about evolution of the concept of discrimination.

(2) Historically, only direct discrimination was prohibited in early days. The assumption was that when direct discrimination (in other words, different treatment of persons based on their attributes) was present, the inevitable consequences from the direct discrimination would be unfair, as direct discrimination would deprive some individuals of opportunities that had to be equally given. In the case of direct discrimination, therefore, the consequences arising from direct discrimination were not questioned. In order to determine direct discrimination, the focus was on the conduct or “treatment”, whether persons with different attributes such as race were treated differently.

³⁰ Lisa Waddington and Aart Hendriks, *The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination*, *The International Journal of Comparative Labour Law and Industrial Relations*, Vol.18, No.3 (2002), pp.426-427.

³¹ Jolls, Christine. *Antidiscrimination and Accommodation*, 115 *Harv.L.Rev.* 642 (2001).

³² Tomoko Hikuma, “The multi-layer implementation of equal opportunity legislation concerning “disabilities” and reasonable accommodation in the EU region”, *The National Institute of Vocational Rehabilitation*, No.87A Study on the Provision of “Reasonable Accommodation” for the Employment of Persons with Disabilities -- Trends and Development in EU Countries and the United States -, Research Report No. 87 (Tokyo, 2008)

³³ See, Article 2 (b) (ii) of Council Directive 2000/78/EC. Sec. 1630.15 Defenses of Regulations to implement the equal employment provisions of the Americans with Disabilities Act.

(3) The concept of indirect discrimination, or Disparate Impact, came into being to restore impaired fairness arising from applying the same criterion to persons with different attributes. In some cases, applying the same criterion to persons with different attributes would produce different impacts on the persons concerned, even when the criterion does not explicitly discriminate against specific individuals. In such cases, the act alone, which is applying the same criterion to persons with different attributes, may not constitute obvious discrimination, or an unfair act. However, if the effect of the act is not fair, fairness has to be restored, just as in the case of direct discrimination.

(4) The concept of reasonable accommodation came into being to restore impaired fairness arising from the lack of a certain act (omission), based on the idea that, in some cases, the effect of omission can be just as unfair as an effect of commission, which can be either direct or indirect discrimination. In formality, when one party does not do anything, the party cannot deprive the other party of any opportunity. Rather, some argue that opportunities are given without any impediments. So if one cannot take or leverage an opportunity, that is a matter of the individual's capability and thereby difference in consequences arises, but it is not a matter of discrimination. In the context of persons with disabilities, however, the Social Model Approach has overcome such argument. The Social Model Approach assumes that the disadvantages that persons with disabilities experience arise not from the lack of certain capability of these persons, but from the lack of the society's willingness to include and integrate persons with disabilities by addressing their needs. With the Social Model Approach, came the concept of reasonable accommodation, as discrimination now includes not only society's obvious exclusion of persons with disabilities (commission) but also the society's negligence to take necessary action (omission) thereby discriminating against certain persons based on some attributes other than their capability. This does not mean, however, that simplistic unfairness of outcome is prohibited. What is prohibited under CRPD is the unfairness arising from neglecting to take necessary action. The concept of reasonable accommodation, therefore, does not challenge the most commonly understood idea of the modern constitutionalism that the equality does not guarantee the equality of outcomes.

C. Distinct scopes of the three types of discrimination - in concept

Each of the three types of discrimination covers distinct concept of discrimination and does not overlap with the other types of discrimination. Direct and indirect discrimination arises as a result of specific actions which disadvantage certain persons with disabilities. Both direct and indirect discrimination can be classified as types of commission. In direct discrimination, the commission is a different treatment based on the victim's having a characteristic which is related to the discriminatory conduct.³⁴ Commission in indirect discrimination is the conduct of applying neutral rules, standards and/or customs which give different effect to people with different characteristics. Thus, direct and indirect discrimination deal with different ranges of cases.

In contrast, denial of reasonable accommodation can be classified as omission. The concept of denial of reasonable accommodation, while focusing on different effect, takes the same approach as the concept of indirect discrimination. Both of these types of discrimination focus on the effect that disadvantages persons with disabilities. But the difference is in how that disadvantageous effect arises: in the case of indirect discrimination, the disadvantageous effect arises as a result of an action (commission); in the case of denial of reasonable accommodation, the disadvantageous effect arises due to lack of action (omission).

³⁴See, Article 2 (a) of Council Directive 2000/78/EC.

D. Similarity and overlap of the three types of discrimination – in practice

In theory, denial of reasonable accommodation is unique and completely separate from direct/indirect discrimination. In practice, however, these three types of discrimination seem to overlap or have similarity. This discrepancy between the theory and the practice causes some of the confusion in legally analyzing cases of discrimination. In the hope of allaying this confusion, in the following section, I would like to discuss this apparent discrepancy and seek reconciliation between the theory and the practice.

E. What causes the overlap?

(1) It is important to identify the type of discrimination for two reasons: (a) the standard used for evaluating with is lawful or unlawful depends on the type of discrimination, (b) the remedies available depend on the type of discrimination.

In general, the discriminatory situation itself usually suggests an appropriate remedy. When a situation is deemed as discrimination, there is inevitably a gap between the discriminatory situation and what is considered a non-discriminatory situation. In other words, identifying a case as discrimination is a legal exercise in identifying the gap between the existing discriminatory situation and a hypothetical non-discriminatory situation. A proper remedy eliminates the gap.

(2) In some cases, a situation of direct or indirect discrimination can be remedied by prohibiting an act that is causing the discrimination. As examples of a simple remedy requiring only that a discriminatory action be prohibited, consider the following two cases: (a) Direct discrimination where a person with visual impairment is denied entry to a music concert because he is accompanied by a guide dog. If the act of denying his entry is removed, equal opportunity to enter future concerts will be ensured. (b) Indirect discrimination where a company gives preferential treatment to employees with driver's licenses, even though having a driver's license has nothing to do with the essence of the work. Under such circumstances, persons with visual impairment who cannot obtain drivers' licenses are treated unfavorably. If the preferential treatment for holders of drivers' licenses is removed, equal opportunity will be ensured.

(3) In other cases, ensuring equal opportunity requires more than just prohibition of discrimination. An example of direct discrimination that falls into this category would be when a college denies giving an applicant an opportunity to take an entrance exam because the applicant has visual impairment. Removing the act of denial alone cannot ensure equal opportunity to take the exam in this case. The college has to take the further action of providing an entrance exam in Braille to give the applicant an equal opportunity. An example of indirect discrimination that falls into this category would be when a company has a criterion for promotion that requires employees to have a passing score on an English listening comprehension test even though oral communication skills in English are not necessary in the workplace. Waiving the criterion for an employee with hearing impairment alone cannot ensure equal opportunity for promotion in this case.

(4) As seen above, some direct and indirect discrimination cases cannot be remedied only by removing the discriminatory act. Further remedial action has to be taken. This obligation to take remedial action is related to reasonable accommodation. Some direct and indirect discrimination cases involve remedies that require provision of reasonable accommodation. Consequently, there seems to be similarity or overlap between denial of reasonable accommodation and direct/indirect discrimination.

(5) Some discrimination cases do have elements that constitute both direct/indirect discrimination and denial of reasonable accommodation. This does not mean, however, that the “three types of discrimination” is still a premature concept or an ambiguous concept. It only means that a fact can be assessed from various angles, and one could compare it to the Japanese civil law system, where the one set of facts suggests not just one, but several different claims and remedies. The three types have distinct coverage, and they also overlap. There is no contradiction here.

VI. CLOSING REMARKS

At present, only a few member states of the United Nations Economic Commission for Asia and the Pacific have effective laws to prohibit discrimination. Some countries have constitutions that have provisions prohibiting discrimination, but in most of these countries, only direct discrimination is prohibited by the constitution. Unless those countries enact laws or constitutions that effectively prohibit discrimination based on disability, persons with disabilities will remain in a half-way world, where they are protected, but still not equal to persons without disabilities.

Including denial of reasonable accommodation as one type of discrimination will have significant legal impact as it obliges the discriminating party to take action to eliminate the discrimination. The concept of the reasonable accommodations will strengthen some rights that have been classified with economic, social and cultural rights, to be realized progressively.

Now that the CRPD has entered into force, State Parties ratified this Convention are obligated to ensure non-discrimination. It is not an overstatement to say that the success or failure of the State Parties’ in ensuring that non-discrimination, including ensuring provision of reasonable accommodation, shall determine if millions of their own citizens have - or do not have - an opportunity to live a life that we can call human.