

2009

Right to Work? A Comparative Look at China and Japan's Labor Rights for Disabled Persons

Cerise Fritsch

Loyola University Chicago, School of Law

Follow this and additional works at: <http://lawcommons.luc.edu/lucilr>



Part of the [International Law Commons](#)

Recommended Citation

Cerise Fritsch *Right to Work? A Comparative Look at China and Japan's Labor Rights for Disabled Persons*, 6 Loy. U. Chi. Int'l L. Rev. 403 (2009).

Available at: <http://lawcommons.luc.edu/lucilr/vol6/iss2/5>

This Student Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago International Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

RIGHT TO WORK? A COMPARATIVE LOOK AT CHINA AND JAPAN'S LABOR RIGHTS FOR DISABLED PERSONS

Cerise Fritsch[†]

Introduction

The international community recognizes the universal principles of dignity and justice for all persons.¹ It is the duty of all States, regardless of their underlying legal, economic, and cultural systems to protect and promote the inalienable rights and fundamental liberties of all. One such fundamental right recognized in the international community is the right to employment.² Employment not only offers an individual a means to support one's livelihood, but also provides an opportunity for social interaction, advancement, and feelings of self-accomplishment.

Yet employers and government actors deny persons with disabilities the fundamental right to work each day. Approximately 650 million individuals, or ten percent of the world's population, live with a disability.³ Eighty percent of these individuals live in countries stricken by poverty, where the majority of individuals of legal working age are unemployed.⁴ The lack of equal opportunity to earn gainful employment and discrimination in the workforce results in the continuing marginalization, poverty, and social exclusion of persons with disabilities.

Discrimination in the labor market is an issue most prevalent in the Asian Pacific region, which has the largest number of persons with a disability in the world.⁵ Recognizing the need to address the rights of people with disabilities in this region, the United Nations Economic and Social Commission for Asia and the Pacific ("ESCAP") launched the Decade of Disabled Persons ("Decade"), which lasted from 1993 to 2002.⁶ The Agenda for Action of the Decade, adopted in 1993, focused on the issue of training and employment of persons with disabilities. Due to a marked disparity in implementation of the Decade's Agenda, the original Decade was extended for a second decade from 2003 to 2012.⁷ The

[†] J.D., Loyola University Chicago, expected May 2010.

¹ United Nations Enable, International Day of Persons with Disabilities – 3 December, <http://www.un.org/disabilities/default.asp?id=109> (last visited May 1, 2009).

² Arthur O'Reilly, *The Right to Decent Work of Persons with Disabilities* (Int'l Labour Org., Working Paper, 2003).

³ Int'l Labour Org. Facts on Disability in the World of Work (2007), http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Factsheets/lang=en/docName=WCMS_087707/index.htm.

⁴ International Day of Persons with Disabilities, *supra* note 1. In fact, 80 to 90 percent of disabled persons in developing countries are unemployed, and 50 to 70 percent in industrialized nations are unemployed.

⁵ O'Reilly, *supra* note 2.

⁶ *Id.*

⁷ *Id.*

Right to Work?

second Decade carries forward the goal of “full participation and equality of persons with disabilities” in Asian society, calling for training and employment opportunities for persons with a disability to be addressed.⁸

At the beginning of this second Asian and Pacific Decade of Disabled Persons, advocates in the international community underwent a fundamental shift in thinking with respect to the rights of disabled persons. The adoption of the Convention on the Rights of Persons with Disabilities (“CRPD”) and its Optional Protocol exemplifies this philosophical change in looking at the rights of persons with disabilities. The adoption of the CPRD marked a new era in the international efforts to promote and safeguard the “civil, political, social, economic and cultural rights of persons with disabilities, and to promote disability-inclusive development and international cooperation.”⁹ The Biwako Millennium Framework and the CRPD both strive to achieve a barrier-free, rights-based society for persons with disabilities.¹⁰

As State Parties to the CRPD, China and Japan should incorporate its provisions into their national law and guarantee all the rights enumerated in the CRPD for persons with disabilities.¹¹ As such, domestic legislation enacted pursuant to the CRPD should include either a reference to provisions of the CRPD or the specific text of the provisions. Further, the United Nations (“U.N.”) requires countries to implement public policies and programs to ensure that the provisions of the CRPD are put into practice and impact the lives of persons with disabilities in a meaningful way.¹² This includes the adoption of Article 27 of the CRPD, which specifically addresses the employment rights of persons with disabilities.¹³ Whereas China is formally bound to the CRPD as a ratified party, Japan has signed, but has not ratified the treaty, indicating the government’s agreement with the principles of the CRPD, but its unwillingness to face repercussions should it choose not to fully provide the protections afforded to persons with disabilities as outlined in the CPRD.¹⁴ Nonetheless, as a signatory party, Japan should refrain from actions that defeat the purpose of the CPRD.

To this end, China and Japan address the issue of the rights of persons with disabilities in their domestic laws. China and Japan approach the issue of discrimination against persons with disabilities in a similar manner, by focusing on

⁸ United Nations, Econ. & Soc. Comm’n for Asia & the Pacific [ESCAP], Biwako Millenium Framework for Action towards an Inclusive, Barrier-free and Rights-based Society for Persons with Disabilities in Asia and the Pacific, E/ESCAP/APDDP/4/Rev.1 (Jan. 24, 2003) [hereinafter BMF for Action]. The 2003-2012 Asian and Pacific Decade of Disabled Persons commenced a number of initiatives to ensure the goal of the previous Decade is met and that equal employment rights are extended to all persons with a disability in the region. One such initiative is the Biwako Millennium Framework for Action towards an Inclusive, Barrier-free and Rights-based Society for Persons with Disabilities in Asia and the Pacific. *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ International Day of Persons with Disabilities, *supra* note 1.

¹² *Id.*

¹³ Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, art. 27, U.N. Doc. A/Res/61/106 (Dec. 13, 2006) [hereinafter CRPD].

¹⁴ *Id.*

Right to Work?

the special considerations owed to such individuals and on the need for state assistance, rather than by outlawing employment discrimination per se in order to guarantee equal opportunity for minority persons.¹⁵ Thus, although their domestic laws grant protections for disabled persons' right to work, the countries do not recognize the equal treatment of persons with disabilities as a civil rights issue.¹⁶ This approach is in stark contrast to Article 27 of the CRPD and maintains the pre-CRPD view of disabled persons as objects.¹⁷

This article will examine whether the Chinese and Japanese legal systems adequately protect the rights of disabled persons in the work environment, including the right to equal opportunity in hiring and treatment in the workforce. The laws and policies in China and Japan will be measured against international legal standards, particularly the CRPD. Although the Chinese and Japanese legal systems generally provide for the protection of the right of persons with disabilities to work, including equal opportunity and treatment in the workplace, a disparity exists in the full implementation and recognition of the rights of persons with disabilities. In light of international legal standards, this article contends that the domestic legal framework in China and Japan inherently discriminates against persons with disabilities, necessitating a civil-rights based approach to ensure the full enjoyment of the fundamental right to employment for persons with disabilities.

Part I of this article outlines the international legal standards related to persons with disabilities and the right to employment and discusses the definition of the term "disability." Part II provides an overview of the domestic legal framework of disability law in China and Japan, offering comparisons of the two systems. Additionally, it examines the extent to which the domestic laws and policies in China and Japan have complied with international legal standards, illuminating areas of major concern due to inadequate protections. Lastly, this article evaluates the disability law with respect to employment in each country and offers recommendations for future compliance with international legal standards and the full protection of persons with disabilities.

I. International Legal Standards and the Employment of Disabled Persons

The right to work transcends the right to mere employment, and extends to the right to have a meaningful and gainful occupation, whereby a person with a disability has the opportunity to freely choose an occupation based on his or her capabilities. In order to exercise this right, it is necessary to have access to the same education, vocational training, and development opportunities as are available to those without a disability. This is a fundamental human right recognized

¹⁵ This is the approach taken by the United States under the 1990 Americans with Disabilities Act, as well as the approach taken in disability legislation in Australia, New Zealand, Canada, and Great Britain. See Robert Burgdorf, *The American with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

¹⁶ *Id.*

¹⁷ *Id.*; CRPD, *supra* note 13.

Right to Work?

by the U.N. and the international community. The deprivation of the right to work for persons with disabilities, perhaps more so than for any other group in society, results in complete exclusion from society, and greatly contributes to the poverty of a country. Thus, the full participation of persons with disabilities in all aspects of society will result in "their enhanced sense of belonging and in significant advances in . . . human, social and economic development . . . and the eradication of poverty," demonstrating the necessity of ensuring that this fundamental right is granted to all persons.¹⁸

International legal standards provide a framework for rights of disabled persons and recognize the promotion of human rights and fundamental freedoms for persons with disabilities. The rights of persons with disabilities have historically been protected under the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), and the International Covenant on Civil and Political Rights, which together comprise the International Bill of Human Rights. Additionally, the International Labour Organization ("ILO") has promulgated several conventions governing the issue of workers with disabilities. Most notably, however, Article 27 of the CRPD calls for comprehensive labor rights and legal protections to workers with disabilities.¹⁹

A. International Covenant on Economic, Social, and Cultural Rights and Universal Declaration of Human Rights

As previously stated, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the ICESCR provide a framework for an International Bill of Human Rights.²⁰ Specifically, the ICESCR was the first international covenant providing comprehensive provisions on the right to employment and equal opportunity in hiring and treatment in the workforce.²¹ Although none of the provisions within the ICESCR directly address the right of disabled persons in the work environment, including equal opportunity in hiring and treatment in the workforce, Article 6 and Article 7 of the ICESCR generally provide for the right to work and the full enjoyment of this right.²²

Under Article 6, the ICESCR provides that State Parties shall recognize the right to work, which extends to all persons and includes the opportunity to earn a living by work that one freely chooses or accepts.²³ This Article also calls for State Parties to take active steps towards the "full realization of this right" by providing for vocational training, programs and policies to ensure economic, so-

¹⁸ CRPD, *supra* note 13, pmb1.

¹⁹ *Id.* art. 27.

²⁰ U.N. High Commissioner for Hum. Rts., *Human Rights: A Compilation of International Instruments*, Vol. II U.N. Doc. ST/HR/1/Rev.6 (Vol. I/Part 2) (2002).

²¹ See generally International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/2200 (Dec. 16, 1966).

²² *Id.* arts. 6-7.

²³ *Id.*

Right to Work?

cial, and cultural development, and employment conditions that safeguard the freedoms of all individuals.²⁴

Article 7 of the ICESCR further requires that State Parties recognize the right of all persons to enjoy just and favorable working conditions. The ICESCR provides that, at a minimum, State Parties should have fair wages with equal pay for equal work, employment opportunities that will ensure a decent living for workers and their families, "safe and healthy working conditions," equal opportunity in employment promotions, and adequate working hours to provide for rest, leisure, and holidays.²⁵

Although not specifically addressed within the ICESCR provisions, the Committee on Economic, Social, and Cultural Rights emphasizes the importance of protecting and providing rights for persons with disabilities in the labor market.²⁶ The Committee in its General Comment No. 5 discusses the prominent and persistent discrimination against persons with disabilities with respect to employment.²⁷ As such, the Committee calls for State Parties to the ICESCR to take several additional measures to protect and ensure the full enjoyment of employment rights for workers with disabilities, including but not limited to: removal of barriers to employment; mainstreaming employment rather than excluding persons with disabilities in "sheltered facilities"; modes of accessible transportation; and adoption of the ILO's Convention No. 159 related to vocational training and rehabilitation.²⁸

The Universal Declaration of Human Rights also recognizes the right to employment.²⁹ Specifically, Article 23 explicates the right to work, the freedom of employment, the protection against unemployment, the right to equal pay for equal work, the right to adequate and just working conditions, and the right to human dignity by those employed and their families.³⁰ However, similar to the ICESCR, the Universal Declaration of Human Rights does not specifically address the rights of workers with disabilities.

B. U.N. Standard Rules on Equalization of Opportunities for Persons with Disabilities

In 1993, the U.N. adopted the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.³¹ Although these Rules did not have an obligatory effect on States, they implied that States should take action for the

²⁴ *Id.*

²⁵ *Id.*

²⁶ U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 5: Persons with Disabilities*, ¶ 20, U.N. Doc. E/1995/22 (Dec. 9, 1994).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Universal Declaration of Human Rights, G.A. Res. 217 A(III), art. 23, U.N. Doc. A/Res/217/A (Dec. 10, 1948).

³⁰ *Id.*

³¹ Standard Rules on the Equalization of Opportunities for Persons with Disabilities, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/RES/48/96 (Dec. 20, 1993).

Right to Work?

“equalization of opportunities” for persons with disabilities by providing a basis for cooperation among States and acting as a policy-making tool.³²

The Standard Rules discuss the issue of employment in Rule 7, which states that parties:

[S]hould recognize the principle that persons with disabilities must be empowered to exercise their human rights, particularly in the field of employment. In both rural and urban areas they must have equal opportunities for productive and gainful employment in the labor market.³³

The Standard Rules further call for non-discrimination laws and regulations and the integration of workers with disabilities in the open labor market. This can occur through measures such as:

Vocational training, incentive-oriented quota schemes, reserved or designated employment, loans or grants for small business, exclusive contracts or priority production rights, tax concessions, contract compliance or other technical or financial assistance to enterprises employing workers with disabilities.³⁴

As previously mentioned, the Rules did not have binding authority on States that a convention such as the CRPD would have. Nonetheless, the Rules were influential in making policies concerning persons with disabilities in many areas of the world on the issues of medical care, rehabilitation, support services, and personal training.³⁵

C. International Labour Organization Conventions

The ILO is the U.N. agency charged with promoting “decent work throughout the world” and bringing together governments, employers, and workers of member States.³⁶ Specifically, the ILO has a Disability Program that promotes decent work for persons with disabilities and provides a means for breaking down the barriers that prevent disabled persons’ access to full participation and enjoyment of their rights in the labor market.³⁷

To this end, the ILO has promulgated conventions and international norms related to the employment rights of persons with disabilities. The most noteworthy convention with respect to persons with disabilities is the Vocational Rehabilitation and Employment Convention of 1983 (No. 159) and its accompanying

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*; see World Health Organization, The U.N. Standard Rules on the Equalizations of Opportunities for Persons with Disabilities: Government Responses to the Implementation of the Rules on Medical Care, Rehabilitation, Support Services and personal training, WHO Doc. WHO/DAR/01.4 (2001), available at http://whqlibdoc.who.int/hq/2001/WHO_DAR_01.4.pdf.

³⁶ Int’l Labour Org, <http://www.ilo.org/global/lang—en/index.htm> (last visited Dec. 2, 2008).

³⁷ *Id.*

Right to Work?

Recommendation (No. 168).³⁸ Two other conventions also address the rights of disabled persons – the 1958 Discrimination Convention (No. 111) and the 1964 Employment, Policy Convention.³⁹

1. 1983 ILO Vocational Rehabilitation and Employment Convention (No. 159)

The 1983 ILO Vocational Rehabilitation and Employment Convention (“IVREC”) defines the term “disabled person” as an “individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recogni[z]ed physical or mental impairment.”⁴⁰ The IVREC focuses on vocational rehabilitation and calls on each Member State to “consider the purpose of vocational rehabilitation” in allowing disabled persons to secure, maintain and advance in suitable employment, which would result in the integration and acceptance of persons with disabilities in society.⁴¹ Thus, the IVREC recognizes the importance of the fundamental right to work for disabled persons, who can thereby gain a sense of self-fulfillment from employment, and further have a means to escape oppression, discrimination, and marginalization from society. These are positive obligations on State Parties, and both China and Japan have ratified the IVREC.⁴²

Furthermore, the IVREC calls for Members to take measures to ensure that the right to work is afforded to persons with disabilities. It states that Members should “formulate, implement and periodically review a national policy on vocational rehabilitation and employment” of disabled persons.⁴³ The Convention requires that these policies be based on the equal opportunity of disabled workers and that special “positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other workers.”⁴⁴ This provision implies that under international standards, measures such as a quota system, mandating that a percentage of persons with disabilities be employed, are a lawful and effective means of ensuring employment rights for persons with a disability.

2. 1958 Discrimination Convention (No. 111)

The 1958 ILO Discrimination Convention (“IDC”) discusses the discrimination of persons in the workplace, stating that discrimination involves “any dis-

³⁸ Int’l Labour Org. Vocational Rehabilitation and Employment Convention of 1983 (No. 159) [hereinafter 1983 Convention].

³⁹ Int’l Labour Org. 1958 Discrimination Convention; 1964 Employment, Policy Convention (No. 122).

⁴⁰ 1983 Convention, *supra* note 38, art. 1.

⁴¹ *Id.*

⁴² See Pacific Islands Treaty Series, Status Report C159 Vocational Rehabilitation and Employment (Disabled Persons) Convention, <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C159> (last visited May 1, 2009).

⁴³ 1983 Convention, *supra* note 38, art. 2.

⁴⁴ *Id.* art. 4

tion, exclusion or preference made on any grounds” within the Convention or by the State, “which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”⁴⁵

Specifically, Article 5 of the IDC provides that affirmative action and similar measures, such as the quota system employed by Japan, may not be considered to be discrimination.⁴⁶ Article 5 also states that special measures of protection or assistance adopted by the ILO are not a form of discrimination.⁴⁷ This provision has the effect of permitting a quota system if applied to the employment of persons with disabilities, which may nevertheless fail to properly promote and protect the labor rights of persons with disabilities, as discussed in Part II of this article under the Japanese domestic legal framework.

Despite these measures calling for non-discrimination practices and equal opportunity and treatment in employment, neither the IDC nor the accompanying Recommendation (No. 111) specifically preclude discrimination on grounds of disability.⁴⁸ Similarly, the 1964 Employment Policy Convention (No. 122) fails to mention disability. Rather, the 1964 Convention (No. 122) limits its application to freedom of choice and equal opportunity in employment on the basis of a person’s “race, color, sex, religion, political opinion, national extraction or social origin.”⁴⁹

D. Convention on the Rights of Persons with Disabilities

The U.N. General Assembly adopted the CRPD and the Optional Protocol on December 13, 2006.⁵⁰ On the day the CPRD was opened for signatures, March 30, 2007, it received eighty-two signatories. Additionally, forty-four countries signed the Optional Protocol, and one country ratified the CPRD.⁵¹ To date, there are 142 signatories to the CPRD, including Japan, eighty-five signatories to the Optional Protocol, sixty-two ratifications, including China, and forty ratifications to the Optional Protocol.⁵² As discussed above, parties who have signed the treaty have expressed their intent to ratify the CRPD in the future, but are neither currently legally bound by the provisions of the CRPD nor required to ratify the treaty. On the other hand, ratifying parties must take an active role in implementing the treaty and are bound by its provisions.

The CRPD is the first binding international treaty that specifically addresses the rights of persons with disabilities and is the first comprehensive human rights

⁴⁵ 1958 Discrimination Convention, *supra* note 39, art. 1.

⁴⁶ *Id.* art. 5.

⁴⁷ *Id.*

⁴⁸ O'Reilly, *supra* note 2, at 13.

⁴⁹ Employment Policy Convention (No. 122) art. 1(2)(c), July 8, 1965, 569 U.N.T.S. 65.

⁵⁰ CRPD, *supra* note 13.

⁵¹ This is the highest number of signatories to a U.N. Convention on opening day. United Nations Enable. Convention and Optional Protocol Signatures and Ratifications, <http://www.un.org/disabilities/countries.asp?id=166> (last visited May 1, 2009).

⁵² *Id.*

Right to Work?

treaty of this century.⁵³ Recognizing the need for a shift in attitudes and approaches to addressing persons with disabilities, the CRPD makes a paradigm shift in the world's view of persons with disabilities.⁵⁴ Instead of treating persons with disabilities as "objects," the CRPD treats them as "subjects" with rights and capabilities, including decision-making capabilities and active participation in society.⁵⁵ The human rights model that the CRPD adopts serves to eradicate barriers erected by societies to exclude and stigmatize persons with disabilities, barriers which are often more disabling than the mental or physical disabilities themselves.⁵⁶

The CRPD directly addresses the issue of disability-related discrimination in employment in Article 27.⁵⁷ Article 27 illustrates the importance of the issue of inadequate employment opportunities for persons with disabilities and the negative effects on society when persons with disabilities are not afforded the right to enjoy equal opportunity in gaining employment and indiscriminate treatment in the workforce.⁵⁸ This Article protects the right to employment of persons with disabilities to a far greater extent than the previously existing international standards and norms.

Specifically, Article 27 of the CRPD provides that:

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a [labor] market and work environment that is open, inclusive and accessible to persons with disabilities.

States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, *inter alia*:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and [favorable] conditions of work, including equal oppor-

⁵³ International Day of Persons with Disabilities, *supra* note 1.

⁵⁴ The Biwako Millennium Framework also emphasizes this "paradigm shift" from a charity-based approach to a rights-based approach. BMF for Action, *supra* note 8.

⁵⁵ CRPD, *supra* note 13.

⁵⁶ Article 1 of the CRPD most notably recognizes this paradigm shift to a human rights model. The provision states: "The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity." *Id.* art. 1.

⁵⁷ The CRPD entered into force on May 3, 2008. *Id.*

⁵⁸ *Id.*

Right to Work?

tunities and equal remuneration for work of equal value, safe and healthy grievances;

(c) Ensure that persons with disabilities are able to exercise their [labor] and trade union rights on an equal basis with others;

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance [programs], placement services and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the [labor] market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action [programs], incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) Promote the acquisition by persons with disabilities of work experience in the open [labor] market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work [programs] for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory [labor].⁵⁹

The U.N. General Assembly distinguishes Article 27 of the CRPD from the ICESCR. Article 27 protects the rights of persons with disabilities in the employment sector under a single article, whereas the ICESCR deals with the right to work in its Article 6 and then addresses the right to favorable and just working conditions under its Article 7.⁶⁰ On the other hand, Article 27 of the CRPD requires that State parties address the issue of discrimination by prohibiting it *per se* and further includes specific obligations for State parties, requiring them to take actions to promote the enjoyment of the right to work and employment of persons with disabilities.⁶¹

⁵⁹ *Id.* art. 27.

⁶⁰ *Id.*; ICESCR, *supra* note 21, arts. 6-7.

⁶¹ CRPD, *supra* note 13, art. 27; ICESCR, *supra* note 21, arts. 6-7.

II. Domestic Legal Framework in China and Japan

A. China

China, the largest developing country in the world, has approximately eighty-three million persons with disabilities, comprising 6.3 percent of the population.⁶² Under Chinese domestic laws, the rights of persons with disabilities are protected in the Constitution, the Labor Law, and the Law on the Protection of Disabled Persons ("LPDP"). These laws and other measures taken by the Chinese government provide a legal framework for the full enjoyment of employment rights and opportunities for persons with disabilities.

China has also taken part in international legal measures to protect the rights of persons with disabilities. China is a State Party to over twenty international human rights treaties, including the CRPD. Furthermore, China took part in the Asian and Pacific Decades of Disabled Persons and the Biwako Millennium Framework.⁶³ China became a signatory to IVREC, and has ratified other ILO conventions, including the IDC.⁶⁴

Under Chinese law, a disabled person is defined as "one who suffers from abnormalities of loss of a certain organ or function, psychologically or physiologically, or in anatomical structure and has lost wholly or in part the ability to perform an activity in the way considered normal."⁶⁵ Furthermore, the term "disabled persons" specifically includes "those with visual, hearing, speech or physical disabilities, intellectual disabilities, psychiatric disabilities, multiple disabilities and/or other disabilities."⁶⁶ The definition of a person with a disability under Chinese law encompasses not only physical handicaps but mental handicaps. This definition positively impacts the rights of persons with mental illnesses who in some countries are stigmatized and excluded in society with no legal basis for overcoming barriers to the full realization of employment rights.

1. Chinese Constitution

The Constitution of China includes provisions on the right to work and guarantees the equality of all citizens in China. Specifically, Article 33 states that "all

⁶² International Day of Persons with Disabilities, *supra* note 1.

⁶³ See U.N. Econ. & Soc. Comm. For Asia and the Pacific, High-level Intergovernmental Meeting on the Midpoint Review of the Asian and Pacific Decade of Disabled Persons, 2003-2012 (Sept. 19-21, 2007), available at <http://www.worldenable.net/bmf5/finalreport.htm> (naming China as one of the attendees).

⁶⁴ See Int'l Labour Org., ILOLEX Database of International Labour Standards, Convention No. C111, <http://www.ilo.org/ilolex/english/convdisp1> [follow "C111" hyperlink; then follow "See the ratifications for this Convention"] (last visited Dec. 1, 2008).

⁶⁵ Law on the Protection of Disabled Persons (adopted at the 17th mtg. of the 7th Standing Comm. of the 7th Nat'l People's Cong. on Dec. 28, 1990, and revised at the 2d mtg. of the 11th Standing Com. Nat'l People's Cong April 24, 2008) (P.R.C.) [hereinafter Law on Protection of Disabled Persons (P.R.C.)], available at http://www.cdpf.org.cn/english/law/content/2008-04/10/content_84949.htm.

⁶⁶ *Id.*

Right to Work?

citizens of the People's Republic of China are equal before the law.”⁶⁷ The Constitution also protects the right to employment for all persons. Article 42 states that “citizens of the People's Republic of China have the right as well as the duty to work.” Article 43 further provides that “working people in the People's Republic of China have the right to rest.”⁶⁸

In relation to persons with disabilities, Article 45 of the Constitution provides that:

Citizens of the People's Republic of China have the right to material assistance from the state and society when they are old, ill or *disabled*. The state develops the social insurance, social relief and medical and health services that are required to enable citizens to enjoy this right. The state and society ensure the *livelihood of disabled members* of the armed forces, provide pensions to the families of martyrs and give preferential treatment to the families of military personnel. The state and society help make arrangements for the *work*, livelihood and education of the blind, deaf-mute and other handicapped citizens.⁶⁹

2. Labor Law - Article 12

China's Labor Law establishes equality and non-discrimination practices in the employment of individuals generally. Article 12 of the Labor Law calls for anti-discrimination measures on the basis of “nationality, race, sex, or religious beliefs.”⁷⁰ Although this Article does not address persons with disabilities specifically, it provides that “special stipulations in laws and regulations concerning the employment of the disabled” apply.⁷¹

If an employee becomes injured and disabled as a result of a work-related incident or illness, the individual is eligible to receive the full enjoyment of social insurance benefits. The Labor Law states that “workers shall enjoy social insurance treatment according to law in one of the following cases: (1) retirement; (2) falling ill or suffering job injuries; (3) disabled by job injuries or occupational diseases; or (4) unemployment.”⁷²

3. Law on the Protection of Disabled Persons

The rights of disabled persons in China are further protected by the LPDP, enacted in 1991.⁷³ In April 2008, the National People's Congress revised the

⁶⁷ XIAN FA art. 33 (1982) (P.R.C.), available at <http://english.peopledaily.com.cn/constitution/constitution.html>.

⁶⁸ *Id.* arts. 42-43.

⁶⁹ *Id.* (emphasis added).

⁷⁰ Labor Law (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) art. 12 (P.R.C.).

⁷¹ *Id.*

⁷² *Id.* art. 73.

⁷³ Law on the Protection of Disabled Persons *supra* note 65.

Right to Work?

LPDP. The purpose of this statute is to protect the rights and interests of persons with disabilities by “promoting the work on disability, ensuring the equal and full participation of persons with disabilities in social life and their share of the material and cultural wealth of society.”⁷⁴

Chapter 4 of the LPDP guarantees protections for disabled persons as related to employment.⁷⁵ Generally, the law prohibits discrimination practices against persons with disabilities “in recruitment, employment, obtainment of permanent status, promotion, determining technical or professional titles, payment, welfare, holidays and vacations, social insurance or in other aspects.”⁷⁶ The law also prohibits organizations and individuals from forcing persons with disabilities to work in conditions of “violence, threat or illegal restriction of personal freedom.”⁷⁷

The government of China supports welfare enterprises, self-employment initiatives, and a quota scheme under the LPDP. First, under Article 32 of LPDP, the establishment of welfare enterprises provides for “concentrative” employment opportunities for persons with disabilities.⁷⁸ Essentially, the government and the Chinese people will establish specific businesses, solely for the purpose of employing persons with disabilities. For example, such welfare enterprises could include “blind massage institutions.”⁷⁹ Next, the LPDP supports the self-employment of persons with disabilities. In Article 34, the LPDP “encourages and supports the efforts of persons with disabilities to find their own jobs or set up their own businesses.” Lastly, the statute establishes a quota scheme for the hiring of individuals with disabilities. Article 33 of LPDP mandates the implementation of a quota scheme to “provide jobs for persons with disabilities.” Article 33 provides that:

Government agencies, social organizations, enterprises, public institutions, and private-run non-enterprise entities shall, in accordance with the quota stipulated in relevant regulations, arrange job opportunities for persons with disabilities, and offer them appropriate work and positions. Those who cannot reach the quota as prescribed in relevant regulations shall fulfill their obligation to guarantee job opportunities for persons with disabilities in accordance with relevant state regulations. The State encourages employers to over fulfill their obligation to employ more persons with disabilities.

The concrete measures on the employment of persons with disabilities shall be formulated by the State Council.⁸⁰

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* art. 38.

⁷⁷ *Id.* art. 40.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

Right to Work?

4. *Implications of Chinese Domestic Laws on the Rights of Workers with Disabilities*

In theory, China's domestic laws serve to protect the rights of workers with disabilities. The latest statistics in 2003 reflect that 83.9 percent of persons with disabilities in China were employed, and the quota scheme reached maximum implementation across the country in 2005.⁸¹ Despite these improvements, there is still a significant population of persons with disabilities in China who are not employed in the open labor market, and the development of employment opportunities has remained limited in recent years. Furthermore, prejudice against persons with disabilities is ingrained in Chinese society, which results in continued unfair treatment in the workforce.⁸² Additionally, the laws have not adequately provided for the training of persons with disabilities, thereby resulting in a lack of competitive skills.⁸³ Although the quota scheme has been established across the country, employers still often prefer to pay the fine rather than to hire workers with disabilities, even if the government sanctions the companies under the LPDP.⁸⁴

B. Japan

Japan is a developed and thriving nation with one of the largest economies in the world. Approximately five percent of Japan's population has a disability.⁸⁵ As persons age, they are increasingly likely to develop a disability. In Japan, where the average life expectancy exceeds the age of seventy, persons spend approximately eight years (11.5 percent of their lives) living with a disability.⁸⁶ The percent of physically disabled persons employed in Japan in 2005 was sixty-six percent, with approximately fifty-eight percent employed who were intellectually disabled, and seventy-eight percent of non-disabled persons employed.⁸⁷

The rights of persons with disabilities are protected under Japanese domestic laws and policies within the Constitution, Basic Law for Persons with Disabilities (amended and renamed in 2004 as the Law for Employment Promotion of the Physically Disabled), and the Basic Programme for Persons with Disabilities. These laws and other measures taken by the Japanese government provide a legal framework for the employment rights of persons with disabilities.

Japanese law defines a disabled person as a person "whose daily life or life in society is substantially limited over the long term due to a physical disability,

⁸¹ INFO. OFFICE OF THE STATE COUNCIL, CHINA'S EMPLOYMENT SITUATION AND POLICIES (April 2004), available at <http://www.china.org.cn/e-white/20040426/index.htm>.

⁸² Zhang Qi, Employment and Social Security for the Disabled in China (2004).

⁸³ *Id.*

⁸⁴ Zou Yuchun, *How to Make Employment Security System Workable and Efficient for Disabled Persons in Urban Areas*, in STUDIES ON SOCIAL SECURITY OF DISABLED PERSONS 268-69 (2004).

⁸⁵ Approximately 7.24 million have a disability. ESCAP, *Disability at a Glance: A Profile of 28 Countries and Areas in Asia and the Pacific* at 18, U.N. Doc. ST/ESCAP/2421, U.N. Sales No. E.06II.F.24 (2006), available at http://www.unescap.org/ESID/publications/disability_at_a_glance.pdf.

⁸⁶ Editorial: *Uphold Disabled People's Rights*, JAPAN TIMES, June 22, 2008.

⁸⁷ *Id.*

Right to Work?

mental retardation, or mental disability.”⁸⁸ As such, similar to Chinese law, this definition of a person with a disability encompasses not only physical but mental handicaps, positively impacting the rights of persons with mental illnesses.

1. *Japanese Constitution*

Under Japan’s Constitution, promulgated in 1946, the fundamental human rights of every individual are protected under Article 11. Articles 13 and 14 address the respect for individuals and equality under the law.⁸⁹ Article 13 calls for the “right to life, liberty, and the pursuit of happiness” to be the “supreme consideration in legislation and in other governmental affairs” so long as it “does not interfere with the public welfare.”⁹⁰ Under Article 14, all people “are equal under the law,” therefore prohibiting “discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”⁹¹ Again, similar to Chinese law, the Japanese Constitution calls for equality under the law but does not single out disability as a basis of discrimination.

Article 25 of the Japanese Constitution states that “all people shall have the right to maintain the minimum standards of wholesome and cultured living,” and the “State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.”⁹² Lastly, Article 27 of the Constitution specifically addresses the rights and obligations to work, guaranteeing “standards for wages, hours, rest and other working conditions . . . to be fixed by law.”⁹³

2. *Law for Employment Promotion of the Physically Disabled*

As previously noted, Japan protects the rights of persons with disabilities within its society by focusing on the special considerations owed these individuals and the need for State assistance. In this respect, Japan enacted the Law for Employment Promotion of the Physically Disabled, which establishes a quota system whereby employers are required to hire a specified number of employees with disabilities or face sanctions.⁹⁴

Under this law, general employers, including the government and municipal offices, are “obligated to employ workers with disabilities in excess of the [following] quotas:”⁹⁵

Governmental bodies: 2.1%

⁸⁸ SHOUGAISHA KIHONHOU [Disabled Peoples’ Fundamental Law] art. 1(2) (1993).

⁸⁹ KENPO, arts. 13-14.

⁹⁰ *Id.* art. 13.

⁹¹ *Id.* art. 14.

⁹² *Id.* art. 25.

⁹³ *Id.* art. 27.

⁹⁴ Shintai shougaisha koyou sokushinhous [Law for Employment Promotion, etc. of the Disabled Persons], Law No. 123 of 1960.

⁹⁵ JAPANESE SOC’Y FOR REHABILITATION OF PERSONS WITH DISABILITIES, THE 38 SELECTED JAPANESE LAWS RELATED TO PERSONS WITH DISABILITIES ch. 6 (Oct. 29, 2004) [hereinafter 38 SELECTED JAPANESE LAWS].

Right to Work?

Private companies: 1.8% (Specialized juridical persons: 2.1%)

Boards of Education in prefectures: 2.0%

The quota system does not address persons with psychiatric or mental disabilities.⁹⁶ The quota system obligates employers to report annually the number of persons with disabilities they employ.⁹⁷ The employment rate of disabled persons in the private sector in 2006 was 1.52 percent, and in the public sector it reached 2.2 percent.⁹⁸ Under the quota scheme, a company must hire at least the number of disabled employees required by law. The legally required amount of employees at a given company is calculated by multiplying the total number of full-time employees by the employment quota rate.⁹⁹

3. *Implications of Japanese Domestic Laws on the Rights of Workers with Disabilities*

Japan's domestic laws, specifically the Law for Employment Promotion of the Physically Disabled, provide state assistance to disabled persons and establish a quota system to further this goal. Despite the implementation of a quota system, there is a significant gap in the number of persons with disabilities employed, demonstrating the ineffectiveness of the law. In 2003, there were approximately 3.48 million physically disabled persons in Japan and only 369,000 were employed, which was a decrease of 6.8 percent since 1998.¹⁰⁰ The number of persons with intellectual disabilities over the age of eighteen in 2005 was 410,000.¹⁰¹ In 2003, approximately 114,000 persons with intellectual disabilities were regularly employed.¹⁰² Nonetheless, there has been an increase in recent years in employment applications by persons with disabilities. In 2007, the number of persons successful in finding employment increased 3.6 percent from 2006.¹⁰³ As in China, the Japanese quota system lacks adequate enforcement and effective implementation by authorities. The goal of the quota system is to ensure that a percentage of persons with disabilities are employed in the open labor market, but the government in many cases fails to impose the sanctions for non-compliance, and, as in China, employers often prefer to pay the fine instead of hiring workers with disabilities.

⁹⁶ However, these persons who are employed and granted a Health and Welfare Identification Booklet for Persons with Mental Disabilities can be added to the number of persons employed in the respective enterprise and used when calculating the employment rate. Ministry of Health, Labour and Welfare & Japan Org. for Emp. of the Elderly and Persons with Disabilities, *Supporting the Employment of Persons with Disabilities*, at 11 (2008) [hereinafter Ministry of HLW & JEED].

⁹⁷ 38 SELECTED JAPANESE LAWS, *supra* note 95, ch. 6.

⁹⁸ Hiroshi Ueno, *Work and Employment of Persons with Disabilities in Japan* (Oct. 15, 2007), <http://www.google.com/url?sa=t&source=web&ct=res&cd=2&url=http%3A%2F%2Fwww.jicafriends.jp%2Fleaders%2Fpdf%2F2007lecture1015.pdf&ei=D5p1SoTvBM-StgfF1NGWCQ&usg=AFQjCNHdQxtShT9Yk3WlWsyRer4VADyW4Q&sig2=HC0K8BkzOOR8IB0VH3eq7A>.

⁹⁹ Ministry of HLW & JEED, *supra* note 96.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

II. Recommendations and Conclusion

Under international norms, the fundamental right to gainful employment extends to persons with a disability. Historically, this right was protected for all persons under the treaties that make up the International Bill of Human Rights. The U.N.'s recent adoption of the CRPD protects the right to employment, specifically for persons with a disability, and is the first comprehensive international treaty to highlight equal opportunity in employment, fair treatment in the workforce, and anti-discrimination policies on the basis of disability.

As State Parties to the CRPD, China is bound by the Convention and Japan has expressed its intent to comply with the standards in the Convention. The Chinese and Japanese governments have addressed the issue of employment rights for persons with disabilities in a similar manner by providing protections and quota systems, but have failed to outlaw discrimination per se or to recognize employment for persons with disabilities as a civil-rights based issue.

Although the Chinese and Japanese governments have initiated reforms under their respective legal systems to comply with the CRPD and to protect the right to work for persons with disabilities, critical issues remain regarding the implementation of these laws and the basis of the policies. For example, the integration of persons with disabilities in the economic mainstream remains a concern. Despite Japan's signing and China's ratification of the CRPD and their implementation of domestic laws requiring measures to protect the rights of persons with disabilities, the lack of adequate implementation of policies and practices results in the continued disproportionate number of unemployed, untrained, and impoverished persons with disabilities.¹⁰⁴

In making statements before the General Assembly on the CPRD, the Japanese government stated that the Convention is only a stepping stone in ensuring the full realization of the rights of persons with disabilities.¹⁰⁵ Although the Japanese delegation further expressed the government's intent to sign and ratify the Convention, the government has to date neither ratified the CRPD nor adopted a human rights approach to looking at the employment rights of persons with disabilities. Although the domestic laws of China reflect a protection of rights for persons with disabilities, evaluation and full implementation of these laws must occur. China as a communist country has an international reputation for a lack of extending and protecting human rights to its people. The rights of persons with disabilities may be no different, necessitating domestic systems to review and ensure the full implementation of the laws.

Other critical issues as outlined in the Biwako Millennium Framework Action Plan are a lack of trained and competent staff to work with persons with disabilities and capacity issues concerning the implementation, evaluation, and dissemination of effective policies and programs. Open employment for persons with disabilities should effectuate model standards in equal opportunity and advance-

¹⁰⁴ BMF for Action, *supra* note 8.

¹⁰⁵ Statement of Yasushi Takase, Permanent Mission of Japan to the United Nations, Statements Made on the Adoption of the Convention on the Rights of Persons with Disabilities, <http://www.un.org/esa/socdev/enable/convstatementgov.htm#jp> (last visited May 1, 2009).

Right to Work?

ment of persons with disabilities in government positions. China and Japan should also call for mainstream employment for workers with disabilities to allow for an inclusive and barrier-free society for these workers. In order to comply with the CRPD, legislation and policies should prohibit discrimination in “recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.”¹⁰⁶ Lastly, promotion of public awareness of the issue in both countries would limit prejudice and empower people with disabilities, leading to equal opportunity in employment and treatment in the workforce.

Implementation of these recommendations would result in full compliance with the CRPD and international standards related to the employment rights of persons with disabilities in China and Japan. Anti-discrimination laws may be the most effective way of protecting the rights of workers with disabilities in equal treatment and equal opportunity in the workforce, necessitating consideration of a civil-rights’ based approach to the right to work for disabled persons in China and Japan. Most importantly, persons with disabilities must be involved in and have a voice in the process of promulgating policies and practices to ensure that their labor rights are fully protected.

¹⁰⁶ CRPD, *supra* note 13, art. 27.