Normative Basis of Reasonable Accommodation for Employees with Disabilities

Jun Nakagawa

Professor, Faculty of Contemporary Law
Tokyo Keizai University (Tokyo University of Economics)
1-7-34 Minami-cho, Kokubunji, Tokyo, Japan

junnaka@tku.ac.jp

http://www.tku.ac.jp/iss/

ABSTRACT

Reasonable accommodation obliges employers to take reasonable steps to enable employees with disabilities to work in an open labour market. The United Nations Convention on Rights of Persons with Disabilities (hereafter, CRPD) promulgates reasonable accommodation as one of the most relevant obligations. However, CRPD does not clarify what the concept of reasonable accommodation requires the State Parties to do or how far they must go in taking these actions. CRPD may impose very ambiguous and uncertain conditions on them. Thus, State Parties may have no clear basis on which to provide reasonable accommodation. In order to identify clear guidelines as completely as possible, this study aims at exploring firm bases of reasonable accommodation. It first attempts to clarify whether anti-discrimination can be a normative basis of reasonable accommodation, although it is often said that reasonable accommodation is in the realm of anti-discrimination. Second, if those normative bases are not compatible with reasonable accommodation, it attempts to search for other bases. This study concludes first that normative bases of anti-discrimination law are not compatible with reasonable accommodation, and second that in order to clarify the firm basis, there should exist a new idea that constructive agreement among members of a quasi-community of enterprise legitimizes the principles of reasonable accommodation.

Keywords: Reasonable accommodation, Disability discrimination, Employment, CRPD

1. Introduction

Reasonable accommodation is an epoch-making legal concept. It obliges employers to take reasonable steps to enable employees with disabilities to work in an open labour market. For example, reasonable accommodation requires an employer to widen a doorway, install a ramp in an establishment, change a worker's shift, reassign his/her duties or transfer him/her to a light-duty job. The United Nations Convention on Rights of Persons with Disabilities (hereafter, CRPD) promulgates reasonable accommodation as one of the most relevant obligations. For example, Section 2 of CPRD defines it as follows:

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

However, CRPD does not clarify what the concept of reasonable accommodation requires the State Parties to do or how far they must go in taking these actions. CRPD may impose very ambiguous and uncertain conditions on them. Thus, State Parties may have no clear basis on which to provide reasonable accommodation. Although many Asian countries have created and inserted provisions of reasonable accommodation into disability discrimination laws in order to ratify CRPD, such murky obligations may cause some legally theoretical and practical problems, especially in a case of colliding to traditional discrimination jurisprudence. In fact, there has been a long history in the United States to discuss whether reasonable accommodation should be permitted in the sphere of anti-discrimination law and be limited in application. There would be the crucial but common agenda to be resolved and thus may be necessity to discuss the normative bases of reasonable accommodation in the Asia and Pacific area, learning from American lessens, as an urgent one.

In order to identify clear guidelines as completely as possible, this study aims at exploring firm bases of reasonable accommodation. It first attempts to clarify whether anti-discrimination can be a normative basis of reasonable accommodation, although it is often said that reasonable accommodation is in the realm of anti-discrimination. Second, if those normative bases are not compatible with reasonable accommodation, it attempts to search for other bases.

2. Methodology of the Study

This study qualitative and aims at clarifying the natures of reasonable accommodation by employing the methodology of legal hermeneutics. The object of the study is about considering the theoretical features and practical functions of reasonable accommodation, such as positive obligations on innocent employers, stemming and extracting from cases and theories to evaluate the cases. First, it examines whether the distinctive features and functions may be explained by traditional discrimination jurisprudence in terms of liability, coverages (concept of disability) and positive/negative obligations. Second, it scrutinizes whether the features and functions may be originated or designated by social model of disability. Third, it finally explores what factors legitimatize the features and functions and what theory may provide a firm basis for reasonable accommodation.

3. Anti-discrimination and Equality as Bases of Reasonable Accommodation

3.1 Correlation between Anti-discrimination and Reasonable Accommodation

Reasonable accommodation is considered to be in the realm of anti-discrimination.

First, the history and development of reasonable accommodation in the United States reveals the correlation between anti-discrimination and reasonable accommodation. The concept was first developed in the EEOC guidelines of religious discrimination in 1966 and 1967 and then was incorporated into the disability discrimination provision, section 504, of Rehabilitation Act of 1973.[1] Then, Americans with Disabilities Act as a comprehensive disability discrimination law, promulgates it in 1990.[2]

Second, provisions of CRPD also present that reasonable accommodation has relevancy to anti-discrimination. Section 2 of CRPD defines discrimination as including "all forms of discrimination, including denial of reasonable accommodation." Section 5 of CRPD also provides that "In order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided." From this

[1] Richard K. Scotch, From Good Will to Civil Rights: Transforming Federal Disability Policy, (Philadelphia: Temple University Press, 1984) at Chapter 5 & 6 (82-).

[2] Burgdorf Jr. and Bell proposed that reasonable accommodation, as a distinctive concept from traditional discrimination law, be incorporated into the future handicapped civil rights law called as ADA later on. Robert L. Burgdorf Jr. and Christopher Bell, *Eliminating Discrimination against Physically and Mentally Handicapped Persons: A Statutory Blueprint*, Vol. 8 No. 1 MPDLR 64 (1984) at 69.

perspective, it would be understandable that reasonable accommodation should be made to implement equality and eliminate discrimination. Thus, it might be said that anti-discrimination and equality should be the normative bases of reasonable accommodation.

3.2 Direct Discrimination and Reasonable Accommodation

Thus, one may explore first whether reasonable accommodation is logically required by anti-discrimination law in the context of direct discrimination. Direct discrimination occurs when an employer's decision is intentionally made without regard for the employee's qualifications or productivity but on the basis of a distinctive characteristic, such as a disability, which is prohibited to use as a reason for a judgment, on the grounds that to do so constitutes discrimination.[3] Additionally, direct discrimination can be distinguished as being driven by animus or by a rational reason, such as financial costs.

Does the theory of direct discrimination law justify the requirement of reasonable accommodation? I would say that it does not because the composition of direct discrimination is different from that of reasonable accommodation.

First, while direct discrimination requires the intent of the wrongdoer, reasonable accommodation does not always require it.[4] Employers should be responsible for intentional employment decisions that are discriminatory and demonstrate animus because these actions cause an intentional disadvantage to an employee with a distinctive characteristic. It is morally wrong and unlawful for an employer to intentionally exclude an applicant or employee from the labor market by reason of a distinctive characteristic, regardless of the individual's qualification and productivity. This is somehow similar to tort liability. A wrongdoer in tort law, who intentionally causes someone to suffer loss or harm, should be liable for this injury and thus be required to compensate for the damage. Likewise, employers should be liable and compensate for their intentional employment decisions that constitute discrimination with animus, such as employer's employment decision not to hire an applicant based on her prejudice to his disability, under anti-discrimination law because the employers have denied the employee with a distinctive characteristic the benefit of working in a fair employment market. While direct

[3] Mark Kelman, *Market Discrimination and Groups*, 53 Stan. L. Rev. 833 (2000) at 840, Mark Bell, *Direct Discrimination (Chapter 2)*, Dagmar Schiek, Lisa Waddington & Mark Bell eds., Cases, Materials and Text on National, Supranational and International Non-Discrimination Law (Oxford: Hart Pub., 2007).

[4] Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination and Reasonable Accommodation*, 46 Duke L. J. 1 (1996) at 8-9.

discrimination requires the wrongdoer to compensate for discrimination, the reasonable accommodation provision obliges even an innocent and rational employer to be liable for the employee's disadvantage from impairment.[5] It places a legal obligation on an employer who does not discriminate against an employee by reason of his/her distinctive trait. The duty of reasonable accommodation requires a more expansive application of liability than required for intentional discrimination. Although a prohibition of direct discrimination inevitably entails such a cause-liability-compensation model, reasonable accommodation is not based on it. Reasonable accommodations are not an appropriate way to compensate an employee because the employer is not liable for the employee's disadvantage and it is rationale for the employer to not pay for an accommodation.

Second, while direct discrimination focuses on equal treatment, reasonable accommodation envisions a redistribution of jobs to improve the employment opportunities of the disabled as a class. Direct discrimination is based on a doctrine as known as "color-blindness" that all persons should be treated by employers without regard to their characteristics. It is very individualistic and directs toward freeing job competitors from them.[6] Thus, it establishes strict neutrality test such as *Bona Fide* Occupational Qualification (hereafter, BFOQ) defense. Meanwhile, reasonable accommodation is made only for job-applicants or employees with disabilities. It more emphasizes on improvement of economic condition by redistributing more desired job for the disabled as a group. Thus, it sets the lower standard of defenses, such as essential functions of employment position, direct threat and undue hardship.

3.3 Indirect Discrimination and Reasonable Accommodation

One secondly may explore whether prohibition of indirect discrimination can legitimize reasonable accommodation. Indirect discrimination occurs when an employment policy or practice has a negative effect on an employee with a distinctive characteristic, such as disability. Although CRPD does not include the words indirect discrimination, it may include the prohibition of indirect discrimination. Section 2 provides that . . .

"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the

[5] *Ibid.* at 32.

[6] Marcus B. Chandler, *Comments: The Business Necessity Defense to Disparate-Impact Liability under Title VII*, 46 U. Chi. L. Rev. 911 (1979) at 921.

recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms ...."

A negative effect itself is permissible even if an employment standard or practice has such an effect to a certain degree, even a detrimental degree. For example, discharging an employee itself is permissible even if it gives a grave consequence on its discharged employee. However, it is not permissible when it has a unilaterally, drastically detrimental impact on particular marginalized people and therefore should be eliminated from a real society even if it does not entail culpability. Indirect discrimination in employment is measured by whether an employer's business necessity or purpose to the safe and efficient operation of business itself is legitimate or whether it overrides the discriminatory impact. In other words, indirect discrimination examines whether an employer's interests take priority over an employee's rights.[7] At the same time, indirect discrimination law takes into consideration corrective justice[8] and redistributive justice[9] issues and seeks to change the status quo[10] or to challenge what is considered rationality and common sense in the business community, seeking to address not only what is but also what should be. Goal of indirect discrimination law is potentially limitless in terms of the duties and costs which it may impose on employer. The degree of protection ultimately depends on the weight to competing the goal in striking the balance between achievement of economic equality and business necessity.[11] Thus, the examination of the priorities is often seen as being in the sphere of judicial public policy-making.[12]

The stated rationale for prohibitions based on indirect discrimination principles is almost entirely absent from official legal arguments. Whether prohibitions are rational or irrational is dependent upon other formal judgments. In taking many factors into account, the norms considered in forming judgments must vary on a case-by-case basis, and a choice of norms and the combining of them may be subjective, ambiguous, uncertain and unstable, depending upon the background of an individual case.

---

[7] *Ibid.* at 913-.

[8] Robert Belton, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 Yale L. Pol'y Rev. 223 (1990) at 228, Dagmar Schiek, *Indirect Discrimination (Chapter 3)*, in Schiek, Waddington & Bell eds., *supra* note 3, (2007) 323 at 330.

[9] Michael A. Stein, *Disability Human Rights*, 95 Cal. L. Rev. 75 (2007) at 91.

[10] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) at 430.

[11] Chandler, *supra* note 6 at 922.

[12] Chandler, *supra* note 7 at 922.

From the beginning, moreover, rationale of prohibition on indirect discrimination was not clear and stable. Indirect discrimination jurisprudence in the United States[13] was developed in course of and correlated to direct discrimination. Indirect discrimination was used when it was difficult to prove a discriminatory motive,[14] such as in case that a facially neutral employment rule or practice has discriminatory effect on particular group, such as African American. A commentator clarifies from his analysis of the early cases that theory of indirect discrimination was indispensable for proving a discriminatory intent. In addition, focus of indirect discrimination was limited in application. In the United States, litigations about indirect discrimination were successful mainly only in written exam cases in the early cases. Thus, indirect discrimination might stand on unstable ground.

Reasonable accommodation is a somehow similar composition to indirect discrimination. It aims at ameliorating adverse effect on minority employees as a class or group, taking corrective and redistributive justice into consideration, and seeking to change the status quo to respect for their integration with a mainstream society, likewise with indirect discrimination. It also requires judiciary to examine the priority between economic achievement of equality and business necessity. Thus, if prohibition on indirect discrimination is rationalized, reasonable accommodation might be also legitimatized. However, as described above, there is uncertainty about doctrinal basis of indirect discrimination. Even if reasonable accommodation is based on indirect discrimination, it means that CRPD gives State Parties carte blanche or at least wider discretion in what and to what degrees reasonable accommodation is made.

There exist some differences between indirect discrimination and reasonable accommodation. First, reasonable accommodation more focuses on individualized injury caused by physical or mental impairment than indirect discrimination that improves economic situation of a group promulgated as a prohibited ground as a whole. It may reflect more personalized special needs of individual with a special trait such as the disabled than situation of prohibited grounded persons as a group. Second, the contents of examination under reasonable accommodation are different from those of indirect discrimination. Reasonable

[13] The reason why this paper deals mainly with American decisions and literature is that the United States has long history to deal with discrimination and reasonable accommodation and has elaborated and shaped many theories.

[14] George Rutherglen, *Disparate Impact under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297 (1987) at 1332.

accommodation does not require examining whether employer's business necessity of employment standard or rule is legitimate but, on the premise of its legitimation for general employees, whether an exceptional alternative as reasonable accommodation enables employees with disabilities to perform "essential functions" of an employment position as an individualized job without "direct threat" or whether it constitutes "undue hardship." Although, reasonable accommodation also requires examining the "business necessity" used as the same words in indirect discrimination, the nature is different.

3.4 Is Anti-discrimination a Negative or Positive Obligation?

Anti-discrimination law mandates negative obligations which require employers "not to be" and thus prohibits certain actions. Meanwhile, reasonable accommodation imposes positive or affirmative responsibility, as an exceptional personalized act or omit, on employers in order to guarantee the improvement of economic equality and integration of the disabled into a society. If anti-discrimination law can impose positive obligations on employers, it may oblige them to make reasonable accommodations for employees with disabilities. We will now explore whether anti-discrimination laws themselves evolve from negative obligation to positive obligation.

It seems difficult to say that the answer is positive. The dichotomy between (a) unacceptably discriminatory practices and (b) business decisions and practices considered reasonable forms a key component of the method used to apply anti-discrimination principles. Anti-discrimination requires proving the business rationality of a concerned employment practice or rule. In direct discrimination, it is examined whether an intentional employment decision is indispensable for BFOQ as the higher business rationality. In indirect discrimination, it is investigated whether a facially neutral employment practice or rule is rationally related to business necessity. If the concerned employment decision or rule is not related to the business rationality as lower neutrality, it is regarded as discrimination and the practice or rule itself is null and void. In other word, anti-discrimination mandates drawing a clear line between discrimination not to be done and reasonable business decision and practice. The dichotomy does not call for positive or affirmative duty because anti-discrimination only sheds light on the discrimination not to be dome against business rationality. Anti-discrimination laws cannot

mandate such duties that extend to imposing on employers the obligation to take action to ameliorate the negative effects of given conditions or practices.

Meanwhile, there might be several ways to rebut the argument. First, one might say that if indirect discrimination law has permitted "acceptable alternative" test which examines whether employer has available alternative policies or practices to accomplish the business purpose better or equally well with a lesser differential impact, the same kind of test may apply for reasonable accommodation. In the United States, courts sometimes require employer to prove whether business necessity mandates a discriminatory practice and then whether there is no alternative practice consistent with its business operation without the same adverse effect on minorities. This might indicate that indirect discrimination law admits positive and affirmative obligations as exceptional alternatives to ameliorate discriminatory effect and so can it do. However, this is originally not true. The acceptable alternative test focused on making stricter the examination of indirect discrimination[15] and thus it was not actual requirement of an acceptable alternative.

Second, other describes that if anti-discrimination jurisprudence aims at eliminating societal and economic subordination of groups promulgated in prohibited grounds, even rational discrimination, which means that employment standard and practice motivated by requirement of rational costs and productivities has disadvantageous results on marginalized individuals, should be remedied.[16] Thus, if direct and indirect discrimination law and reasonable accommodation share the equivalent goals and means, then positive and affirmative obligation as reasonable accommodation is permissible.[17] Doctrinal basis of this theory derives from the "equal-access-to-social-goods"[18] argument to enable persons with disabilities to equally access to their social goods and needs. However, this concept expands the anti-discrimination jurisprudence to excessive and undue extent. It implicitly requires maintaining appropriate levels of all aspects of living for all individuals of disadvantaged groups. Anti-discrimination cannot mandate this but provides only more reasonably or fairer competitive environment for all. Anti-discrimination jurisprudence, thus, would not permit this idea because it artificially

[15] *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir., 1971).
[16] Samuel R. Bagenstos, Law and the Contradictions of the Disability Right Movement, (New Haven: Yale Univ. Press, 2009) at 59-63.
[17] *Ibid.* at 63-68.
[18] *Ibid.* at 64.

integrates positive duty into the theory at the outset. In other words, it incorporates other norms into anti-discrimination. The idea is different from the reality and development of anti-discrimination and thus not logical.

3.5 Concept of Disability under Anti-discrimination Law and Reasonable Accommodation

Even if the reasonable accommodation duty does not logically arise from anti-discrimination especially direct discrimination, one might hypothesize that the significance of the concept of "disability" in discrimination law legitimizes it.

The hypothesis is based on that if the concept of "disability" is inserted into anti-discrimination law as a prohibited ground in reflection of more or most drastic disparately excluded experiences of the disabled, comparing to other grounds, the concept may impose more expansive and stronger obligation not to discriminate and to make reasonable accommodation on employer. However, the concept of disability cannot legitimatize more expansive and stronger duty on employer in terms of anti-discrimination and reasonable accommodation over anti-discrimination.

If the concept of disability reflects most disparately excluded experiences of the disabled, the examination would be applied higher standard like BFOQ or the strict scrutiny in 14th Amendment of US Constitution. It means that the employment decision or distinction by reason of disability is estimated discriminatory unless employer proves that it is indispensable for performing a job or has a compelling interest. This limits rational reason for the distinction to very exceptional one and thus requires employer not to make employment decision and distinction by reason of disability.

Apart from the discussion above, the disparately excluded experiences of the disabled might influence on judicial policy making in indirect discrimination and may require positive duty for the disabled. However, it is difficult to think that the concept of disability reflecting such experiences requires more expansive or stronger duty. First, prohibition on certain actions on the basis of disability as a ground for discrimination has a relatively weak nature. For example, disability as a prohibited ground of discrimination is classified as rational scrutiny, the lower scrutiny in the interpretation of the US Constitution. In addition, BFOQ standard legitimatizes job qualification which directly collides with disability to lower it. Second, even if disability as the ground has a relatively strict nature, disability discrimination is very limited in application. There is a wide range of symptoms and wide ranges and degrees of impairments.

Also, there is a wide spectrum of disadvantages from these impairments. Where impairment is minimal, the prohibition on discrimination is weaker. Reasonable accommodation duty is oriented toward relatively weaker degrees than disability discrimination. The concept of disability in anti-discrimination is different from one of reasonable accommodation. The concept in anti-discrimination is based on historically excluded disparate experiences. Coverage of anti-discrimination law should be strictly limited to discrimination for those who have the same experiences with the past. Meanwhile, the concept of disability under reasonable accommodation is oriented toward the present or future disadvantages that individuals with impairments face. The concept of disability discrimination, thus, cannot require employer to make accommodations for broader and more comprehensive disabilities. The type of disabilities for which a reasonable accommodation duty may apply is estranged from the historical concept of disability discrimination based on segregation and exclusion, although these concepts of disability do partially overlap. If reasonable accommodation adheres to be in the realm of disability discrimination, the coverage of reasonable accommodation becomes very narrow.

4. Social Model of Disability as Basis of Reasonable Accommodation

Next it explores whether social model of disability legitimizes reasonable accommodation.

Many of disability advocates describe that CRPD adopts the social model of disability, or that the social model of disability stands at the core of the CRPD. Moreover, it is often said that social model of disability is correlated to reasonable accommodation.[19] Both "social mode of disability" and "reasonable accommodation" appeared in the almost same period and take a similar approach in removing barriers to guarantee employee with disability to participate in labour market.

The social model understands disability as the consequence of the relation between an individual and his/her social environment. The most positive part of the social model is to clarify the process of how societally-created barriers are disabling. In addition, social model indicates that a society is liable for the barriers which it has created for physical access, or effective communication, and prevents people with disabilities from having equal opportunities. If the concept of disability adopts the social model of disability, then a society should have an

[19] Adam Samaha, *What Good Is the Social Model of Disability?*, 74 U. Chi. L. Rev. 1251 (2007) at 1252.

obligation to remove the barriers as a reasonable accommodation. Can the social model of disability be the normative basis of reasonable accommodation? If so, what degree the society model obligated to remove barriers as reasonable accommodations?

The social model arguably requires some changes to the social environment. It also emphasizes intuitive causation between disadvantage created by society and remedy for disadvantage from perspective of responsibility and compensation or that between needs of persons with disabilities and their fulfillment to implement equality with other persons. This causation cannot justify basis of liability. All individuals face some disadvantages created by society and have needs to resolve or ameliorate them, but a society does not have to respond all of needs. There are some needs to be responded to by society and others needs for which society should not be responsible. Thus, intuitive causation does not explain why a society should be responsible for removing the barrier. The social model is an empty concept in normative argument. It cannot mandate liability for anyone. As commentators explain, the social model's concept of 'disabling' does not designate any policy goal.[20] This means that the social model cannot identify any goals, or any methods, to reach the goals. The social model requires some normative basis to legitimize policy goals.[21]

5. Reasonable Accommodation: Stepping Out from Anti-discrimination

Although I have attempted to clarify that reasonable accommodation is partially incompatible to anti-discrimination, the American legal literature implicitly indicates the incompatibility. Moreover, it also implies that the legitimacy of reasonable accommodation requires something different from anti-discrimination, even though the commentators agree that reasonable accommodation is in a realm of anti-discrimination law.

For example, Pamela Karlan & George Rutherglen understand that although both reasonable accommodation and anti-discrimination pursue the equal opportunity and efficiency in the labour market,[22] reasonable accommodation is "a far different definition of 'discrimination' than the definition embraced in other area of employment discrimination law."[23]

---

[20] *Ibid.* at 1252-1253, 1275, David Wasserman, *Philosophical Issues in the Definition and Social Response to Disability*, in Gary L. Albrecht ed., Handbook of Disability Studies (London: Sage, 2001) 219 at 244

[21] Samaha, *ibid.* at 1286-.

[22] Karlan & Rutherglen, *supra* note 4 at 25.

[23] *Ibid.* at 9.

Then, they describe that reasonable accommodation is legitimatized by pursuing the equal opportunity under an insurance market.[24] People in a community constructively agree with an insurance scheme behind "a veil of ignorance" to make accommodation for persons with disabilities to a reasonable extent.[25]

Next, Mark Kelman describes the distinction between anti-discrimination, he says "simple discrimination," and reasonable accommodation,[26] and characterizes entitlement to reasonable accommodation as a regulatory tax-and transfer program.[27] I find that there are two remarkable points in his argument. First, the duty of reasonable accommodation is a redistributive transfer program for increasing social inclusion,[28] while anti-discrimination is a compensatory program for those who experience discrimination based on disability. Second, the duty of reasonable accommodation would be legitimated by compulsory tax scheme or, at least constructive or explicit agreement in a rational market.

Parts of the insurance scheme model stemming from the Rawlsian point of view by Karlan & Rutherglen and the redistributive transfer program model by Kelman go beyond the theory of anti-discrimination; direct discrimination is a compensatory program based on culpability similar to the tort liability, and indirect discrimination is an individual right protection program examining whether the disabled individual rights override employer's and other's benefits and rights in judicial public policy making. It is a claim for a deprivation of an employee's individual right and benefit by employer. Culpability and drastically negative impact which exclude the disabled from labour market reflecting disparately excluded experiences legitimatize anti-discrimination. Equilibrium of anti-discrimination is in the intersection between equal opportunity and efficacy in the labour market.[29] Meanwhile, two models are premised on a hypothetical market or community whose members, or insured and insurer, constructively agree with an insurance scheme or redistributive transfer system. Thus, the request of reasonable accommodation is to require a market or community to expense parts of shared benefits to its members. In their models, constructive agreement in a hypothetical

[24] *Ibid.* at 26-.
[25] *Ibid.* at 27.
[26] Kelman, *supra* note 3 at 840-845.
[27] *Ibid.* at 880.
[28] *Ibid.* at 890.
[29] Karlan & Rutherglen, *supra* note 4 at 25.

market or community itself legitimatizes reasonable accommodation and decides its equilibrium.

Those commentators might assert that group disadvantage based on historically excluded experience and its significance legitimates reasonable accommodation. This kind of idea would not be impossible because it is possible to equalize the equilibrium of anti-discrimination with constructively agreed level of insurance scheme or distributive transfer program in a hypothetical community. However, if so, as I said above, the coverage of reasonable accommodation is very limited and becomes almost meaningless for the needs of the disabled.

6. Quasi-communities Designed to Seek Maximize Mutual Benefit as Legitimacy for Reasonable Accommodation Laws

If justification for requirement of reasonable accommodation practices is not found in the realm of anti-discrimination law, this calls for shifting to a new paradigm. According to the discussions by the scholars just noted, practicing reasonable accommodation requires a market or community to dispense portions of shared benefits to its members. Its advocates thus should attempt to pursue a new theory that constructive agreement among members of a quasi-community of enterprise legitimizes the principles of reasonable accommodation.

Although any community imposes some obligation on its members, this quasi-community as an enterprise strengthens the mutual obligations of its constituents. First, since members in the quasi-community share the specific purposes of pursuing profits, interests and benefits towards a competitive market, such a purpose-oriented community requires of its members more cooperative relationships. Second, since they share the realization that increasing one member's benefit enhances other members' benefits, as long as they pursue the same purpose, members are required to make investments in other members in order to maximize benefits for all. Third, since they share the awareness that members are mutually dependent, members are required to compensate for the insufficiencies of other members. The nature of such quasi-communities legitimizes reasonable accommodation as a positive duty of all members, including the disabled, to seek the maximize benefit for members who face some difficulty.

If members in the community agree to these mutual and positive obligations, they agree to meet the costs of the obligation at the same time. This becomes necessary in order to avoid damaging the employer's and colleagues' profits, interests and benefits by members' share to cost the expenses.

6.Conclusion

Although reasonable accommodation goes beyond the theory of anti-discrimination, there are reasons for the incompatibility. First, anti-discrimination cannot explain imposing positive duty on employer. Second, it cannot logically lead reasonable limitation on the duty since it does not fit undue hardship determined corresponding to employer's economic condition, such as business magnitudes, its financial burdens on employer, and so on. Third, as I discussed above, the disparately excluded experiences of the disabled does not fit the conception of disability under reasonable accommodation. Fourth, it cannot impose an interactive process which both employer and employee mutually make the best effort to search for the appropriate accommodation because it unilaterally obliges employer not to be done. Fifth, it cannot permit general rationality and applicability of employment practice and rule which has negative effect on a particular individual with disability while requirement of reasonable accommodation focuses only on the negative effect and does not matter with whether the practice or rule with the effect applies for other employees except the particular individual.

Thus, this study pursues a new, "quasi-community," theory described in Part 6 that constructive agreement among members of a quasi-community of enterprise legitimizes the principles of reasonable accommodation as a positive duty of all members, including the disabled, to seek the maximize benefit for members who face some difficulty. These mutual and positive obligations by the agreement are consistent to doctrinal basis of reasonable accommodation.

7. References

Bagenstos, Samuel R., Law and the Contradictions of the Disability Right Movement, (New Haven: Yale Univ. Press, 2009)

Bell, Mark, *Direct Discrimination* (Chapter 2), Dagmar Schiek, Lisa Waddington & Mark Bell eds., Cases, Materials and Text on National, Supranational and International Non-Discrimination Law (Oxford: Hart Pub., 2007)

Belton, Robert, *The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction*, 8 Yale L. Pol'y Rev. 223 (1990) at 228

Burgdorf Jr., Robert L. and Bell, Christopher, *Eliminating Discrimination against Physically and Mentally Handicapped Persons: A Statutory Blueprint*, Vol. 8 No. 1 MPDLR 64 (1984)

Chandler, Marcus B., *Comments: The Business Necessity Defense to Disparate-Impact Liability under Title VII*, 46 U. Chi. L. Rev. 911 (1979)

Karlan, Pamela S. & Rutherglen, George, *Disabilities, Discrimination and Reasonable Accommodation*, 46 Duke L. J. 1 (1996)

Rutherglen, George, *Disparate Impact under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297 (1987)

Kelman, Mark, *Market Discrimination and Groups*, 53 Stan. L. Rev. 833 (2000)

Nakagawa, Jun & Blanck, Peter, *Future of Disability Law in Japan: Employment and Accommodation*, Vol. 33 Loyola of Los Angeles, International & Comparative Law Review 173-220 (2010)

Samaha, Adam, *What Good Is the Social Model of Disability?*, 74 U. Chi. L. Rev. 1251 (2007)

Schiek, Dagmar, *Indirect Discrimination* (Chapter 3), in Schiek, *et al* eds., Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, 323 (Oxford: Hart Pub., 2007)

Scotch, Richard K., From Good Will to Civil Rights: Transforming Federal Disability Policy, (Philadelphia: Temple University Press, 1984)

Selmi, Michael, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701(2006)

Selmi, Michael, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 Wisconsin L. Rev. 937 (2014)

Stein, Michael A., *Disability Human Rights*, 95 Cal. L. Rev. 75 (2007)

Wasserman, David, *Philosophical Issues in the Definition and Social Response to Disability*, in Gary L. Albrecht ed., Handbook of Disability Studies (London: Sage, 2001)

[Decisions]

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) at 430.

Robinson v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir., 1971).