

9-1-2010

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Recommended Citation -

Jun Nakagawa and Peter Blanck *Future of Disability Law in Japan: Employment and Accommodation* 33 Loy.L.A. Int'l & Comp.L. Rev. - 173 (2010). -

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Future of Disability Law in Japan: Employment and Accommodation

JUN NAKAGAWA¹ & PETER BLANCK²

I. INTRODUCTION

With ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD),³ Japanese people with disabilities envision a new and bright future focused on their greater inclusion in society and economic empowerment. The CRPD will have a positive impact on attitudes toward disability law and policy for persons with disabilities in Japan.

There are historical and cultural currents, however, affecting the prospects for the future of Japanese disability antidiscrimination law. Although the CRPD requires state parties to forbid discrimination and

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2. University Professor & Chairman, Burton Blatt Institute (BBI), Syracuse University; Ph.D. Psychology, Harvard University; and I.D., Stanford Law School. The program of research described herein is supported in part by grants from: (a) The National Institute on Disability and Rehabilitation Research (NIDRR), U.S. Department of Education, for (i) "The Asset Accumulation and Economic Self-Sufficiency Project," Grant No. H133A090014, (ii) "Demand Side Employment Placement Models," Grant No. H133A060033, (iii) "Southeast Disability & Business Technical Assistance Center," Grant No. H133A060094, and (iv) "Center on Effective Delivery of Rehabilitation Technology by Vocational Rehabilitation Agencies," Grant No. H133A090004; (b) The Rehabilitation Services Administration (RSA) for "Technical Assistance and Continuing Education (TACE) Center Region IV (Southeast TACE)," Grant No. H264A080021; and (c) the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services for "New York's Comprehensive Medicaid Infrastructure Grant (MIG)," Grant #1QACMS030318.

3. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. A/61/611 (Dec. 13, 2006) [hereinafter CRPD],

make reasonable accommodations for persons with disabilities,⁴ Japanese law and policy does not yet fully realize these concepts, nor are they seen as part of Japan's broader civil and human rights initiative. The Japanese legal system has not developed a clear model for prohibiting discrimination against persons with disabilities. Although Japan lacks certain foundational prerequisites for disability law and policy, it has a unique opportunity to develop a paradigm with new leaders of the Japanese disability rights movement.

This article stems from a new and timely partnership between Japanese and U.S. disability researchers. It furthers the discussion of present and future challenges and opportunities in emerging Japanese employment law and policy for persons with disabilities, particularly in light of the passage of the CRPD and the developing concept of reasonable accommodation. The Japanese Cabinet Office has commissioned Professor Nakagawa to prepare a report setting forth a review of current Japanese antidiscrimination employment law for people with disabilities, focusing on the concept of accommodation, and to assist in developing the legal foundation for passage of a new law.⁵

Part II of this article describes current disability employment law in Japan and the concept of accommodation. Part III sets out ideas relevant to the future of Japanese disability employment law, considering comparative perspectives. The article will close with recommendations for future disability law and policy development in Japan.

II. PRESENT DISABILITY LAW AND POLICY IN JAPAN

A. *Statutory Protection of Persons with Disabilities*

The CRPD requires party nations to provide reasonable accommodation for persons with disabilities, including prohibiting discrimination.⁶ In contrast to the Americans with Disabilities Act

4. CRPD, *supra* note 3, art. 4.

5. See generally Cabinet Office, Government of Japan, Heisei 20 Nendo Shougaiha no Shakaisanka Suishin Nado Ni Kansuru Kokusaihikaku Chousa [The 2008-2009 Report to the Japan National Cabinet Office: Comparative Study Regarding Social Inclusion and Participation of Persons with Disabilities], 2009, <http://www8.cao.go.jp/shougai/suishin/tyosa/h20kokusai/pdf/all/Igaiyo.pdf> [hereinafter 2008-2009 Report] (providing a comparative study of disability discrimination laws and guidelines, especially the duty of reasonable accommodation for persons with disability in employment and education).

6. CRPD, *supra* note 3, art. 7.

(ADA) enacted in the United States,⁷ Japan has no comprehensive law prohibiting employment discrimination against persons with disabilities.⁸ The development of antidiscrimination law for Japanese with disabilities is of crucial importance, yet Japan still lacks understanding and clear political commitment to civil rights in the field of disability law.

In a 2005 survey, there were approximately 7.24 million Japanese persons with disabilities (including 3.66 million with physical disabilities, .547 million with intellectual disabilities and 3.03 million with mental disabilities).⁹ In general, Japanese disability groups and policymakers understand that persons with disabilities are entitled to protection by the government, and that the government has to provide services to persons with disabilities and guarantee vocational rehabilitation.¹⁰

To date, Japanese disability groups have focused advocacy efforts on requiring local and central governments to deliver protection through more and better vocational rehabilitation and services,¹¹ while Japanese law and policymakers have attempted to expand services for persons with disabilities.¹² Disability groups do not focus primarily on a Japanese civil rights paradigm, obliging private entities, such as employers, to treat persons with and without disabilities equally.¹³ Likewise, the government has focused on the "protection," not the equal treatment, of persons with disabilities. In 1993, the Fundamental Act on Policy and Measure for Persons with Physical Disabilities and Mental Retardation of 1970¹⁴ was amended, and the Fundamental Act for

7. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2010) [hereinafter ADA],

8. See Katharina Heyer, *From Special Needs to Equal Rights Japanese Disability Law*, 1 ASIAN-PAC. L. & POL'Y J. 1, 2-3 (2000).

9. JAPAN ORG. FOR EMP'T OF THE ELDERLY AND PERSONS WITH DISABILITIES [JEED], EMPLOYMENT GUIDE FOR EMPLOYERS AND PERSONS WITH DISABILITIES: SUPPORTING EMPLOYMENT OF PERSONS WITH DISABILITIES 1 (2009), available at <http://www.jeed.or.jp/english/download/reference01.pdf> [hereinafter JEED 1],

10. See, e.g., Heyer, *supra* note 8, at 5-7.

11. See, e.g., *id.* at 7.

12. *Id.*

13. Tsutomu Ohtani, *Nihon Ni Okeru Syougaisya Kenri Hou No Yoake [The Daybreak of Disability Rights Law in Japan]*, 93 Q. FUKUSHI RODO 29, 32-33 (2000) (Japan).

14. Fundamental Act on Policy and Measure for Persons with Physical Disabilities and Mental Retardation, Law No. 84 of 1970 (Japan) [hereinafter Fundamental Law No. 84], available at <http://www8.cao.go.jp/shougai/english/law/no84.html#03>.

Persons with Disabilities of 1993¹⁵ (FAPD) was developed, both of which remain the prominent disability laws in Japan. They are general and limited in application, reflecting the "protection" and medical models that still dominate Japanese disability law.¹⁶

There have been attempts to incorporate the antidiscrimination paradigm for persons with disabilities into the Japanese legal system. The "Project for Normalization" developed a blueprint in the 1980s to prohibit discrimination on the basis of disability,¹⁷ and the Japanese Council on Independent Living Centers (JIL) developed its comprehensive draft proposal in 2000.¹⁸

In addition, the Japanese Cabinet submitted a draft comprehensive human rights law, the Human Rights Protection Bill, to parliament in 2002, rumored to contain a provision prohibiting employers from discriminating against their employees on the basis of disability.¹⁹ The House of Representatives discarded the draft, however, when it dissolved.²⁰ The members of the Japanese House of Councillors (Senate) and the House of Representatives instead took the antidiscrimination provision into account when amending the FAPD in 2003.²¹

There are perhaps two reasons for these political developments. One is the impact of the ADA model on the Japanese disability community.²² Second, the government realized that improved services,

15. The 1993 Amendment Act of Fundamental Act on Policy and Measure for Persons with Physical Disabilities and Mental Retardation of 1970, Law No. 94 of 1993 (Japan) [hereinafter Law No. 94]; see generally Fundamental Law No. 84, *supra* note 14.

16. See generally Fundamental Law No. 84, *supra* note 14 (enumerating antidiscrimination laws for persons with disabilities in Japan based on the "protection" model); see also LARRY LOGUE & PETER BLANCK, RACE, ETHNICITY, AND DISABILITY: VETERANS AND BENEFITS IN POST-CIVIL WAR AMERICA 1-2 (2010) (discussing the protective medical model versus the civil rights paradigm in the ADA).

17. Heyer, *supra* note 8, at 9-12.

18. See Toshihiro Higashi, *Sabetsu Kinshi Hou No Seitei No Hitsuyousei [Necessity of Disability Discrimination Law in Japan]*, 93 Q. FUKUSHIRODO 12, 19 (2000) (Japan).

19. See generally OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS (OHCHR), THE HUMAN RIGHTS REPORT FOR CONVEYING THE REAL CONDITION IN JAPAN 18-19 (2008), available at http://www2.ohchr.org/english/bodies/hrc/docs/ngos/JWCHR_Japan92.doc.

20. *Id.*

21. See *Disability Discrimination Act (Limitation of Disabled Persons Fundamental)*, JAPAN NAT'L ASSEMBLY OF DISABLED PERSONS INT'L, <http://web.archive.org/web/20081006214859/http://www.dpi-japan.org/3issues/3-2dis/01.htm> (accessed via the Internet Archive index) (last visited Oct. 15, 2011) [hereinafter DPI Japan] (editorializing on the 1993 FAPD, including pointing out how it was influential in the drafting of the 2003 FAPD).

22. *Id.*

in terms of quantity and quality delivered, as well as a more stable life, promote a sense of civil rights for persons with disabilities.²³ Still, these attempts to develop antidiscrimination law for persons with disabilities have had only a small impact in Japan.²⁴

Perhaps the most positive impact came from the government's 2004 incorporation into the FAPD of a sub-section prohibiting discrimination against persons with disabilities.²⁵ Section 3 of the FAPD provides various fundamental and guiding principles in relevant part. For instance, it states:

(1) Every person with a disability shall have a right to be respected for his or her individual dignity and lead a decent life. (2) Every person with disability [s/c], as a member of the society, shall be entitled opportunities to participate in social, economic, cultural and all other activities in the society. (3) No one shall be allowed to discriminate against persons with disabilities or violate their rights and benefits on the basis of disability.²⁶

Section 3(3) of the FAPD generally obliges the central and local governments to forbid discrimination on the basis of disability law and policy. The subsection, however, does not prohibit discrimination by private entities, nor provide administrative and judicial remedies, and therefore is not rights-oriented.

There has been only one case in which a plaintiff filed a complaint using the FAPD. The plaintiff alleged that abolishing the home-help service provided by a city violated Section 3(3), as well as provisions of other acts, and Japanese Constitutional Law.²⁷ The trial court dismissed the complaint, stating that the plaintiff was able to receive home-help service from other private organizations sponsored by the city.²⁸ The extent of FAPD coverage is therefore uncertain, as is the degree to which it prohibits discrimination, including failures to provide reasonable accommodations. Furthermore, the court left unclear

23. Ohtani, *supra* note 13, at 31-32.

24. *See, e.g.*, Heyer, *supra* note 8, at 19-21.

25. Fundamental Law No. 84, *supra* note 14; *see also* Conference Report, Japan National Assembly of Disabled Peoples' International, Motion re: Revising the Fundamental Law (2003.5 to 2003.7) [hereinafter DPI Japan Motion],

26. Fundamental Law No. 84, *supra* note 14, § 3.

27. 311 Hanrei Chihou-jiti 81 [Nagoya Dist. Ct.] Mar. 26, 2008, (Japan) (alleging that the abolition of home-help service sponsored by the city violated sections 25 (the right to live) and 13 (the right to life, liberty and the pursuit of happiness) of the Japanese Constitution).

28. *Id.* at 84.

whether a private party has a right of action in court to enforce the FAPD.

Japan's present interest in disability antidiscrimination law is motivated by the international community's efforts to ratify the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁹ In 1985, when the Japanese government passed the Equal Employment Opportunity Law (EEO),³⁰ which prohibited gender-based discrimination in employment, it too was motivated by ratification of the CEDAW. Thus, although domestic demands of Japanese women and the society at large contributed to the advent of the EEO in part, the power of these demands should not be overestimated.

Individual coverage of service and disability pension plans under Japanese disability policies is also limited in application. These policies are based on the medical model of disability.³¹ Thus, a medical examination and certification determines whether a person has a disability.³² A doctor examines a person's impairment and quantifies the type and degree of impairment.³³

With respect to physical disabilities, the Physically Disabled Persons' Welfare Act (Welfare Act) establishes grades for the severity of physical disabilities.³⁴ Thus, if a person has lost both arms, he or she is classified as a person with a first grade disability.³⁵ A person with a first grade disability can receive a pension.³⁶ If a person lost two fingers, including a forefinger, he or she is classified as a person with a sixth

29. See Heyer, *supra* note 8, at 4-6.

30. Equal Employment Opportunity Law of 1985 (the 1985 Amendment of Act on Women's Welfare in Employment (Law No. 113, July 1st, 1972), (Law No. 45, 1985)); Amendment Act of Equal Employment Opportunity Law of 1985 (Law No. 92, 1997), available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/48529/65098/E99JPN01.htm>.

31. See Heyer, *supra* note 8, at 1-2.

32. Chapter 2 *Welfare Services for Persons with Physical Disabilities*, JAPAN INT'L COOPERATION AGENCY FRIENDS, § 2(1)(1), <http://www.jicafriends.jp/world/japan/chapter/chapter2.html> (last visited Oct. 15, 2011) [hereinafter *Welfare Services*].

33. *Id.*

34. See generally The Physically Disabled Persons' Welfare Act, Law No. 283 of 1949 (Japan). The Welfare Act has been incorporated into Services and Supports for Persons with Disabilities Act since 2005. See generally Services and Supports for Persons with Disabilities Act, *infra* note 40.

35. Table 2 *List of Grades of Physical Disability*, JAPAN INT'L COOPERATION AGENCY FRIENDS, http://www.jicafriends.jp/vocational/gi2005/material/resume/terashima/t_table2.html (last visited Oct. 15, 2011) [hereinafter *List of Grades*].

36. *Basics of Systems for Persons with Disabilities in Japan*, JAPAN INT'L COOPERATION AGENCY FRIENDS, § (C)(1), http://www.jicafriends.jp/vocational/gi2005/material/resume/basics_system.html (last visited Oct. 15, 2011) [hereinafter *Basics of Systems*].

grade disability.³⁷ Moreover, the certification system limits the Welfare Act's coverage to selected lists.³⁸ For example, hepatic diseases are excluded from coverage, even if a symptom is debilitating.³⁹ In addition to physical disabilities, the certification system is applicable to intellectual and mental disabilities, as reflected in the Services and Supports for Persons with Disabilities Act.⁴⁰

The FAPD generally only provides rights for "certified" persons with physical, intellectual, and mental disabilities.⁴¹ The Employment Promotion Act for Persons with Disabilities (EPAPD), which provides the vocational rehabilitation and the quota system for persons with disabilities, is also generally applied to persons with a medical certification.⁴² Moreover, the Services and Supports for Persons with Disabilities Act states that the medical certification standard applies for care services, medical rehabilitation services, and vocational rehabilitation services.⁴³ The medical certification system focuses on medical, intellectual, and mental needs, but it does not consider the daily social or environmental needs and concerns of persons with disabilities, including the barriers they face.⁴⁴ Furthermore, this system delineates between a "curable" disability and a "non-curable" disability, delivering different services respectively.⁴⁵ Historically, government

37. *List of Grades*, *supra* note 35.

38. *Welfare Services*, *supra* note 32, § 2(1)(2).

39. *Cf. id.* (certification is only provided to those on the list, which does not contain hepatic diseases).

40. Services and Supports for Persons with Disabilities Act, Act No. 123 of 2005, art. 4(1) (Japan), <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=2&re=02&dn=l&yo=services+and+supports&x=0&y=0&ky=&page=l&vm=02> [hereinafter Disabilities Act],

41. *See Welfare Services*, *supra* note 32 (explaining that the FAPD is the governing law in this area); *see also Basics of Systems*, *supra* note 36 (explaining how those with physical disabilities obtain protections); *Welfare Services for Persons with Intellectual Disabilities*, <http://www.jicafriends.jp/world/japan/chapter/chapter4.html> (last visited Oct. 15, 2011) (explaining how those with intellectual disabilities obtain protections); *Welfare Services for Persons with Psychiatric Disabilities*, JAPAN INT'L COOPERATION AGENCY FRIENDS, <http://www.jicafriends.jp/world/japan/chapter/chapter5.html> (last visited Oct. 15, 2011) (explaining how those with mental/psychological disabilities obtain protections).

42. JAPAN ORG. FOR EMP'T OF THE ELDERLY AND PERSONS WITH DISABILITIES [JEED], EMPLOYMENT GUIDE FOR EMPLOYERS AND PERSONS WITH DISABILITIES: SUPPORTING EMPLOYMENT OF PERSONS WITH DISABILITIES 8-10 (2009), *available at* <http://www.jeed.or.jp/english/download/reference02.pdf> (explaining who qualifies under the EPAPD and describing the vocational rehabilitation available under EPAPD) [hereinafter JEED 2].

43. Disabilities Act, *supra* note 40, art. 5(1).

44. *See id.* art. 5 (enumerating all the support provided, which does not include social rehabilitation of any kind).

45. *See, e.g., id.* art. 5(8)-(9).

services for persons with disabilities were not sufficient to support their daily life activities, even though the Japanese National Health Insurance (Medicare) system⁴⁶ provides them with medical services.⁴⁷

Despite this political, logistical, and cultural context, the concept of civil rights for people with disabilities has not developed, for example, as a vehicle for alleging employment discrimination.⁴⁸ Rather, when an individual is certified as a person with a disability by a prefecture or a municipal government, the government provides modest benefits, such as wheelchairs or assistive devices, subsidies for medical treatment, public transportation discounts, and income tax deductions.⁴⁹

Similarly, employment discrimination is limited by a quota system.⁵⁰ The EPAPD obligates employers in the private and public sectors to have at least 1.8 percent and 2.1 percent of their workforces, respectively, made up of persons with disabilities.⁵¹ Should an employer with more than 301 employees not reach its quota in hiring persons with disabilities, that employer must pay a levy.⁵² The levy is fifty thousand yen (approximately five hundred dollars) per month for each person below the quota.⁵³ The levy is payable to the Japan Organization for

46. The Japanese Medicare system is based on the concept of social insurance. The system provides access to medical services to all Japanese people, except those people and their dependent family members who do not pay the premiums. *See* T.R. Reid, *Japanese Pay Less for More Health Care*, NAT'L PUB. RADIO (Apr. 14, 2008), <http://www.npr.org/templates/story/story.php?storyId=89626309>.

47. HIROE YODA, SHOGAISHA SABETSU NO SHAKAIGAKU: JENDA, KAZOKU, KOKKA [THE SOCIOLOGY OF DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES; GENDER, FAMILY AND STATE] 203-08(1999).

48. *See generally id.*

49. *Cf. generally* Disabilities Act, *supra* note 40 (enumerating all of the services provided by and required of the municipality and the state, including employment services, but saying nothing about limitations on employment discrimination).

50. Masako Okuhira, *Better Employment Prospects for Disabled Japanese?*, DISABILITY INFO. RES. (2001), http://www.dinf.ne.jp/doc/english/other/wz_employmentpro_e.html (last visited Oct. 15, 2011).

51. *Id.*

52. JEED 2, *supra* note 42, at 15.

53. *Id.* Until June 30, 2010, the EPAPD imposed the levy on an employer with more than three hundred regular employees if the company's hiring rate is below the quota. The present policy remains in a state of transition. Starting April 1, 2015, the EPAPD will require an employer with more than one hundred regular employees to pay the levy if it is below the quota. The levy decreases from fifty thousand yen to forty thousand yen during the transition periods. The transition period for an employer with more than two hundred employees and less than three hundred regular employees is from July 1, 2010, to March 31, 2015. The transition period for an employer with more than one hundred and less than two hundred regular employees is from April 1, 2015, to March 31, 2020. *Id.* at 17.

Employment of the Elderly and Persons with Disabilities (JEED).⁵⁴

In calculating the employment quota, a person with a profound physical or intellectual disability is counted as two persons, and a person with a profound physical or intellectual disability who is a part-time employee is counted as one person.⁵⁵ A person with a mental disability who is employed as a regular worker may be counted as one person, and a short term worker with a mental disability can be counted as one half person.⁵⁶

The levy collected by JEED is used to directly and indirectly support other employees with disabilities.⁵⁷ For example, if an employer with more than three hundred regular employees employs more than the stipulated quota of employees with physical, intellectual, and/or mental disabilities, that employer can apply for an adjustment allowance.⁵⁸ The adjustment allowance is twenty-seven thousand yen (approximately 270 dollars) per month per person.⁵⁹

Half of all employers do not fulfill this obligation and choose to pay the levy.⁶⁰ In the private sector, the employment rate of persons with certified disabilities was about 1.63 percent in a 2009 survey.⁶¹ Despite the present situation in Japan, employers have an obligation to accommodate persons with disabilities, especially those with diseases, sicknesses or injuries.

As previously stated, there is no statutory antidiscrimination protection, except as reflected in Section 3(3) of the FAPD.⁶² In addition, the Japanese Labor Standards Act of 1947 does not contain a provision to prohibit discrimination against, and require accommodation

54. *Id.* at 15.

55. *Id.* at 10-11.

56. *Id.*; "Short time workers with severe physical or severe intellectual disabilities" are defined as workers with a disability who work more than twenty hours and less than thirty hours. *Id.* at 10.

57. JEED 2, *supra* note 42, at 15.

58. *See id.* at 15-16.

59. *Id.*

60. Heyer, *supra* note 8, at 8.

61. *See Individual Labor Dispute Resolution Enforcement Status in 2008*, JAPANESE MINISTRY OF HEALTH, LABOUR & WELFARE (May 2009), <http://www.mhlw.go.jp/houdou/2009/05/h0522-4.html> (last visited Oct. 15, 2011). The average employment rate of those with disabilities in a company with more than one thousand employees is 1.83%. The rate that companies with more than one thousand employees hire people with disabilities is 49.2%. The hiring rate of workers with disabilities at companies with fifty-six to ninety-nine and one hundred to 299 employees is 1.40% and 1.35%, respectively.

62. *See generally* Law No. 84, *supra* note 14.

of, persons with disabilities, even though Article Three of the FAPD does prohibit discrimination on basis of race, religious, and political beliefs, and social status.⁶³ The obligation to persons with disabilities instead is derived from case law interpreting employment contracts.⁶⁴

B. Duty of Accommodation under Japanese Employment Contract Law

In Japan, the duty to accommodate persons with disabilities stems from unique features of Japanese employment law. It is difficult for a Japanese employer to discharge an employee under an employment contract without a fixed period, even if the employee is temporarily incompetent, or lacks or loses the level of productivity or qualifications required to perform the job.⁶⁵ The difficulty of dismissing an employee under Japanese law obliges most employers to transfer an employee with a disability to another job or to a light duty position.⁶⁶ An employer may legitimately discharge an employee if there are reasonable grounds (just cause) for dismissal, but Japanese case law on employment contracts has not permitted a broad exercise of the right of dismissal.⁶⁷

In support of a dismissal, an employer must fulfill certain substantive and procedural requirements.⁶⁸ Generally the employer must apply employment termination provisions, or "work rules" (*Shugyo-kisoku*), as required by individual cases of particular employees.⁶⁹

63. Labor Standards Act, Act No. 91 of 1947 (Japan), available at [http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=l&yo=&al\[\]=L&x=10&y=12&ky=&page=2](http://www.japaneselawtranslation.go.jp/law/detail/?ft=2&re=02&dn=l&yo=&al[]=L&x=10&y=12&ky=&page=2) [hereinafter Labor Standards Act].

64. See, e.g., Ryoko Sakuraba, *Employment Equality Law in Japan Human Rights or Employment Policy?*, 6 JAPAN INST. FOR LAB. POL'Y & TRAINING REP. 181, 198 (2008) (summarizing cases where the court has followed a doctrine of non-discrimination against the persons with disabilities).

65. See Hiroki Kobayashi, *Ten Questions on Japanese Employment Law*, THE WORKING WORLD, June 2010, at 10, http://www.lw.com/upload/pubContent/_pdf/pub3590_1.pdf (last visited Oct. 15, 2011) (describing the situations in which courts find dismissal to be permissible, but not including temporary incompetence, or lacking productivity or qualifications); cf. KAZUO SUGENO, JAPANESE LABOR LAW 402 (Leo Kanowitz trans., 1992) (1985) (explaining that prolonged, not just temporary, loss of ability would be necessary to justify dismissal).

66. See Kobayashi, *supra* note 65, at 11 (explaining that Japanese courts will only consider allowing dismissal of indefinite contract employees ("regular employees") if the employer has made efforts to avoid dismissal).

67. See SUGENO, *supra* note 65, at 402 (specifying that an employer can only dismiss an employee on "objectively reasonable grounds," which are limited to prolonged incompetence, violation of disciplinary rule, or business necessity).

68. *Id.* at 403.

69. *Id.* (defining *Shugyo-kisoku*); see Miwako Ogawa, *Noncompetete Covenants in Japanese Employment Contracts Recent Developments*, 22 HASTINGS INT'L & COMP. L. REV. 341, 343 (1999) (defining the role of "work rules").

Regarding the substantive dismissal requirements, an employer may dismiss an employee if the employer estimates that the period of "incompetence, or lack or loss of the skills and qualifications required for performance of the worker's job," is not temporary but long-term.⁷⁰

The employer also may exercise the right of dismissal if the employee cannot perform the essential functions of the job when employed under a fixed contract.⁷¹ As for the procedural elements of dismissal, before an employer may seek dismissal of an employee who is incapacitated or less qualified, the employer must reassign the employee to a more appropriate position, or transfer the employee to another department.⁷² This requirement is applicable not only to an employee with a disability, but also to other employees who cannot perform their jobs within reason.⁷³

The dismissal requirements also apply to an employee with a disease or injury. Whether the law obliges an employer to make an accommodation, however, depends on whether an employee can perform the duties of the position, whether the employment contract is of a fixed duty or duration, and whether the requested accommodation establishes burdens on the employer and others.⁷⁴ The Tokyo Court of Appeal examined this issue in *City of Yokohama, Commission for Public School Healthcare*,⁷⁵ In this case, the plaintiff was a dental technician who worked in public elementary schools in Yokohama.⁷⁶ Her duties included checking the students' teeth and providing instruction on dental hygiene.⁷⁷

The plaintiff was diagnosed with a physical impairment in 1988 and took paid and unpaid sick leaves until 1992.⁷⁸ She asked to return to

70. SUGENO, *supra* note 65, at 402.

71. See Kobayashi, *supra* note 65, at 11 (explaining that dismissal within the fixed period is allowed only for "unavoidable reasons").

72. See *id.* at 10-11.

73. See *id.*

74. See Kobayashi, *supra* note 65, at 10 (explaining that employers may dismiss employees with indefinite contracts, who are unable to perform their work); see, e.g., Sakuraba, *supra* note 64, at 198 (describing how the court permitted a dismissal where accommodating the employee with a disability was so time-consuming that it was beyond the employer's duty of reasonable accommodation).

75. Tokyo Kótó Saibansho [Tokyo App. Ct.] 2005, 890 RÓDÓ HANREI 58 (Japan); see Sakuraba, *supra* note 64, at 198 (summarizing the case and the court's holding).

76. Regarding the fact finding of the case, see Yokohama Chihó Saibansho [Yokohama Dist. Ct.] 2004, 890 RÓDÓ HANREI 63, 67 (Japan) [hereinafter City of Yokohama],

77. *Id.* at 67-68.

78. *Id.* at 68-69.

her job in 1992, 1993, and 1994.⁷⁹ Her employer continuously refused, and finally dismissed her in 1994 saying she could not perform the essential function of the job.⁸⁰ The plaintiff had difficulty conducting appropriate dental procedures, such as examining a student's mouth, because of her lower point of view from the wheelchair.⁸¹ She had requested from her employer a special chair, adjustable to two different heights for students to sit in, or for students to lie down on the floor, so that she would be able to see inside their mouths and do her job, but her employer refused the request.⁸²

The Tokyo Court of Appeal dismissed the case even though the cost for accommodation was relatively modest.⁸³ The court viewed the appellant's requested accommodation (i.e., to provide an appropriate working environment and remove burdens on her) as an undue hardship on personnel and economic resources, and more than an employer's ordinary duty to accommodate persons with disabilities, regardless of whether the court felt it desirable to accommodate those in society with disabilities.⁸⁴

First, the court held that an employer may appropriately exercise the right to dismissal if an employee cannot perform the essential functions of the employment contract, which specifies a fixed and mandatory duty, with or without accommodation.⁸⁵ Second, the court found that an employer is not required to make an accommodation if the request imposes any burden on the employer, or as in this case, on the students or caregivers.⁸⁶

Also, the court found that the employer does not have to make an accommodation if the accommodation may lower the efficiency of the business as defined by the employer.⁸⁷ Thus, an accommodation is only appropriate, according to this court, when it enables an employee with a disability to perform essential job duties at no cost to the employer and with only a minimal impact on the time required to complete those duties.⁸⁸ The court's view is that any burdens on an employer, however

79. *Id.* at 69.

80. *Id.* at 70.

81. *Id.*

82. City of Yokohama, 890 RÓDÓ HANREI at 66

83. *Id.* at 62-63.

84. *Id.* at 63.

85. *Id.* at 62-63.

86. *Id.*

87. *Id.* at 63.

88. City of Yokohama, 890 RÓDÓ HANREI at 63

marginal, and even if the accommodation is "desirable for inclusion of persons with disabilities into . . . society,"⁸⁹ are not enough to override the employer's rights.⁹⁰

A similar approach was found in *Independent Administrative Institution "N."*⁹¹ The plaintiff was an employee at the Independent Administrative Institution, and had a mental illness with symptoms that included depression and a character disorder.⁹² As a result of his disability, his employer transferred the plaintiff, assigning him to relatively light duty work, but his condition worsened, and he took periodic sick leaves.⁹³ When the Institution merged with another, the employer required the plaintiff to undergo new job testing at which he made mistakes.⁹⁴ Based on the testing, his employer then asked him to take sick leave.⁹⁵ During his one-year sick leave, the employee asked to return to the light duty job, which he had successfully performed.⁹⁶ The employer refused this request, because the employer believed that the plaintiff could not, or would never, perform his duties.⁹⁷ The employer made this decision even though the plaintiff's doctor noted that he could return from a lighter duty job to his job in six months.⁹⁸

The Tokyo District Court held that the employer does not have a duty to reassign the plaintiff employee with a disability after taking sick leave, unless he "recovers from a disease" and may perform his duty at a normal level or perform his original work duty in a reasonable period.⁹⁹ The court held this to be true even if he cannot perform his original duty for the moment, as long as his employment contract does not provide a fixed period and duty.¹⁰⁰ The court did not address the

89. *Id.*

90. Compare empirical studies of accommodation in the U.S. finding minimal costs and high benefits, such as in Helen A. Schartz et al., *Workplace Accommodations: Empirical Study of Current Employees*, 75 Miss. L.J. 917, 943 (2006) [hereinafter *Empirical Study of Current Employees*] and Helen A. Schartz et al., *Workplace Accommodations: Evidence Based Outcomes*, 27 WORK 345, 354 (2006) [hereinafter *Evidence Based Outcomes*].

91. See generally Tokyo Chihó Saibansho [Tokyo Dist. Ct.] 2004, 876 RÓDÓ HANREI 56 (Japan) [hereinafter *Independent Administrative Institution*],

92. *Id.* at 62.

93. *Id.*

94. *Id.* at 63.

95. *Id.*

96. *Id.* at 64.

97. *Independent Administrative Institution*, 876 RÓDÓ HANREI at 64.

98. *Id.* at 65.

99. *Id.*

100. *Id.*

concept of accommodation, and instead emphasized a rigid medical approach to disability focusing on the cure of the condition so that the individual may fit back into the prescribed work environment.¹⁰¹

The Osaka District Court took a different approach in *Japan Railways Company, Tokai (Osaka) [JR Tokai]*.¹⁰² In this case, the plaintiff performed maintenance duties inside railcars.¹⁰³ During that time, he suffered a stroke and high blood pressure and had to take sick leave.¹⁰⁴ After completing a three-year sick leave, the respondent company, JR Tokai, asked him to return to his former job and informed him that they would discharge him if he could not do so.¹⁰⁵ Without accommodation, the plaintiff could not fully perform his original job because he could not use his right hand functionally.¹⁰⁶ The company dismissed him as a result.¹⁰⁷

Although the plaintiff told his supervisor that he could do a light duty job or a job with accommodation and asked for reassignment, the supervisor refused this request.¹⁰⁸ The court held that the employer had an obligation to reassign the plaintiff with a disability to a light duty job based on the concept of employment contract.¹⁰⁹ As such, when an employee shows his intention to return to work effectively, with accommodation, even if he would not be able to perform his former job after completing a sick leave, an employer must attempt to accommodate him by a transfer to another job or reassignment to light duty.¹¹⁰ The employer also must consider present capability, experience, and work capacity, as well as job-type and factors related to the difficulty of accommodation and reassignment.¹¹¹ The court's holding indicates that the employer has a duty to accommodate an employee with a disability through a transfer or reassignment, regardless of whether he can perform his original duty in a reasonable period.¹¹²

101. *Id.* at 65-66.

102. Osaka Chihō Saibansho [Osaka Dist. Ct.] 1999, 771 RŌDŌ HANREI 25 (Japan) [hereinafter JR Tokai].

103. *Id.* at 26.

104. *Id.* at 27.

105. *Id.* at 28.

106. *Id.*

107. *Id.*

108. JR Tokai, 771 RŌDŌ HANREI at 29-30.

109. *Id.* at 30.

110. *Id.*

111. *Id.* at 30-31.

112. *Id.*

This case clarifies that the appropriateness of an accommodation through transfer or reassignment depends on the employee's capability, experience, status, and the overall size of the business or types of operation, the practical aspect of transfer and reassignment of its employees and the difficulty. This holding was influenced by the *Katayama-gumi* case,¹¹³ which was the first case the Supreme Court of Japan considered regarding these issues.

Katayama-gumi was not an issue of employee dismissal, but it involved the accommodation of temporary reassignment. In this case, an employee, who was a supervisory worker in a construction company, had Graves' disease and asked his manager to transfer him to a clerk job for four months.¹¹⁴ The employer refused to make the accommodation and ordered him to take unpaid leave for the duration.¹¹⁵ As a result, the employee sued the employer seeking the payment of unpaid wages.¹¹⁶ The Supreme Court of Japan held that a contracted employee should be allowed to fulfill an employment contract through an alternative position suited to his abilities if the employee so requests.¹¹⁷

The 2008 decision from the Osaka District Court in *Canon Soft Information System Co.*, took a different approach from *JR Tokai* and followed closely the logic of recent cases of other courts.¹¹⁸ It also clarified that while an employer cannot immediately exercise the right to dismissal, even if a plaintiff cannot perform his original duty, the qualification standard is much higher than *JR Tokai*. In *JR Tokai* the standard for qualifying for accommodation was whether the employee can perform a light duty according to the employee's capability. The standard in *Canon*, however, is whether the employee can perform her ordinary duty according to the abilities of others in the same position.¹¹⁹

In *Canon*, an employee with Cushing syndrome and autonomic dysfunction, which causes excessive fatigue, excessive thirst, dizziness, vertigo, or feelings of anxiety or panic, was discharged after completing a two-year sick leave, during which he had hoped to return to his job.¹²⁰

113. Saiko Saibansho [Sup. Ct.] 1998, 736 RODO HANREI 15 (Japan) [hereinafter *Katayama-gumi*],

114. Tokyo Kótó Saibansho [Tokyo App. Ct.] 1995, 684 RÓDÓ HANREI 92, 95-96 (Japan).

115. *Id.* at 96.

116. *Id.* at 97.

117. *Katayama-gumi*, 736 R.H. at 17-18.

118. *See generally* Osaka Chihó Saibansho [Osaka Dist. Ct.] 2008, 960 RÓDÓ HANREI 49 (Japan) [hereinafter *Canon*],

119. *Id.*

120. *Id.* at 56-59.

The Osaka District Court held that the plaintiff qualified for accommodation or transfer because he was in a condition to perform most of the duties of the transferable employment positions, as performed by other employees in the establishment, and his employment contract did not provide a fixed duty or period, regardless of being unable to do his former duty or overtime work.¹²¹

Importantly, the court held the exercise of the right to dismissal is not legitimate unless the employer attempts to accommodate the employee, such as by decreasing the employee's workload.¹²² This approach does not require an employee with a disability to be qualified to the extent required to perform his original duty when he wishes to return, but the employee must be in a condition to perform most of the duties other employees do in the alternative position.¹²³

These cases show that the central legal reason an employer is obliged to make accommodation for an employee with a disability is derived from Japanese employment contract concepts, and not from a civil rights or antidiscrimination law perspective. Employment contract governs the continuous, human relationship between employer and employee, and therefore emphasizes avoiding dismissal,¹²⁴ which

121. *Id.* at 61.

122. *Id.*

123. *Id.* at 60-61.

124. Theories of legal restriction on dismissal have developed since the 1950s. Before World War II, the Japanese Civil Law of 1898, modeled from French and German Civil Laws, provided in section 627(1), "If the parties have not fixed the duration of the contract of hiring, either party may at any time give notice to terminate it, in which case it will terminate two weeks after such notice." Therefore, either an employer or an employee could terminate an employment contract at any time they desired. Just after World War II and the enactment of the Labor Standards Act of 1947 (LSA), Japanese courts' holdings regarding dismissal cases began to be based on the freedom of dismissal, similar to the employment-at-will doctrine in the United States. *See* Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of Stability?*, 43 UCLA L. REV. 635, 647, 707 (1996). Japanese courts no longer required any reason for dismissal. *See id.* at 647. The courts changed the theories because of the increase of labor disputes and strikes, and developed the theory of "just cause," or the theory of "abuse of employer's right to dismissal," in the 1950s and 1960s. *See id.* at 644-647. Although this brief history may make it seem that the development of the restriction on dismissal was relatively recent and based on the activation of the Japanese labor unions and their movements, this is not the case. Before World War II, most Japanese employers believed that employers and employees were family, or master and servant, and the employers, as parents, should be responsible for their employees, as their children. William M. Tsutsui, *Rethinking the Paternalist Paradigm in Japanese Industrial Management*, 26 Bus. & ECON. HIST. 561, 562-63 (1997). In fact, the employers provided the employees' education, clothing, and food. *Id.* at 567. Employers even built apartments for their employees to live and sometimes created a life insurance plan inside of the company for their families. *See id.* This welfare program inside enterprises was not a right of employees but an act of benevolence from the employer. *See id.* at 568. Moreover, store-owners

impacts the employee's economic life and the core duties of the employment contract.

In *Kentoku*, the Osaka District Court reflected both the partially new, yet traditional paradigm, to support the provision of accommodation.¹²⁵ The court emphasized the human hierarchical relationship between employee and employer when it held that it was up to the employer and the employee to alter an employment contract according to a suitable work-life balance.¹²⁶ Ultimately, the court held that if the employer and employee determine the employee cannot perform the employee's duties as both would expect, due to a disability, then it is the employer's responsibility to care for the employee.¹²⁷

While this holding contains a new idea of "work-life balance," it limits the traditional view of the Japanese employment contract and places the duty of accommodation on employers.¹²⁸ The employment contract is premised upon mutual understanding between employer and employee.

In addition to avoiding dismissal, the employment contract doctrine of incidental obligation requires employers to make accommodation for employees with disabilities by requiring the employer to provide employee sick leave or to cease overwork policies.¹²⁹ Japanese employment contracts place a duty to work on the employee and the duty to pay wages on the employer, along with other

tended not to discharge their employees if they became regular employees (*Tedai*) after their early apprenticeship (*Decchi*). See Kando Maruyama & Namifumi Nanshi Imamura, *Decchi Detchi Seido no Kenkyu* [A Study of Apprenticeship in Kyoto] 19 (1998). When the Japanese government attempted to enact the Japanese Factory Act (Law No. 46, Mar. 29, 1911), following the United Kingdom's Factory Acts, most of the employers opposed the legislation. As a result, the adoption of the Act was delayed for decades because the employers believed that the law lacked the virtue of the paternalistic relationship. See Fujiyoshi Sakamoto, *Nihon Koyou Shi Gekan* [The History of Japanese Employment II] 65 (1977). Therefore, while the legal restriction on dismissal is not a traditional legal concept, the restriction on dismissal prevailed throughout Japanese society as a product of tradition and culture. This nature has been lost, however. Recently, commentators have attempted to analyze the traditional theories and build a new theory based on the perspective of law and economics. For example, see generally FUMIO OTAKEET AL., KAICO FIOUSEI WO KANGAERU: FIOUGAKU TO KEIZAIGAKU NO SHITEN [ZOUHO-BAN] [RECONSIDERING THE LAW OF DISMISSAL: A VIEW FROM LAW AND ECONOMICS] (2d ed. 2004).

125. Osaka Chihó Saibansho [Osaka Dist. Ct.] 2009, 989 RÓDÓ FIANREI 70 (Japan) [hereinafter *Kentoku*]

126. *Id.* at 78-79.

127. *Id.* at 79.

128. *Id.* at 78-79.

129. Labor Standards Act, *supra* note 63, arts. 26 (sick leave), 32-38 (overwork).

"incidental obligations."¹³⁰ The incidental obligations are legal obligations incidental to the employment contract and imposed on an employer to adhere to a standard of reasonable care while performing any act that could foreseeably harm or disadvantage employees.¹³¹

One of the relevant incidental duties in the context of disability is protection of employees' safety and health. The "incidental obligation to consider employee's health and safety (*Anzen Hairyo Gimu*) requires employers to provide employees with safe working environments and prevent employees from incurring disease or injury in the course of employment.¹³²

For example, the incidental obligation doctrine obliges employers to provide and apply appropriate employment standards for employees, implement medical checks for employees, and assign duties corresponding to an employee's individual health condition and age.¹³³ If an employee dies from an unsafe policy and practice in the workplace (*Karo-shi*) that was worsened by a disability such as depression, cardiac infarction, or cerebral infarction,¹³⁴ the decedent's family may file a

130. *See generally id.*

131. The Japanese concept of the incidental obligation to consider employees' health and safety is influenced by the German concept (*see Legal Systems of the World*, CIVIL LAW NETWORK, <http://civillawnetwork.wordpress.com/2008/01/08/legal-systems-of-the-world/> (explaining that Japanese law is largely influenced by German law)), and in 1975 the Supreme Court of Japan imposed the incidental obligation on the Japanese self-defense force in the *Japanese National Self-Defense* case. *See* Saikō Saibansho [Sup. Ct.] 1975, 143 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MLNSHŪ] 29-2 (Japan). The concept has been developed both in court and by academics. Recently, the common view is that the responsibility of "incidental obligation" adherence to an employment contract is not different from that of tort liability in employment. Ryuichi Yamakawa, *The Enactment of the Labor Contract Act Its Significance and Future Issues*, 6 JAPAN LAB. REV. 4 (2009), available at http://www.jil.go.jp/english/JLR/documents/2009/JLR22_all.pdf. However, the time to bring an action under tort is only three years. Sayuri Umeda, Law Library of Congress, *Japan WWII POW and Forced Labor Compensation Cases* 1, 9 (2008), available at <http://www.loc.gov/law/help/japan-wwii-pow.pdf>.

132. *See generally* Industrial Safety and Health Act, Law No. 57 of 1972 http://www.ilo.org/aids/legislation/lang—en/docName—WCMS_117327/index.htm (Japan) [hereinafter Law No. 57].

133. Ikuko Mizushima, *White-Collar Rodosya To Shiyousya No Kenko-hairyo-gimu \Health Care of White-Collar Employees and Employers' Responsibilities]*, 492 JAPANESE J. OF LAB. STUD. 25, 30 (2001)(Japan).

134. "*Karo-shi*" originally means "death from overwork." *See* Katsuo Nishiyama and Jeffrey V. Johnson, *Karoshi—Death from Overwork Occupational Health Consequences of the Japanese Production Management* (Feb. 4, 1997), <http://www.workhealth.org/whatsnew/lpkarosh.html>. Under "*Karo-shi*," physical or mental fatigue and stress caused by overwork, conflict with a supervisor or a colleague, and other work related factors worsen underlying diseases of employees and cause them to die. *See id.* The Japanese Ministry of Health, Labor and Welfare set standards to judge "*Karo-shi*." *See* Kenji Iwasaki et al., *Health Problems due to Long Working Hours in Japan Working Hours, Workers' Compensation (Karoshi), and Preventative*

complaint based on violation of the duty, tort liability, and/or apply for worker's compensation based on the *Worker's Compensation Act*.¹³⁵

An employer has a further obligation to decrease workload to prevent employees with disabilities from being injured in the workplace. For example, if employees present a disabling condition, their supervisor is obligated to recommend they have a medical check and decrease their workload accordingly.¹³⁶ Again, the employer's obligation under the incidental duty stems from the employment contract and protects employees' health and safety in ways similar to a broad duty of accommodation.

In summary, although the duty to accommodate persons with disabilities in Japan derives from unique features of Japanese employment and contract law, it results in a patchwork of doctrines with little coherence and relevance to disability antidiscrimination law.¹³⁷ The two core legal doctrines giving rise to Japanese accommodation policies—to avoid dismissal and to protect the health and safety of employees—are based on a medical or curative model of disability.¹³⁸ These policies require only limited accommodations for employees, such as transfer, reassignment, sick leave, and reduction of workload.¹³⁹

Measures, 44 INDUS. HEALTH 537, 539 (2006) available at http://www.jniosh.go.jp/old/niih/en/indu_hel/2006/pdf/indhealth_44_4_537.pdf. If an employee does work more than 100 hours in a month before death or averages more than 80 hours per month from two to six months before death, the death of the employee is admitted "*Karo-shi*" by the Labor Standard and Workers' Compensation Board. *See id.* If the Board admits "*Karo-shi*" it provides medical care and compensation for employees who are injured or for families whose members have died in the course of employment. *See* Labor Standards Act, *supra* note 63, arts. 75, 77-86. In addition, employees injured and families of employees who died in the course of employment can claim damages, which Workers' Compensation does not cover even if they receive medical care or compensation from Workers' Compensation. *Id.*

135. Rodosha Saigai Hoshō Hoken Hō [Workers' Accident Compensation Insurance Law], Law No. 50 of 1947, art. 16-2 (Japan), available at http://www.jil.go.jp/english/laborinfo/library/documents/lj_law12.pdf.

136. Law No. 57, *supra* note 132, art. 66-5 (Japan). Employers should discharge the incidental obligation to consider employees' health and safety regardless of whether or not an employee presents a disabling condition. In fact, employers must be responsible for the damage caused by their employees' death from overwork, even if they do not present a disabling condition. *Id.*

137. As such, accommodations in practice are limited in Japan. Empirical study is needed to document the prevalence and the type of accommodation actually practiced and as a function of disability type and severity. The survey should reveal what accommodations employees with disabilities require in particular situations, whether accommodation is available to the employees when they request it, what corporate culture influenced the employer's decisions, and so on.

138. Heyer, *supra* note 8, at 1.

139. Law No. 57, *supra* note 132, art. 66-5.

Moreover, the Japanese duty of accommodation has not developed into a coherent approach to address an employee's ongoing need to effectively perform current jobs and to advance towards higher-level jobs.¹⁴⁰ Although the law requires employers to avoid dismissing employees with disabilities by transferring and reassigning, application of these accommodations primarily depends on the consequences of dismissing the employee. Additionally, although employers are incidentally required to protect employees' health and safety, the protection arises from fear of the most severe consequence of poor workplace health and safety: the death of an employee. Therefore, though the principles may oblige an employer to transfer or reassign employees to avoid grave consequences, the employer is not required or encouraged to accommodate in most cases that involve simple and cost-free alternatives and that provide efficiency and flexibility.¹⁴¹

Furthermore, in Japan this duty applies to relatively few individuals with disabilities. The duty applies only to employees who have an employment contract without a fixed period and designated job.¹⁴² It rarely applies to other workers, such as part-time workers and employees with a contract with a fixed period and a designated job.¹⁴³

To date, the Japanese idea of accommodation is based on a paternalistic and medical point of view and not on equal opportunity or civil rights doctrine. No legal basis exists to require an employer to accommodate the employee with a disability unless work rules provide such a duty. No provision prevents discrimination or unjust dismissal from failure to accommodate. Overall, a paternalistic tradition, where the employer is a "parent figure" that should protect and support employees, influences the avoidance of dismissal, as well as an

140. For a discussion and empirical study of workplace culture in the U.S., see generally Lisa Schur, Douglas Kruse, Joseph Blasi & Peter Blanck, *Is Disability Disabling in All Workplaces? Workplace Disparities and Corporate Culture*, 48(3) INDUS. REL. 381 (2009), available at http://bbi.syr.edu/publications/blanck_docs/2009/Disability_Workplace_Disparities_and%20Corporate_Culture_06-04-09.pdf.

141. *Empirical Study of Current Employees*, *supra* note 90, at 937-38 ("[Approximately half (49.1%) of the accommodations made had no cost. Almost three-quarters (74.8%) had a First Calendar Year Cost of \$500 or less. Of the 115 that had a cost, the median First Calendar Year Cost was \$500."])

142. See Sakuraba, *Employment Discrimination Law in Japan Human Rights or Employment Policy?*, *supra* note 64, at 190-91.

143. See *id.*

employer's incidental obligations in regard to the concept of accommodation under Japanese employment contract law.¹⁴⁴

III. TOWARD RATIFICATION OF THE CRPD IN JAPAN AND A COMPARATIVE ANALYSIS

We have suggested the premise of traditional Japanese employment law and policy does not provide a clear foundation for future antidiscrimination policies for persons with disabilities, at least in the tradition of Western approaches. Japanese experience and culture do not yet provide a conceptual basis for the prohibition of discrimination, disparate impact of laws and policies, and requirement of reasonable accommodation.

This part summarizes relevant experiences of other countries' disability discrimination law and applies them to emerging Japanese domestic legislation for persons with disabilities.

A. Preparation for New Japanese Legislation

The Japanese government signed and officially declared its intention to ratify the CRPD on September 28, 2006, and has since been preparing for ratification.¹⁴⁵ The CRPD, however, does not provide detailed guidelines and requirements on how a state party must fulfill its obligations under the CRPD.¹⁴⁶ Instead, the CRPD entrusts the task to the individual state party.¹⁴⁷ Therefore, a state party, such as Japan, which does not have comprehensive antidiscrimination law for persons with disabilities, must begin the process of developing and advancing its disability discrimination law and policy.¹⁴⁸

144. Japanese legal scholars may not agree with emphasizing the paternalistic nature of Japanese employment contracts, since they have attempted to break away from the paternalistic theory.

145. *Convention and Optional Protocol Signatures and Ratifications*, U.N. ENABLE (Oct. 15, 2011), <http://www.un.org/disabilities/countries.asp?navid=12&pid=166>.

146. See *Dignity for Disabled People*, JAPAN TIMES, Feb. 14, 2007, <http://search.japantimes.co.jp/cgi-bin/ed20070214a1.html>.

147. *Id.*

148. Commentators describe the future of Japanese disability antidiscrimination law as premised on the ratification of the CRPD. For example, Fukushi Rodo Quarterly published a special issue on the ratification of CRPD and its impact on present and future disability law in Japan. See Masaya Asahi, *Syogaisya Kenrijyoyaku Ka Ni Okeru Syogaisya Koyou No Kadai [Agenda of Employment for Persons with Disabilities under the CRPD]*, 121 Q. FUKUSHI RODO 12 (2008); Tamako Hasegawa, *America Ni Okeru Syogaisya Koyou No Jittai to 2008 Nen ADA Kaiseihou [Employment of Persons with Disabilities and ADAAA in the United States]* 121 Q. FUKUSHI RODO 32 (2008); Tomoko Hikuma, *Syogai No Aru Hitobito, Kazoku, Shiensya Ni*

In 2007, the Japanese Ministry of Health, Labor, and Welfare (MHLW) commissioned a committee and study group of leading researchers to conduct a comparative study on reasonable accommodation for persons with disabilities in employment. The members submitted an initial brief in March 2008, analyzing the impact of the CRPD on the disability policy in Japan and the possibility of reasonable accommodation in employment law.¹⁴⁹

In addition, the Japanese Cabinet Office commenced its own research project on the accommodation of persons with disabilities.¹⁵⁰ It produced its first report in 2007-2008.¹⁵¹ The 2007-2008 report describes the laws and regulations regarding disability discrimination and reasonable accommodations for persons with disabilities in the United States, the United Kingdom (UK), Germany, France, and New Zealand.¹⁵² Officials working in their Japanese Embassies and Consulates wrote the 2007-2008 report, which describes laws and regulations in detail, and yet is not prescriptive.¹⁵³

The Cabinet Office subsequently asked Professor Nakagawa to chair the 2008-2009 and the 2009-2010 research projects and conduct further comprehensive and comparative research of the United States

Kakawaru EU Kintouhou Seisaku To Kokuren No Shin-jyoyaku No Kousaku [Support for Persons with Disabilities, Their Family and Caregivers under the EU Equal Employment Policy and the CRPD] 121 Q. FUKUSHI RODO 43 (2008); Hitomi Nagano, *France No Syougaisya Koyou No Seisaku [Employment Practice and Policy for Persons with Disabilities in France]* 121 Q. FUKUSHI RODO 63 (2008); Jun Ashida, *Italia No Syougaisya Koyou, Rodo Seisaku To Sono Jittai [Employment Practice and Policy for Persons with Disabilities in Italy]* 121 Q. FUKUSHI RODO 75 (2008); and Hiroshi Katouda, *Sweden No Syougaisya Koyou Rodo Seisaku No Jittai To Shin Sabestu-kinshi Hou [Employment of Persons with Disabilities in Sweden Employment Policy and Prohibition on Discrimination]* 121 Q. FUKUSHI RODO 83 (2008).

149. The members of the 2007 Committee created by the Ministry of Health, Labor and Welfare are Masahiko Iwamura (Professor, Law School, University of Tokyo) as the chair, Tamako Hasegawa (Researcher, Japan Society for the Promotion of Science), <http://www.mhlw.go.jp/shingi/2008/04/s0402-4e.html>, Hitomi Nagano (Ph.D. Candidate, Graduate School of Law and Politics, University of Tokyo), <http://www.mhlw.go.jp/shingi/2008/04/dl/s0402-4f.pdf>, Osamu Nagase (Associate Professor, Research Center for the Advanced Science and Technology, University of Tokyo), Ryosuke Ryo Matsui (Professor, Faculty of Social Policy & Administration, Hosei University), Chuji Sashida (Researcher, NIVR), <http://www.mhlw.go.jp/shingi/2008/04/dl/s0402-4g.pdf>. The initial brief was written in Japanese.

150. See generally 2007-2008 REPORT TO THE JAPAN NATIONAL CABINET OFFICE: COMPARATIVE STUDY REGARDING SOCIAL INCLUSION AND PARTICIPATION OF PERSONS WITH DISABILITIES (Mar. 28, 2008). The Japan National Cabinet Office implemented this project itself, not in cooperation with any other researchers.

151. *Id.*

152. *Id.*

153. *Id.*

(on which Professor Blanck assisted), the UK, Germany, France, Australia, and New Zealand in areas of employment, education, and transportation. The 2008-2009 research project of the Cabinet Office explores concepts and implementation strategies of antidiscrimination laws for persons with disabilities in various countries.¹⁵⁴

The 2009-2010 research project focuses on clarifying concepts and strategies by reviewing decisions regarding the disability discrimination laws in those countries.¹⁵⁵ For example, the review examines the concept and bases of disability discrimination law and the duty of reasonable accommodation, the definition of disability as applicable to antidiscrimination law and reasonable accommodation, the parameters of reasonableness and undue hardship of requested accommodation, and the accommodation interactive process, as well as burdens of proof and related policies.¹⁵⁶ Below we highlight these areas and recommendations relevant to the development of Japanese disability law and provision of accommodation.

In addition to the research projects, in December 2009, the Cabinet Office established a task force of scholars and members of the disability community to prepare for a new general Japanese disability law and policy.¹⁵⁷ The task force announced its interim report on June 7, 2010, and established three recommendations for the government: revise the FAPD; legislate new disability antidiscrimination law; and abolish the present Service and Support Act for Independent Living for the Persons with Disabilities, renaming and amending it to the new General Welfare Act for the Persons with Disabilities as a current tentative name.¹⁵⁸

Regarding the disability discrimination law, the "disability discrimination law" division of the task force has discussed theoretical and practical issues and elaborated on ideas. This analysis of the

154. *See generally* 2008-2009 Report *supra* note 5.

155. *See* 2009-2010 REPORT TO THE JAPAN NATIONAL CABINET OFFICE: COMPARATIVE STUDY REGARDING SOCIAL INCLUSION AND PARTICIPATION OF PERSONS WITH DISABILITIES (Cabinet Office of Gov't of Japan ed., 2010), *available at* <http://www8.cao.go.jp/shougai/suishin/tyosa/h21kokusai/gaiyou.html>.

156. *Id.*

157. Cabinet Office Taskforce for Reform of the System for Persons with Disabilities & Promotion Committee for Reform of the System for Persons with Disabilities, <http://www8.cao.go.jp/shougai/suishin/kaikaku/kaikaku.html> (last visited Oct. 15, 2011) [hereinafter Taskforce for Reform]; *see also* Ministry of Health, Labor and Welfare, *Support for Community Life for People with Disabilities*, http://www.mhlw.go.jp/english/wp/wp-hw4/dl/honbun/2_2_9.pdf (last visited Oct. 15, 2011).

158. Taskforce for Reform, *supra* note 157.

proposed disability discrimination law and reasonable accommodation is both crucial and timely.

B. Recommendations from Comparative Studies of Reasonable Accommodation

As discussed, an employer's duty of accommodation is not a statutory obligation in Japan.¹⁵⁹ Analogously, courts do not mandate accommodation when interpreting provisions of prohibition on gender discrimination.¹⁶⁰ Only some employment contracts partially impose a duty for employers to make accommodations for employees with disabilities.¹⁶¹

In order for the new disability discrimination law in Japan to appropriately oblige employers to perform the accommodation duty, there needs to be established prerequisite terms; stipulations of reasonable accommodations in disability discrimination law; legal bases for reasonableness, undue hardship, the interactive process, and alternative dispute resolution; relevancy to the present quota system; and enforceability of the new law.

C. Stipulation and Codification of Reasonable Accommodation for Persons with Disabilities in Japanese Disability Antidiscrimination Law

The FAPD promulgates a provision to prohibit disability discrimination in Japan.¹⁶² Does this provision include the duty of reasonable accommodation as a separate cause of action such as in the ADA? This is a possible interpretation. The Rehabilitation Act, a U.S. law, shows that the U.S. courts played an active role in the development of the jurisprudence of reasonable accommodation.¹⁶³ Similarly, Canadian development of the Human Rights Acts, which prohibit

159. *See supra* Part II.B.

160. *See* Heyer, *supra* note 8, at 4-5.

161. *Id.*

162. *See generally* Law No. 94, *supra* note 15.

163. Regarding the development of American disability discrimination law and reasonable accommodation, see RICHARD K. SCOTCH, FROM GOOD TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (2d ed. 2001); RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE (2001); Judith W. Wegner, *The Antidiscrimination Model Reconsidered Ensuring Equal Opportunity Without Respect to Handicap under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 411-16 (1984). In terms of establishing the burden of proof for reasonable accommodation, one of the most important early decisions for the development of the reasonable accommodation in the United States was *Prewitt v. U.S. Postal Service*, 662 F.2d292 (5th Cir. 1981).

discrimination on the basis of disability, reveals that the Canadian courts' interpretation contributed to the advent and the development of reasonable accommodation.¹⁶⁴ Historically, the duty of reasonable accommodation has been seen as a byproduct of the interpretation of antidiscrimination law.¹⁶⁵

However, courts in other countries have not followed this course. Although the Australian Disability Discrimination Act (Australian DDA) of 1992 prohibits discrimination against persons with disabilities, it did not stipulate the duty of reasonable accommodation (or reasonable adjustment) until August 2009.¹⁶⁶ Government documents, including those from ministries, describe an implied requirement for an employer to make reasonable adjustments for employees.¹⁶⁷ Furthermore, the Australian Human Rights Commission found that the Australian DDA imposed on employers a duty to provide reasonable adjustment for persons with disabilities.¹⁶⁸ Yet, a limited number of court cases provide an anchor for an employer's duty of reasonable adjustment.¹⁶⁹

164. In Canada, reasonable accommodation is an employer's obligation based on the Human Rights Act in all jurisdictions. *See generally* Canadian Human Rights Commission, *Questions and Answers about the Duty to Accommodate*, http://www.chrc-ccdp.ca/discrimination/apfa_uppt/pagel-eng.aspx (last visited Oct. 15, 2011) [hereinafter Q&A]. However, this obligation was not originally a statutory obligation but came from the interpretation of the Human Rights Act. *Id.* The Ontario Board of Inquiry imposed the duty to accommodate a person with a particular religion for the first time in *Ishar v. Security Investigation Services, Ltd.*, [unreported] (May 31, 1977). Even after the Supreme Court of Canada held in *O'Malley v. Simpson-Sears Ltd.*, 1 C.H.R.R. D/3102 (1985), that an employer was obliged to accommodate an employee who was a Seventh-day Adventist, few jurisdictions have stipulated the obligation in the acts. The Canadian concept of the duty of reasonable accommodation is not limited to discrimination against religion. *See generally* Q&A. Rather, it expands to all prohibited grounds, such as disability, pregnancy, and so on, through courts' and tribunals' interpretations. *Id.*

165. Professor Bagenstos explains that "given antidiscrimination law's general prohibition of rational discrimination against protected classes—and the principles that necessarily underlie that general prohibition—antidiscrimination law also properly requires accommodation." Samuel R. Bagenstos, "Rational Discrimination," *Accommodation and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 838 (2003). Although this view would be theoretically correct, it seems optimistic in terms of Japanese law.

166. Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth) (Austl.) [hereinafter Australia Disability Act], § 5(2)(a).

167. *See, e.g., Disability Rights*, AUSTL. HUMAN RIGHTS COMM'N, at 2, http://www.hreoc.gov.au/disability_rights/faq/Employment/employment_faq_1.html#adjustment (last visited Oct. 15, 2011); AUSTL. FAIR PAY COMM'N, EMPLOYEES WITH DISABILITY-COVERAGE OF AFPC WAGE INSTRUMENTS (2009).

168. *Id.*

169. There seems to be a debate over whether Section 5(2) of the Australian DDA actually implies an obligation to make adjustments by providing different accommodation or service. *See, e.g.,* AUSTL. GOV'T PRODUCTIVITY COMM'N, REVIEW OF THE DISABILITY DISCRIMINATION ACT

Responding to this situation,¹⁷⁰ the Disability Discrimination and Other Human Rights Legislation Amendment Act of 2009—Schedule 2¹⁷¹ promulgated a provision to oblige employers to make reasonable adjustment in the Australian DDA.

Based on the Japanese Committee's review, statutory mandates in most of the countries examined reflect reasonable accommodation concepts,¹⁷² even if a law provides a prohibition on discrimination against persons with disabilities. The development of the duty of reasonable accommodation is imperative in Japan, as demonstrated by the experiences of Australia and other countries.

I). Prohibition of Rational Discrimination and the Disparate Impact on the Legitimacy of Reasonable Accommodation

The provision of reasonable accommodation remains controversial in the United States because the distinctive nature of accommodation often collides with traditional and formal views of equality.¹⁷³ Other equality theories addressed in law, such as disparate impact, or the

1992 185-86 (2004) [hereinafter AUSTL. GOV'T PRODUCTIVITY COMM'N]; *see also* Cosma v Qantas Airways Ltd. (2002) 124 FCR 504; Laycock v. Comm'r of Police, NSW Police (2006) NSWADT 261 (Austl.), available at <http://www.lawlink.nsw.gov.au/adjudgments/2006nswadt.nsf/00000000000000000000000000000000/d2d48b4df5637e07ca2571e000082b2b?open document>.

170. The Productivity Commission of the Australian Commonwealth Government reviewed the situation without reasonable adjustment and made the recommendation in 2004. *See* Productivity Comm'n (2004), *Review of the Disability Discrimination Act 1992 Productivity Commission Inquiry Report Volume 1 Chapter No. 30* (Apr. 30, 2004); AUSTL. GOV'T PRODUCTIVITY COMM'N, *supra* note 169, at 185-89.

171. Australia Disability Act, *supra* note 166, § 4(1) (inserting "reasonable adjustment" into section 4(1) of the 1992 draft).

172. Throughout the world, countries indicate an employer's duty of reasonable accommodation under antidiscrimination acts or provisions, such as "reasonable adjustment" in the United Kingdom (Equality Act 2010, 2010, c. 15, at 10 (Eng.), available at http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf) (formally the Disability Discrimination Act) [hereinafter Equality Act]; "special service" in New Zealand (New Zealand Human Rights Commission (Human Rights Act 1993, 1993, No. 83, § 76(1)(a), (N.Z.)); comprehensive antidiscrimination law for persons with disabilities in the United States (ADA, *supra* note 7), and Australia (Australia Disability Act, *supra* note 166); a provision of general antidiscrimination law in New Zealand (New Zealand Human Rights Commission (Human Rights Act 1993, 1993, No. 83, § 76(1)(a), (N.Z.)) and Germany (General Equal Treatment Act); provisions and guidelines for rehabilitation law in the United States (Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504); and provisions for labor law in France (*see generally* CODE DU TRAVAIL [C. TRAV.]). Although the technical terms are different in each country, the concept is the same.

173. *See generally* Scott Burris et al., *Disputes Under the American with Disabilities Act*, 9 TEMP. POL. & Civ. RTS. L. REV. 237 (1999).

prohibition against even rational discrimination, also impact views on the legitimacy of reasonable accommodation in three ways.

First, reasonable accommodation often is not viewed as legitimate unless the rights and coverage of reasonable accommodation are identical to traditional formal equality. In the United States, which developed early theories of disability discrimination law and reasonable accommodation, scholars debate whether reasonable accommodation is inherently inequitable as it provides for preferential treatment.¹⁷⁴ Commentators argue that the accommodation requirement is not the kind of antidiscrimination provision typically provided for by Title VII of the Civil Rights Act.¹⁷⁵ U.S. antidiscrimination policy is seen by some as limited by applying the "similarly situated" test, and therefore reasonable accommodation is portrayed as an "unfairly" preferential treatment or windfall.¹⁷⁶ As a result, it is understandable for some courts to have melded the concept of the Title VII disparate treatment into the analysis of reasonable accommodation. This position exposes a possible vulnerability of the theoretical foundation of reasonable accommodation for purposes of our analysis here.

Second, accommodation is seen as legitimate only as far as a legislature promulgates its reasonableness. For example, the ADA promulgates reasonable accommodation as a statutory mandate with limits.¹⁷⁷ This statutory mandate legitimates the obligation and prevents reasonable accommodation from being directly connected to other equality theories. The ADA recognizes independent legal causes of action as the following: failure to reasonably accommodate, disparate impact, disparate treatment, and discrimination on the basis of association.¹⁷⁸ This means that failure to accommodate may be a separate legal cause of action, independent of a disparate impact or treatment claim. As such, under the ADA reasonable accommodation

174. See generally Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation under the Americans with Disabilities Act*, 55 ALA. L. REV. 951 (2003-2004).

175. An American commentator describes that "[b]y forcing employers to pay for worksite and other job accommodations, it might allow workers by impairing conditions defined by the law to compete on equal terms, it would require some firms to treat unequal people equally, thus discriminating in favor of the disabled." Sherwin Rosen, *Disability Accommodation and the Labor Market*, in DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES 18, 21 (Carolyn L. Weaver ed., 1991).

176. Cheryl L. Anderson, *What is "Because of the Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323, 331-33 (2006).

177. See ADA, *supra* note 7, § 12111(9).

178. See *id.* § 12112.

requires distinctive burdens of proof, such as undue hardship, reasonableness, and use of the interactive process, independent of the burdens of proof embodied in disparate impact and treatment theories of discrimination.¹⁷⁹ Thus, on its face, the ADA promulgates reasonable accommodation in disability antidiscrimination law as a legitimate obligation, while limiting the relevance of reasonable obligation to other equality theories.

Third, reasonable accommodation is legitimate insofar as its purposes and means are identical to those of the antidiscrimination law and policy provided in Title VII.¹⁸⁰ This position clarifies that antidiscrimination and reasonable accommodation are drawn from the same roots. For example, Professor Bagenstos describes how antidiscrimination premised on Title VII and accommodation cannot be distinguished on the grounds of their purposes and means.¹⁸¹ The legitimacy of reasonable accommodation, therefore, comes from harnessing it to antidiscrimination law.

The second and third positions on reasonable accommodation's source of legitimacy spontaneously, unconsciously, or impliedly depend upon the firm foundation of equality theories in law. The United States has utilized these theories, disparate impact and treatment, and prohibition on rational discrimination, for decades.¹⁸² If the Japanese legal system were prepared to use similar equality theories, they would be suggestive, but reasonable accommodation may not be legitimated in Japan without them for three reasons.

First, formal equality theory does not always account for reasonable accommodation. Formal equality utilizes the "similarly situated" test, and obliges employers to treat equally persons who are in reasonably or rationally the same categorization, and to treat equally those under the same fair and competitive conditions.¹⁸³ Meanwhile, reasonable accommodation obliges employers to treat employees "differently" based on reasonable and rational categorizations.¹⁸⁴ Therefore, formal equality, as the sole source for Japanese

179. *See id.*

180. *See id.* § 12111(9).

181. Bagenstos, *supra* note 165, at 859-70.

182. *See ADA, supra* note 7, § 12112.

183. *See generally* Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 Mo. L. REV. 831 (2002).

184. *See ADA, supra* note 7, § 12111(8).

antidiscrimination policy, may not easily accept the concept of reasonable accommodation.

Second, reasonable accommodation is necessarily premised on the concept of disparate impact. Reasonable accommodation requires employers to treat employees with disabilities differently from other employees as conditions dictate.¹⁸⁵ The reasoning behind special treatment for employees with disabilities is due to the fact that employers with neutral employment conditions or requirements unintentionally have a negative impact on these employees.¹⁸⁶ Without the disparate impact of reasonable accommodation, a neutral employment term and condition will in fact disparately impact an employee with a disability, even though the employer's intentions are without animus or prejudice. Therefore, without the theory of disparate impact, in Japan it would be difficult to find a basis upon which to argue that employers should provide reasonable accommodation for persons with disabilities.

Third, reasonable accommodation is not functional without the prohibition of rational discrimination, which allows for a rational management or employment policy, standard, or criterion, even though it has a negative impact on employees with disabilities.¹⁸⁷ If an employer can argue the rationality of such a practice, then the employer is unlikely to have to employ persons with disabilities.¹⁸⁸ Some argue that employing those with disabilities may impose more costs or consideration, and lower productivity of employees with disabilities and thus cause lower return on interests, though empirical research by Professor Blanck and others do not support this contention.¹⁸⁹

185. *See id.*

186. Robert L. Burgdorf, Jr., *Substantially Limited Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VLL.L. REV. 409 (1997).

187. Bagenstos, *supra* note 165, at 856.

188. *Id.*

189. *See generally* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT: ISSUES IN LAW, PUBLIC POLICY, AND RESEARCH (Peter D. Blanck ed., 2000) (providing discussions by disability scholars that, in part, dispel the myths about employment and people with disabilities); THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE (David C. Stapleton & Richard V. Burkhauser eds. 2003) (discussing, in part, the various causes of low employment rates among people with disabilities); Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, 76 Fed. Reg. 16,978, 16,991 & 16,996 (Mar. 25, 2010) (citing studies by Blanck and colleagues in accompanying publication of the U.S. Equal Employment Opportunity Commission's (EEOC) ADA

Prohibition of an employer's authority and discretion to rationally discriminate, however, may be seen in Japan as legitimate, to a certain extent, to implement equality for the purposes of social justice and social inclusion.¹⁹⁰

The Japanese legal system has not developed a clear model for equality theories of reasonable accommodation, as seen in the Japanese gender discrimination law.¹⁹¹ First, the legal system shows a propensity towards a formal equality approach. Second, it puts importance on the authority and discretion of management in judging whether the categorization based on formal equality is reasonable or rational.¹⁹² Third, the law does not require discriminatory intent in proving intentional discrimination.¹⁹³ Instead the law requires differential

regulations, and for the proposition that "research shows accommodations yield measurable benefits with economic value that should be deducted from the cited costs to yield a net value").

190. How the prohibition on rational discrimination limits the employer's authority and discretion is a touchstone of a margin of disability discrimination and of undue hardship of reasonable accommodation.

191. In Japan, gender discrimination is prohibited in employment. For example, Article 4 of the Labor Standards Act of 1947 prohibits wage discrimination on the basis of gender. Meanwhile, the Equal Employment Opportunity Law of 1997 prohibits discrimination on the basis of gender including marital status, pregnancy, and childbirth, in terms of recruitment, hiring, arrangement of personnel, transfer or reassignment, promotion, demotion, training, functions of the job or employment, mandatory retirement, dismissal and renewal of employment contract, etc. MiNPÓ [MINPÓ] [CIV. C.] 1896, art. 90 (Japan), available at <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=0&y=0&co=01&ky=juristic+act&page=2> (implying that under Public Order provision of Article 90 of Civil Law a provision under employment contract which discriminates against female employees is not likely to be enforced). The term of "the Japanese equality law of gender discrimination" means the general legal theories regarding gender discrimination derived from their case laws.

192. See Akita Sogo Bank, Akita Chihó Saibansho [Akita Dist. Ct.] Apr. 10, 1975, 26, 3 RÓDÓ HANREI 388 (Japan); Uchiyama Indus. Co. Ltd., Okayama Chihó Saibansho [Okayama Dist. Ct.] 2001, 814 RÓDÓ HANREI 102 (Japan); Tokyo Chihó Saibansho [Tokyo Dist. Ct.] Aug. 27, 1992, 611 RÓDÓ HANREI 10 (Japan); Hiroshima Chihó Saibansho [Hiroshima Dist. Ct.] 1992, 701 RÓDÓ HANREI 22 (Japan); Shinogi & Co., Ltd., Osaka Chihó Saibansho [Osaka Dist. Ct.] 1999, no. 1032 (Japan); Nomura Securities Co., Ltd., Tokyo Chihó Saibansho [Tokyo Dist. Ct.] 2002, 822 RÓDÓ HANREI 13 (Japan); Yokohama Chihó Saibansho [Yokohama Dist. Ct.], 2007, 938 RÓDÓ HANREI 54 (Japan).

193. Japanese courts tend not to put importance on discriminatory intent to find discrimination and not to use the term of "discriminatory intent." This tendency might be explained by two reasons. One is that tort liability used in many gender discrimination cases does not necessarily require a plaintiff to prove intention of a person responsible for a consequence as an employer. Proof of his negligence or recklessness is enough. Therefore, courts do not have to find the employer's clear intention. The other reason is that since proof of the employer's intention is hard to prove unless the employer confesses such intent, courts cannot find the real intent of the employer. The courts tend to find discrimination if there is differential treatment resulting in substantial disadvantage on the basis of gender. Therefore, it is possible to estimate

treatment resulting in substantial disadvantages.¹⁹⁴ Fourth, the law seems to deny the prohibition of unintentional discrimination altogether.

Thus, the law and theory behind prevention of gender discrimination lack certain fundamental prerequisites that may be applied to future Japanese disability law and policy. Furthermore, Japanese courts have not acknowledged unintentional discrimination;¹⁹⁵ therefore, a new Japanese disability discrimination law may not retain the concept of disparate impact.¹⁹⁶ The law also may fail to include a

that the courts find discrimination if the employer's intention is presumed by objective evidence. This might be similar to the presumption of discriminatory intent in North America.

194. Sumitomo Chemical Co., Ltd., Osaka Chihō Saibansho [Osaka Dist. Ct.] 2001, 807 RÓDÓ HANREI 110 (Japan); Syoko Chukin Bank Ltd., Osaka Chihō Saibansho [Osaka Dist. Ct.] 2000, 979 RÓDÓ HANREI 15 (Japan); Nomura Securities, 822 RÓDÓ HANREI [R. H.] 46 (Japan); Tokyo Chihō Saibansho [Tokyo Dist. Ct.] 2007, 960 RÓDÓ HANREI 63 (Japan). *See also* Social Insurance Medical Fee Payment Foundation, Tokyo Chihō Saibansho [Tokyo Dist. Ct.] 1990, 565 RÓDÓ HANREI 7 (Japan); Sendai Kótō Saibansho [Sendai High Ct.] Jan. 10, 1992, 1410 FLANREI JIHO [FLANJL] 37 (Japan); Sanyo Bussan Corp., Tokyo Chihō Saibansho [Tokyo Dist. Ct.] June 16, 1994, 651 RÓDÓ HANREI 15 (Japan); Shiba Trust Bank case, Tokyo Chihō Saibansho [Tokyo Dist. Ct.] 1996, 764 RÓDÓ HANREI 21 (Japan). Meanwhile, Ryuichi Yamakawa describes that section 4 of the Labor Security Act requires discriminatory intent to prove its violation. RYUICHI YAMAKAWA, KOYO KANKEIHO [EMPLOYMENT RELATIONS LAW] 38, 52 (4th ed. 2008). Flowever, he writes that "discriminatory intent" is assumed if treatment by an employer has a negative effect on female or male employees on the basis of gender. RYUICHI YAMAKAWA, PURAKUTISU RODOHO [PRACTICE OF LABOR LAW] 43^15 (2009).

195. There are some cases whose issue is whether seemingly gender-neutral family allowance has a disparate impact on female employees. *See, e.g.*, Nissan Motors Co., Ltd., Tokyo Chihō Saibansho [Tokyo Dist. Ct.] 1989, 533 RÓDÓ HANREI 45 (Japan). *Nissan* holds that the gender-neutral family allowance provision on the work rule, where the employer pays the allowance to only one of a couple whose payment is higher, is not discriminatory. Based on this decision, many commentators refute the idea that courts have a disparate impact in Japan. *See, e.g.*, Flisako Konno, *Sabetsu No Rissyō Houhou [Burdens of Proof in Sex Discrimination in Japan]*, Mutsuko Asakura, Nobuo Fukaya & Youichi Shimada, *Nihon Ródohō Gakkai, Ródosha no jinkaku to byōdo [Human Rights and Equality of Employees]*, KÓZA 21-SEIKI NO RÓDÓHÓ 254, 259 (2000); FIAJIME WADA, SUSUMU NODA & FIIROYA NAKAKUBO, RÓDÓHÓ NO SEKAI [LABOR LAW] 77 (8th ed. 2009). Flowever, the Equal Employment Opportunity Law of 2006 introduced a provision under section 7 that if gender-neutral employment conditions or terms have a negative impact on male or female employees based on statistical evidence, it is discriminatory unless it is a *bona fide* occupational qualification. A commentator describes that this provision is an indirect discrimination provision. Asakura et al., at 71. Flowever, this provision prohibits only systematic disparate treatment, not disparate impact. *See id.*

196. Most of the antidiscrimination laws acknowledge the distinction between intentional (disparate treatment) discrimination and unintentional (disparate impact or adverse effect) discrimination. The failure to provide reasonable accommodation by an employer is usually understood as unintentional discrimination because it results from the neutral working rule, environment, or equipment in an establishment that has negatively impacted persons with disabilities. Flowever, a neutral standard, which has a disparate impact and is related to reasonable accommodation, is normally rational and/or can be justified for other general employees. Generally, the court is required to choose whether a case is intentional or unintentional and

prohibition on rational discrimination because Japanese courts do not presently recognize disparate treatment based on an employer's strategic or management reasons to be discriminatory.¹⁹⁷ Therefore, the Japanese equality law takes the formal equality approach and lacks the U.S. concepts of disparate impact and rational discrimination.

If the parameters of the equality law above apply to the new disability discrimination law, reasonable accommodation for persons with disabilities may be limited to a narrow path. The new disability discrimination law in Japan, therefore, must establish a basis of prohibition on rational discrimination and allow disparate impact for reasonable accommodation.

attempts to delineate a clear distinction between the two. However, the distinction is somewhat artificial because, in fact, intentional and unintentional discrimination exists in the process of the duty of reasonable accommodation. To be sure, the employer is obliged to make reasonable accommodations for employees with disabilities when a neutral and non-discriminatory conscious rule has a negative impact on an employee, perhaps within a theory of unintentional discrimination. Meanwhile, where an employer knows the request of possible accommodation by an employee and nonetheless does not make possible accommodations or participates in the interactive process, this act or omission by the employer is also regarded as intentional discrimination. This failure of the proper application of the neutral rule, the failure to comply with the appropriate procedure, or the omission of any alternative might be motivated by the employer's intention. Interestingly, the disability discrimination laws of some countries, such as Germany, France, and New Zealand do not clarify or classify reasonable accommodation into intentional or unintentional discrimination. Instead, the United Kingdom's Equality Act clearly regards failure to provide reasonable adjustment as an independent category of discrimination. The independent nature might stem from the artificial distinction above or the distinctive burdens of proof in reasonable accommodation, different burdens from intentional and ordinary unintentional discrimination cases. *See* 2008-2009 Report, *supra* note 5.

197. In this article, rational discrimination means that an employer intentionally or unintentionally treats employees with disabilities differently for a strategic or managerial reason, such as cost and/or lower productivity. In disability discrimination, the employer usually discriminates against an employee with a disability not because of animus, stigma, and negative attitudes toward persons with disabilities but on the basis of cost, profit, and purely managerial reasons. In this case, the employer's application of a certain standard is rationally intentional or intentionally rational rather than unintentional. Rational discrimination occurs when an employment policy or its application, which contributes to an employer's profits or functional management and plays proper a role for general employees, simultaneously has negative impacts on certain persons who have the distinctive social traits or characteristics, such as a disability, regardless of whether it is intentional or unintentional. Prohibition of rational discrimination must exclude the application of formal equality, which requires determining whether an employment policy, standard, or criterion is an adequate rationale for similarly situated category of persons. Whereas the application of formal equality does not allow the duty of reasonable accommodation, the duty requires an employer to provide different treatment for employees with a socially distinctive trait such as a disability. For further discussion of rational discrimination, see Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 643, 652 (2001).

E. Normative Basis of Prohibition on Rational Discrimination and Disparate Impact for Reasonable Accommodation

Japanese disability law also will need to have a legal basis for the duty of reasonable accommodation for persons with disabilities, which derives not from a paternalistic or employment law tradition, but from equal protection or a civil rights perspective. This part explores the normative basis for reasonable accommodation. The discussion requires deciding whether an employer should be legally responsible for rational discrimination and disparate impact—in other words, whether the prohibition on rational discrimination and disparate impact is dependent upon an employer's being morally wrong.

With respect to this question, a Japanese employer does not have to be responsible for rational discrimination and disparate impact. An employer's responsibility for intentional discrimination stems from the moral wrong in discriminating against a person with some characteristics, such as disability. If an employer treats the person with a disability unfairly or unequally out of animus, the employer should bear responsibility for that individual fault. The exclusion of persons with disabilities from employment opportunities on the basis of animus, rather than on appropriate basis, such as productivity, is morally wrong.

If the remedy for discrimination is costly to an employer, the imposed costs may be viewed as compensation for that wrong. Meanwhile, an employer's responsibility for unintentional or rational discrimination does not derive from a sense of moral wrong as long as an employment term or condition, or its application, is purely rational or unintentional. Therefore, evaluating an employer's responsibility for the harm or disadvantage stemming from rational discrimination or disparate impact is complicated.

When an employer is responsible for the harm to and disadvantage of an employee based on rational discrimination or disparate impact, but it is not the result of a moral wrong, a normative analysis of the reasonable accommodation requirement corresponding to a prohibition on rational discrimination or disparate impact is essential. An employer may have an economic reason to make accommodation for persons with disabilities. The obligations must begin with a generalized and theoretical concept of profit-maximization.

The employer that pursues the maximization of profit is by definition following a legitimate and moral course within the business world. However, this does not mean that an employer is completely free to act. Instead, the Japanese employer is still bound by a sense of moral responsibility.

First, the employer's sense of moral responsibility creates an obligation to pursue maximum profit through participation in a fair, safe, and competitive employment market, with a provision of equal employment opportunities for all, and with fair and equal employment terms and conditions. Second, the Japanese concept of moral responsibility requires employers to develop human capital and to exploit an employee's capability and productivity to its maximum. Third, the employer's sense of moral responsibility requires employers to use an employee's labor in the most practical and effective way possible. Finally, it requires employers to maximize an employee's interests, insofar as they are not contrary to the employer's interests. Moreover, the employer is required to invest in all employees and applicants to implement the profit-maximization.¹⁹⁸

The employer's moral responsibility with respect to profit-maximization requires employers to take action regarding particular employees or applicants who may be unfairly treated, and to bear a certain amount of associated cost to accomplish fairness and equality. An employer must bear moral obligations ahead of his or her own interests to avoid participating in the system of subordination in a diverse society.¹⁹⁹ Antidiscrimination law strengthens and clarifies this duty for socially salient groups.

An employer bears not only the responsibility for his individual failure, but also for the cost of contribution and enhancement of the shared values of the moral obligations of Japanese society. Therefore, the cost paid would be fair distribution and redistribution. This conceptual model of the employer's moral responsibility applies for all employees and applicants, though does not always fit reality or guarantee a maximum profit. However, an employer conceptually or theoretically bears such obligations in the state of nature.

In sum, the view of the Committee²⁰⁰ commissioned by the MHLW is that the new Japanese disability discrimination law must, at least in part, have a normative basis to legitimate reasonable accommodation, and at the same time adopt concepts of disparate impact and prohibition on rational discrimination.

198. This idea might explain why Japanese employment contract law allows employees with disabilities to require employers to make accommodations.

199. Bagenstos, *supra* note 165, at 858.

200. *See generally* Taskforce for Reform, *supra* note 157.

F. Concept of Disability

In this part, we explore the definition of "disability" for purposes of Japanese law.²⁰¹ The view of the authors is that Japanese disability antidiscrimination law should cover a wide range of persons with disabilities.²⁰² Professor Nakagawa, in reporting to the Japanese government, has recommended the three-prong approach as set out in the ADA—actual disability, a record of disability, and regarded as having a disability. The ADA Amendments Act of 2008 (ADAAA) broadened this definitional approach.²⁰³

As mentioned, the Japanese quota and disability pension systems are based on the medical model of disability.²⁰⁴ These systems delineate actual or plausible impairment from non- or less impairment. Second, they estimate whether an impairment becomes a mental or physical disability in terms of malfunction, malformation, or disfigurement.²⁰⁵ These methods may be suited to qualification for public pension or quota system because they take a seemingly consistent approach and are cost efficient.²⁰⁶ But are these systems useful to inform the new

201. The Japanese Ministry of Health, Labor, and Welfare seems to assert the coverage of disability antidiscrimination law is limited to those with the medical certification. See *Rodo/koyo Bunya Ni Okeru Syougaisya Kenri Jyoyaku He No Taio No Arikata Ni Kansuru Chukanteki-na Torimatome* [Interim Report for Labor and Employment Policy for Ratification of CRPD], Japan Labor Policy Council of MHLW, March 30, 2010, at 1, <http://www.mhlw.go.jp/shingi/2010/03/dl/s0330-17a.pdf> [hereinafter Interim Report].

202. Saotshi Kawashima also suggests that the coverage of disability antidiscrimination law in Japan should expand. See, e.g., Satoshi Kawashima, *2008 Ne ADA Kaisei-hou No Igi To Nihon Eno Shisa Syougai No Syakai Model Wo Tegurari Ni* [Suggestions to New Japanese Disability Discrimination Law from ADAAA of 2008], 166 *Kaigai Syakaihosyo Kenkyu* [REV. COMP. SOC. SEC. RES.] 4-14 (2009); *Concept of Disability under Disability Discrimination Law From Minority Model to Universal Model*, 4 J. DISABILITY STUD. 82-108 (2008).

203. Americans with Disabilities Act Amendments Act 42 U.S.C. § 12101, Pub. L. 110-325, sub. § 2, Sept. 24, 2008, 122, stat. 3553, sub. § 12102 [hereinafter ADAAA].

204. Regarding the quota system, see Appendix of Section 2 of EPAPD (disability pension); see also Appendix of Section 4.6 of Kokumin Nenkin Ho Sikourei [Guideline of Japan National Pension Act], OrderNo. 184 of 1960.

205. The Physical Disabled Persons' Welfare Act, Law No. 283 of 1949 (Japan).

206. In our opinion, the medical model of disability, which aims at clarifying the beneficiary on the policy, does not correspond to the present and real needs of persons with disabilities. The medical model of disability finds only the existence and the degree of impairment. It cannot find the effect of the impairment on a person's daily activities but instead estimates the probability of the effect. For example, although one of the main purposes of a disability pension is to make up the deficiency of income because of less workability or employability attributed to disability, the qualification standard in medical terms cannot exclude those who have an impairment but sufficient workability or employability. The conception of the disability under the discrimination laws must evaluate the causation between impairment and environmental factors.

Japanese disability antidiscrimination law? We believe the answer is no, and therefore we must delineate the definitions and qualifications the new law may use.

One feature of the definitions of disability under the antidiscrimination laws is that they not only cover a person with actual disability, but also cover individuals with no actual or present disability. In other words, they are concerned with disadvantage resulting from actual disability, previous and possible future disability, misunderstood disability imputed to a person, and discrimination against associates of people with disabilities. Discrimination, which disability discrimination laws should prohibit, thus stems not only from an employer's animus, prejudice, stigma, bias, or sympathy for actual disability, but also from an employer's misunderstandings that a person has an actual disability.

This suggests the present Japanese qualification standard, which qualifies actual and plausible impairment from non- or less impairment in medical terms, does not fit the concept of disability under the disability antidiscrimination laws. The new Japanese law may expand the definition to those who have disadvantages on the basis of actual, previous or future disability, as well as disability mistakenly imputed to a person.

G. Necessity of Substantiality of Limitation on Major Life Activities

Although the prong of actual disability under the ADA before the ADA Amendments Act of 2008 required that an impairment substantially limit one or more major life activities, courts interpreted the "substantiality of limitation" requirement with a narrow definition of disability.²⁰⁷ The ADAAA, however, returned the definition to a broad view of the concept of disability.²⁰⁸ The Japanese concept of disability under the new discrimination law should adopt the same approach as the ADAAA.

This part attempts to clarify why the new Japanese disability discrimination law may adopt the approach of the ADAAA from another perspective. First, the prohibition on discrimination because of animus applies to disadvantages resulting from employer dislikes, hostilities, or sympathies to an employee's characteristics. In the case of

207. *Emory v. AstraZeneca Pharm.*, 401 F.3d 174, 179 (2003) (the district court had narrowly interpreted "substantiality of limitation" but the court of appeals overruled, presaging the broadening of the ADAAA's interpretation).

208. *See generally* ADAAA, *supra* note 203.

discrimination based on animus, the object of an employer's animus and the coverage of the animus to its impairment or limitation on working, and behavior both in the establishment and in the employee's personal life, determines what the disability covers. Second, the prohibition on rational discrimination applies primarily to disadvantages resulting from an employer's concerns in terms of cost. In the rational discrimination scenario, justification may be provided by an estimation of cost or cost-effectiveness (or lack of it) for employing a person with the impairment or the nature of its limitation on working.

It seems clear that what the disability discrimination law protects are unfair disadvantages resulting from an employer's animus or unsubstantiated concerns about cost. Theoretically, the concept of disability for the purposes of antidiscrimination law, including actual, past, and "regarded as" disability, should be identical to those disabilities protected from disadvantages by an employers' animus or concerns about cost. However, the substantial limitation of one or more major life activities prevents the concept from being identical to the disadvantages. After all, the substantiality of the limitation is not always related to animus. Also, it is not directly relevant to cost. Although an employer's cost concerns are related to the employability or productivity of a worker with a disability, and the expense of the accommodation, the substantiality of the limitation does not always relate to that concern.

The new Japanese disability law may limit the definition of the disability to an actual or previous impairment that limits working or activities regarding working to a certain extent, consistent with the ADAAA. However, the law may also define disability as an actual, previous, or "regarded as" impairment that incites an employer's animus, hostility, sympathy, or negative attitude, in the field of employment.

H. Reasonableness and Undue Hardship for Accommodation

The ADA requires employers to make reasonable accommodations short of those presenting an undue hardship.²⁰⁹ Presumably, employers take into account the "reasonableness" of accommodation and its undue hardship. Nonetheless, "reasonableness" has been given many meanings under the Rehabilitation Act and the ADA: (1) as a procedural

209. ADA, *supra* note 7, § 12112(b)(5)(A).

requirement between employer and employee;²¹⁰ (2) as a requirement that an employer provide reasonable accommodations to enable an employee with a disability to perform the essential functions of the position;²¹¹ (3) as requiring effective accommodation of an employee with a disability;²¹² (4) as a requirement that the employee carries the burden of proof to establishing a prima facie case;²¹³ and (5) as a general requirement for the appropriate accommodation of an employee with a disability, including requiring the employer to accept the burden of undue hardship.²¹⁴

The ADA and the EEOC analyze undue hardship by considering factors such as the overall financial resources and the type of operations of the business, and the nature and cost of the accommodation.²¹⁵ If an accommodation requires an employer to deviate from a *bona fide* seniority system, for instance, the court will find that the employer has suffered an undue hardship.²¹⁶

Undue hardship is sometimes understood as the flipside of reasonableness. The result is a complicated discussion; whether reasonableness and undue hardship are homogeneous or heterogeneous in nature, or whether reasonableness includes undue hardship or vice versa. This discussion existed before the advent of the ADA,²¹⁷ and the U.S. Supreme Court addressed this issue in *U.S. Airways, Inc. v. Barnett*²¹⁸*

However, there is no reason necessarily that Japan should anticipate such a complex relation between the requirements of reasonableness and undue hardship. The UK, for example, requires

210. See, e.g., *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145¹⁶ (5th Cir. 1982); *Pinsker v. Joint Dist. No. 28J of Adams & Arapahoe Counties*, 735 F.2d 388, 390-91 (10th Cir. 1984).

211. *Carter v. Bennett*, 840 F.2d 63, 67 (D.C. Cir. 1988). EEOC regulations also provide that "reasonable accommodation means . . . [modifications or adjustments . . . that enable a qualified individual with a disability to perform essential functions of the employment position." 29 C.F.R. § 1630.2 (2011).

212. See, e.g., *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001).

213. E.g., *Barnett v. US Air, Inc.*, 228 F.3d 1105, 1121; *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995); *Barthv. Gelb*, 2 F.3d 1180, 1182 (D.C. Cir. 1993).

214. Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1149 (2010).

215. ADA, *supra* note 203, § 12111(10)(B)(i)—(iv); see generally 29 C.F.R. § 1630 (2011).

216. 29 C.F.R. § 1605.2(e)(2) (2011).

217. Peter Zablotsky, *After the Fall The Employer's Duty to Accommodate Employee Religious Practices Under Title VII After Ansonia Board of Education v. Philbrook*, 50 U. PITT. L. REV. 513, 552 (1989).

218. *Barnett*, 228 F.3d at 1113; *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397¹⁰² (2002).

"reasonableness" in the Equality Act 2010 without any mention of undue hardship.²¹⁹ Meanwhile, the Supreme Court of Canada uses the words "undue hardship" as a general requirement.²²⁰ Both Canada and the UK, however, include factors to be considered such as reasonableness and undue hardship, which the ADA regulations require.²²¹ The new Japanese disability discrimination law may not need to use this terminology, but may still consider one term to encompass all of the factors to be considered, and the other to clarify the detailed guidelines of the provisions.

Regarding undue hardship, the history of the ADA reveals that in the late 1980s and the early 1990s U.S. employers were concerned the enactment of the ADA might impose upon them excessive accommodation costs.²²² If a Japanese employer initially understood the limitation of undue hardship on the duty to accommodate, negative fear may be lessened and corporate attitudes may be more supportive, flexible, cooperative, and constructive for new relationships with persons with disabilities. In fact, the Japanese employers should take note that empirical studies have shown that the average cost of reasonable accommodation to employers is less than \$500.²²³

The factors that determine an employer's duty to accommodate employees with disabilities are similar between the United States and Japan. In Japan, an employer's duty to accommodate under an

219. Equality Act, *supra* note 172, at 10.

220. The Supreme Court of Canada describes the safety (direct threat) requirement as a factor to be considered in undue hardship. *Cent. Canadian Dairy Pool v. Alberta*, [1990] 2 S.C.R. 489 163 (Can.).

221. ADAAA, *supra* note 203, § 12111(10)(B)(i)-(iv); Equality Act, *supra* note 172, at 10; *wad Dairy Pool*, 2 S.C.R. ^ 63 (using reasonableness and undue hardship as factors).

222. Steven B. Epstein, *In Search of a Bright Line Determining When an Employer's Financial Hardship Becomes "Undue" Under the Americans with Disabilities Act*, 48 VAND. L. REV. 391, 423 (1995). *See also* Bonnie P. Tucker, *Section 504 of the Rehabilitation Act After Ten Years of Enforcement The Past and the Future*, 1989 U. ILL. L. REV. 845, 887 (1989); Julie Brandfield, *Undue Hardship Title I of the Americans with Disabilities Act*, 59 FORDHAM L. REV. 113, 128 (1990); Eileen P. Kelly & Robert J. Alberts, *Americans with Disabilities Act Undue Hardship for Private Sector Employers?* 41 LAB. L.J. 675 (1990); Jeffrey O. Cooper, *Overcoming Barriers to Employment The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, U. PA. L. REV. 1423, 1448 (1991); Russell H. Gardner & Carolyn J. Campanella, *The Undue Hardship Defense to the Reasonable Accommodation Requirement of the Americans with Disabilities Act of 1990*, 7 LAB. L.J. 37 (1991); Michael D. Wilson, *Defenses to Discrimination Actions Filed Under the Americans with Disabilities Act*, 42 LAB. L.J. 732, 737 (1991); Margaret E. Stine, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act of 1990*, 37 S. DAKOTA L. REV. 97, 103 n.59 (1992).

223. *See Empirical Study of Current Employees*, *supra* note 90, at 937-38.

employment contract requires courts to take into account the overall size and type of the business; the practicality of assigning the employee with a disability to a position; the possibility of transferring and reassigning the employee; the qualification, productivity, and capability of the employee needing a transfer or reassignment; and the frequency of transfer and reassignment of other employees.²²⁴

Even though Japanese courts rarely evaluate the morale of other employees as a part of such accommodation considerations,²²⁵ these requirements reflect the difficulty of dismissal. Therefore, the accommodations and associated costs an employer may consider in Japan are for the protection of employees with disabilities from dismissal and certain workplace risks. Meanwhile the ADA and Rehabilitation Act require accommodations to better protect against the discrimination of persons with disabilities, from a civil rights perspective.

The different aims, therefore, may result in different consideration of the factors. The Rehabilitation Act and the ADA, for example, stop short of requiring employers to hire another person capable of performing all the elements of the job of an employee with a disability as a reasonable accommodation.²²⁶ On the other hand, the Japanese duty of accommodation fails to even include partial hiring of another person to help or support the disabled employee.²²⁷ This might show that the reasonableness and undue hardship requirements under the ADA guarantee the rights of persons with disabilities in employment more expansively than the Japanese duty under employment contract.

I. Interactive Process

In addition to the substantive element of reasonable accommodation, the Japanese law should require the procedural element of reasonable accommodation for persons with disabilities between

224. See generally Saikó Saibansho [Sup. Ct.] 1998, 736 RÓDÓ HANREI 15 (Japan); see also Osaka Chilló Saibansho [Osaka Dist. Ct.] 1999, 771 RÓDÓ HANREI 25, 30-31 (Japan); Yokohama Chihó Saibansho [Yokohama Dist. Ct.] 2004, 890 RÓDÓ HANREI 63, 67 (Japan); Tokyo Chilló Saibansho [Tokyo Dist. Ct.] 2004, 876 RÓDÓ HANREI at 65-66 (Japan).

225. See, e.g., Tokio Marine & Fire Ins. Co., 2000, 797 RÓDÓ HANREI 65 (2000) (Japan).

226. See, e.g., Treadwell v. Alexander, 707 F.2d 473, 478 (11th Cir. 1983); Nelson v. Thornburgh, 567 F. Supp. 369, 376 (E.D. Pa. 1983); Arneson v. Heckler, 879 F.2d 393, 397 (8th Cir. 1989).

227. In *Yokohama*, the courts refused the plaintiffs allegation that she could perform her job if another person helped her. See *Yokohama*, *supra* note 224, at 68.

employer and employee.²²⁸ The procedural element plays an important role. Disputes regarding discrimination against a person with a disability may voluntarily be resolved through a certain established process. If employers, employees with disabilities, and trade unions are familiar with the procedure, the resolution of the dispute may be more immediate, effective, and affordable. The fulfillment of the procedural element by the employer may also contribute to effective risk management practices.

Moreover, the procedural element contributes to a better overall corporate culture. An empirical study shows that where corporate culture is responsive to the needs of all employees, it is especially beneficial to employees with disabilities, there is no significant difference in job satisfaction, company loyalty, willingness to work hard, and turnover intention between employees with and without disabilities.²²⁹ An effective interactive process promotes fairness and responsiveness and creates good company climate and culture.²³⁰

In Japan, there seems to be minimal foundation for mutually obliging the employer and employee to search for a common resolution. First, no discrimination law imposes such a duty on both parties.²³¹ Second, the dispute resolution systems inside companies typically do not function well.²³²

An empirical study clarifies that in larger companies there are formal dispute resolution systems, such as grievance committees and

228. The ADA's interpretation sometimes incorporates interactive process into the substantive burdens of proof. *Shapiro v. Township of Lakewood*, 292 F.3d 356, 359 (3d Cir. 2002). For example, whether the cost of requested accommodation bears undue hardship on an employer as a substantive element is not identical to whether the employer fails to search for accommodation with the employee in good faith because of cost.

229. Schur et al., *supra* note 140, at 391, 402.

230. See Naomi Schreuer, William N. Myhill, Tal Aratan-Bergman, Deepti Samant & Peter Blanck, *Workplace Accommodations: Occupational Therapists as Mediators in the Interactive Process*, 34 WORK 149, 157-58 (2009) (presenting a model practice for the interactive process).

231. Section 15 of the Equal Employment Opportunity Law urges employers to settle disputes regarding gender discrimination through a consultation window or grievance committee, but this is not a legal duty. An employee who is experiencing discriminatory treatment can make a complaint against her employer even if she does not exhaust grievance or review procedures. See generally Law on Securing, etc. of Equal Opportunity and Treatment Between Men and Women in Employment, Act No. 113 of 1972 (Japan).

232. Akio Kihara, *Kigyō-nai Funso No Yobou To Syori [An Empirical Study of the Dispute Resolution Systems Inside Companies in Japan]*, Bus. LAB. TREND 2, 2 (2008), available at <http://www.jil.go.jp/kokunai/blt/bn/2008-07/002-011.pdf> (looking at employees in general, not just those with disabilities).

consultation windows.²³³ However, it is rare that an employee would visit a consultation window to settle individual employment disputes. In almost eighty percent of Japanese companies, a company's employees make fewer than nine complaints to their consultation window annually.²³⁴ Meanwhile, employees prefer privately talking and consulting about their grievances and complaints with their superiors, supervisors and bosses.²³⁵ However, half of the superiors, supervisors, and bosses feel that they are not sure whether they can settle and handle the employees' grievances and complaints.²³⁶

Moreover, it is rare that a company takes up the employees' grievances or settles them.²³⁷ Therefore, the new Japanese disability discrimination law needs to promulgate a clear and culturally acceptable interactive process.²³⁸ Second, a new law should require companies to prepare an environment that is accessible to employees for consultation and to build dispute resolution systems to allow companies to take up and settle grievances and complaints.

J. Alternative Dispute Resolution in Japanese Disability Antidiscrimination Law

In Japan, there is a special judicial procedure called a "labor tribunal system" aimed at the immediate and cost effective resolution of

233. The study shows that bigger companies tend to set consultation windows and grievance committees. For example, 29.8% of companies hiring less than ninety-nine employees set up consultation windows, and 8.0% of these same companies hire grievance committees. In contrast, 73.9% of companies hiring more than one thousand employees set up consultation windows and only 30.1% of these same companies hire grievance committees. *See id.* at 5.

234. *Id.*

235. The rates that employees have talked or consulted with their superiors, supervisors and bosses about their grievances and complaints are 58.2% while the rates that employees have visits at consultation windows or grievance committees are 11.5% and 7.2% respectively. *Id.* at 5-6.

236. *Id.*

237. *Id.* at 6-7.

238. Only EEOC guidelines note that the interactive process identifies "the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations" and requires direct and good faith communication between the employer and qualified individual. *See* 29 C.F.R. § 1630.2 (2011). Most U.S. federal courts of appeals endorsed the interactive process. *See* PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY* 254 (2d ed. 2009). For example, the Third and Ninth Circuits admit that the employers should appropriately respond to the requested accommodation by employees with disabilities. *Shapiro v. Township of Lakewood*, 292 F.3d 356, 361 (3d Cir. 2002); *Barnett*, 228 F.3d at 1114. However, there is still uncertainty regarding the basis of the interactive process. In fact, despite the Third Circuit decision, the U.S. Supreme Court in *Barnett* did not mention the interactive process. *See* Samuel R. Bagenstos, *U.S. Airways v. Barnett and the Limits of Disability Accommodation* 21-22 (Wash. Univ. in St. Louis Sch. of Law, Working PaperNo. 07-01-02, 2007).

employment disputes. It resolves disputes similar to the ordinary court system.²³⁹ It is authoritative and does not focus on satisfaction of the parties.²⁴⁰

Although a member of the Committee of the Ministry of Health, Labor, and Welfare understands that development of the quasi-judicial system leads to better resolution, the experience of the United States has made it well known that the judicial or quasi-judicial dispute resolution system does not always provide satisfactory settlements in many cases. Satisfactory settlement is crucial in these kinds of disputes in Japan.²⁴¹ In this regard, the Japanese EEOL has provided since 2006 that the Office of Employment Opportunity or mediation board of Prefectural Department of the MHLW mediates disputes regarding violations of the Act.²⁴²

The new Japanese disability antidiscrimination law should provide an alternative dispute resolution (ADR) system in disability discrimination cases. There may be two kinds of ADR. One is to provide a commission to accept, investigate, and resolve complaints, similar to the EEOC.²⁴³ This system may contribute to more fair, immediate, effective, and affordable resolutions of disputes. The other is to provide mediation, such as by the Key Bridge Foundation, sponsored by the U.S. Department of Justice. In addition to the

239. Kazuo Sugeno, *The Birth of the Labor Tribunal System in Japan A Synthesis of Labor Law Reform and Judicial Reform*, 25 COMP. LAB. L. & POL'Y J. 519, 529-31 (2003-2004).

240. *Id.* at 531.

241. Peter R. Maida, *Final Report Proposal to Select, Train and Monitor Professional Mediators for ADA Complaint Referral* 21-28 (2001) (unpublished manuscript). This report, written by the Chair of the Key Bridge Foundation for Education and Research, was submitted to the Department of Justice.

242. Hiroya Nakakubo, "Phase III" of the Japanese Equal Employment Act, 4 JAPAN LAB. REV. 9, 23 (2007).

243. See, e.g., U.K. ACAS (Advisory Conciliation and Arbitration Service) and Equality and Human Rights Committee (Education Act, 1993, c.35, § 27); New Zealand Human Rights Commission (Human Rights Act 1993, 1993, No. 83, § 76(1)(a)) and Employment Relations Authority (Human Rights Act 2001, 2001, § 79A(1)(b)); Complaint Handling Section of Australian Human Rights Commission (Australian Human Rights Commission Act, 1986); HALDE (Haute autorité de lutte contre les discriminations et pour l'égalité) [High Authority Against Discrimination and for Equality] (LOI n 2004-1486 du 30 décembre 2004 pour la création de la haute autorité de lutte contre les discriminations et pour l'égalité, JORF n 304 du 31 décembre 2004) in France; and Antidiskriminierungsstelle [General Act on Equal Treatment], Aug. 14, 2006, BGBl. I at 1897, § 25 (F.R.G.) in Germany. These commissions accept, investigate, and/or settle a complaint regarding disability discrimination through mediation, conciliation, arbitration or advice.

alternative dispute resolution system annexed to the commission, companies would be able to hire mediators or conciliators.

There is uncertainty whether these ADR systems will fit and function well in Japan. As mentioned, Japanese workers, according to one survey, tend to consult with superiors, supervisors, and bosses about their individual employment disputes, but they do not make complaints against their employers outside the company.²⁴⁴

Moreover, presently there are fewer trained mediators or conciliators in Japan.²⁴⁵ However, Japanese employees increasingly are searching for other agencies or institutes to resolve their disputes.²⁴⁶ Moreover, it would be desirable for a company itself to settle its employees' disputes. To do so, we need to know how the Japanese company responds to disputes from persons with disabilities, especially how the corporate environment and culture impact the employment of workers with disabilities.

K. The Japanese Quota System and Disability Discrimination Law

Some scholars express concern about the future availability of the current Japanese quota system.²⁴⁷ If the Japanese government introduces a prohibition on disability discrimination and the duty of reasonable

244. Kihara, *supra* note 232 at 4, Chart 5.

245. In Japan, there are a few universities and centers that offer western styled mediation training programs, such as Faculty of Law, Kyusyu University, Department of Social Policy, Hokusei Gakuen University, and Japan Mediation Centre. See Antonio Formación, *The First Round Table Conference on Mediation in Asia*, Kyushu University, <http://www.law.kyushu-u.ac.jp/programs/english/adr2010/index-1.html> (last visited Oct. 15, 2011) (stating that western-style mediation has been minimal in Japan partly because of the authoritative characteristics of the country).

246. *Individual Labor Dispute Resolution Enforcement Status in 2008*, JAPANESE MINISTRY OF HEALTH, LABOUR & WELFARE (May 2009), <http://www.mhlw.go.jp/houdou/2009/05/h0522-4.html> (last visited Oct. 15, 2011) (the 2009 data shows that the consultation inquiry rate increased 14.1%, and the mediation inquiry rate increased 18.3% compared to the 2008 data).

247. Ryoko Sakuraba, *Anti-Disability Discrimination Law in the US More Transformative than Japanese Labor Law?* 8 (July 6, 2009) (unpublished manuscript). Sakuraba's paper is a handout from her presentation at Kobe Law School on July 6, 2009. In her paper, Sakuraba asserts that the present quota system should be maintained, opposing the introduction of disability antidiscrimination law to Japan. She describes that the present "Japanese approach, which mixes the obligation of employment quotas and the doctrine of employment contracts, is, in one sense, more evolutive and adaptable than the human rights approach in the U.S." because the doctrine of employment contract obliges employers to make reasonable accommodation for persons with disabilities, and "employment quotas . . . provide clearer financial incentives for employers to employ persons with disabilities, including those with severe disability."

accommodation, it may subsequently repeal the present quota system.²⁴⁸ Can the prohibition on disability discrimination, especially the duty of reasonable accommodation, coexist with the quota system in Japan? In the UK, the government abolished their quota system after enacting the Disability Discrimination Act.²⁴⁹

The two systems may coexist, at least initially during a transition period.²⁵⁰ The two likely will cover employees with different impairments, although some cases will overlap. Disability antidiscrimination law covers a broader range of employees with disabilities because the coverage under the ADA is not limited to individuals with actual impairment. Recall, it also applies to those "regarded as" having disabilities.²⁵¹ On the other hand, reasonable accommodation requires individuals with actual or past disabilities to satisfy a qualification standard. Reasonable accommodation mainly targets those with disabilities who are qualified and productive, that is, "qualified individuals."²⁵²

German and Japanese experiences show the coverage of persons with disabilities under the quota system is typically for those who have more profound or severe impairments regardless of whether they are qualified or productive.²⁵³ Furthermore, the aims of reasonable accommodation and the quota system differ. Reasonable accommodation plays a role in making applicants or employees with disabilities equally competitive for the currently available seats in the

248. Members of the task force for the development of the Japanese disability law and policy generally agree that the present quota system and disability antidiscrimination law system can coexist in the new paradigm. See Taskforce for Reform, *supra* note 157; see generally Interim Report, *supra* note 201.

249. Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe From Quotas to Anti-Discrimination Laws*, 18 COMP. LAB. L.J. 62, 67 (1996).

250. The Korean Disability Discrimination Act prohibits disability discrimination and reasonable accommodation while maintaining the quota system. See Chae-U Lee, *Disability Discrimination Act in Korea*, in 2009-2010 REPORT TO THE JAPAN NATIONAL CABINET OFFICE: COMPARATIVE STUDY REGARDING SOCIAL INCLUSION AND PARTICIPATION OF PERSONS WITH DISABILITIES 211 (2010). In Germany and France these two systems co-exist.

251. Tamako Hasegawa, *Equality of Opportunity or Employment Quotas?—A Comparison of Japanese and American Employment Policies for the Disabled*, 10 Soc. SCI. JAPAN J. 41, 49 (2007).

252. For example, the ADA applies to qualified individuals with disabilities who can perform the essential functions of the employment position with or without reasonable accommodation. 29 C.F.R. § 1630.2(l)-(m) (2011).

253. See 2008-2009 Report, *supra* note 5, at 195.

establishment. The quota system provides for new seats within the establishment.²⁵⁴

Reasonable accommodation may complement and improve the employment situation of persons with severe impairments hired under the quota system. The ADA does not require employers to accommodate persons with disabilities who are not qualified and less productive even with accommodation.²⁵⁵ However, those with more profound or severe impairments ordinarily need accommodation to perform a job.

If reasonable accommodation is applicable to those who have more profound or severe impairments, it may supplement the Japanese quota system for the employment of persons with disabilities. If reasonable accommodation helps and improves the capability of such persons with profound or severe disabilities, it may increase and improve their chances to obtain and maintain employment. The new disability antidiscrimination law should have a qualification standard that applies reasonable accommodations based on the relationship between the potential capability, or productivity, of an individual employee, and the job the employee performs in the designated position.

L. Enforcement: Soft Law or Hard Law?

Another issue concerns the enforceability of a new Japanese law. Even if the Japanese government provides a new antidiscrimination law for persons with disabilities, the new law will not necessarily be enforceable against private entities. The traditional Japanese political enforcement of "soft law" may prevent persons with disabilities from having a private right of action or effective remedies.²⁵⁶

The soft law model has been developed in international law. It is applied to labor law in Europe and is available in Japan as well.²⁵⁷ The soft law model means the law is not proscriptive, rather, it only provides

254. Hasegawa, *supra* note 251, at 55.

255. *Id.* at 53.

256. See generally Takashi Araki, *Rodo Rippu Ni Okeru Doryoku-gimu Kitei No Kinou Nihon-gata Soft Law Approach? [Employer's Duty to Endeavour in Employment Statutes The Japanese Soft Law?]*, Michio Tsuchida, Takashi Araki & Fumiko Obata, *Rodo Kankei Hou No Gendai-teki Tenkai [The Development of Industrial Relations Law]* (2004) 19, 44¹⁵.

257. See Takashi Araki, *Equal Employment and Harmonization of Work and Family Life Japan's Soft-Law Approach*, 21 COMP. LAB. L. & POL'Y J. 451, 452 (1999-2000).

norms and codes of behavior.²⁵⁸ Likewise, Japan has a tradition of providing only the "duty to endeavor."²⁵⁹

For example, when the Japanese government enacted the EPAPD in 1960, it followed the 1955 International Labour Organization (ILO) recommendation, and provided the current quota system. The law impliedly obliged an employer to hire a certain percentage of persons with physical disabilities.²⁶⁰ Even if an employer did not fulfill the mandatory percentages, no one could file a complaint against the employer. The purpose of soft law is to change people's norms and actions.²⁶¹

Soft law is a politically compromised rule, used when a law's impact on the society, especially on companies, may be too large. Nevertheless, although the Japanese soft law is not enforceable, employers cannot help but follow the norm. Regarding the EPAPD, the Ministry of Labor at that time obliged employers who could not fulfill the minimum percentages to submit a written plan to hire persons with physical disabilities by 1969, with the Ministry publicly announcing the names of such companies in 1974.²⁶² Once employers establish the drive to hire persons with disabilities, the soft law becomes a legally enforceable law. The 1976 Amendment to the EPAPD finally obliged employers to pay fines for failing to meet the quotas.

Another example of Japanese "soft law" is the EEOL. Before the Japanese government enacted the EEOL, women experienced discrimination in employment and education.²⁶³ The Ministry of Labor attempted to make an enforceable antidiscrimination law, but employers and trade unions objected because of the massive impact on employment practices.²⁶⁴ Ultimately, they compromised on a soft law.

The EEOL of 1985 prohibited discrimination regarding job training, fringe benefits, and termination of employment on the basis of gender.²⁶⁵ The law required employers to endeavor to treat women equally with men in terms of recruitment, hiring, assignment, and promotion, but it did not grant them a private cause of action on those

258. *Id.* at 465-66.

259. *Id.* at 452.

260. Hasegawa, *supra* note 251, at 47.

261. Araki, *supra* note 257, at 466.

262. Hasegawa, *supra* note 251, at 44¹⁵.

263. Nakakubo, *supra* note 242, at 10.

264. *See id.* at 9-10.

265. *Id.* at 10.

reasons.²⁶⁶ In 1997, the EEOL was amended to require that employers not discriminate regarding recruitment, hiring, assignment, and promotion on the grounds of gender.²⁶⁷ These examples suggest the same outcomes may occur in the area of discrimination against persons with disabilities. If the new antidiscrimination law for persons with disabilities becomes a soft law, it may take a generation to evolve toward a legally enforceable "hard" law.²⁶⁸

IV. CONCLUSION

The Japanese Committee's interim report, announced by the Task Force for the General Reform of Disability Law and Policy, established that the government will create a new disability antidiscrimination law by 2013. The new law is important not only for ratification of the CRPD, but also because of the estimated impact on the Japanese society and culture.

Ratification of the CRPD in Japan, and the advent of a new disability antidiscrimination law, likely will have a positive impact on the present employment policy for persons with disabilities. The new law may neither be premised on the present laws and theories, such as the prohibition on unintentional or rational discrimination, nor on their alternatives for adapting reasonable accommodation. Therefore, there are uncertainties for the future of Japanese disability antidiscrimination employment law. The duty of accommodation for persons with disabilities under the theory of employment contract covers limited employees with disabilities, such as those with a contract without a fixed duty and duration. Meanwhile, equality theories regarding gender discrimination only focus on formal equality.

The Japanese Committee made recommendations for embodying or realizing an idea of disability antidiscrimination law and reasonable accommodation. One of the crucial points made by the committee is that disability antidiscrimination law should not only be a judicial norm; the law should also promote conversation about the interactive process inside a company, motivating employers to revise corporate culture and personnel systems, and leading to more productive, cost effective,

266. *Id.*

267. *Id.*; Araki *supra* note 257, at 456.

268. As described before, the present meaning of the Japanese "hard law" is that the court can order employers to pay damages. *See* Labor Standards Act, *supra* note 63, arts. 75, 77-86. New disability antidiscrimination laws, however, should also include a provision to oblige courts to order the reinstatement of employees or restoration for employees if dismissal is unreasonable.

immediate, and satisfactory resolutions. The new law also can serve to reduce friction in Japan in the traditional relationship between employees with disabilities and employers, and be a model positive approach for all.²⁶⁹

269. Many people generously contributed their ideas and time to the development of this article and to the important discussion about a proposed Japanese disability antidiscrimination employment law. We would like to thank Takashi Araki (Professor, Law School, Tokyo University), Tamako Hasegawa (Associate Professor, Faculty of Administration & Social Science, Fukushima University), Masahiro Ken Kuwahara (Professor Emeritus, Faculty of Law, Aichi Gakuin University), Ryosuke Ryo Matsui (Professor Emeritus, Faculty of Social Policy & Administration, Flosei University), William N. Myhill (Director of Legal Research & Writing, Burton Blatt Institute, Syracuse University), Fusako Chako Seki (Associate Professor, International Graduate School of Social Science, Yokohama National University), Hiroko Takeda-Ito (former member of Sapporo City Council of Social Welfare), Hiroyo Tokoro (Assistant Professor, Faculty of Law, University of Hokkaido), Masara Watanabe (Professor, Faculty of Law, Osaka City University), and Ryuichi Yamakawa (Professor, Law School, Keio University) for their invaluable comments on earlier drafts. We also would like to thank Eve Hill (Senior Vice President, Burton Blatt Institute, Syracuse University), Paula Pearlman (Assistant Professor, Disability Rights Legal Center, Loyola Law School, Los Angeles), Michael Waterstone (Associate Dean & J. Howard Ziemann Fellow and Professor, Loyola Law School, Los Angeles), and the other participants at the Japan's Anticipated Disability Law & the Americans with Disabilities at Twenty: Workshop on Comparative Law, Policy and Research, and the participants in the Loyola of Los Angeles International and Comparative Law Review Symposium, The Significance of the United Nations Convention on the Rights of Persons with Disabilities, for their generous comments on remarks that formed the basis for the Article.