

## Student Note

### **Livelihood v. Equality: A Comparison of Visually Impaired Massage Law in Taiwan and Korea**

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#### ABSTRACT

*Taiwan and Korea enacted the massage monopoly law in order to help the visually impaired pursue jobs. The constitutional court in each country reviewed the case and reached opposite conclusion on different grounds. Whereas the Court in Korea provided a scenario of livelihood, the Court in Taiwan developed a scenario of equality. Each scenario provides reflections on the limitations of the other; neither could fully address the issues faced by the visually impaired. The visually impaired seem to have to choose between the full protection of monopoly law at the expense of other people's rights and benefits, or self-dependent without reliable social welfare. The discontent of existing legal discourses may be attributed to the absent voice of the visually impaired. This note argues that the dilemma between livelihood and equality stemming from the prevailing binary thinking between "the disabled" and "the normal." By distinguishing impairment from disability, the social model of disability indicates that people with impairment are also capable of pursuing life plan and various careers if the obstacles in social norms, environment, and structure can be removed. The Canadian decision in *Eldridge v. British Columbia* illustrates how the social model may facilitate the courts to develop more useful rationale to reconsider the situations of the visually impaired. With the discourse of substantive equality based on the social model of disability, the interest*

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*of the visually impaired and people with other physical and mental impaired can be better served without excessively infringe the rights of others.*

**Keywords:** *Equality, Affirmative Action, Disability, Masseur, Social Model*

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## I. INTRODUCTION

The visually impaired have difficulty getting jobs and making a living all around the world. Interestingly, the governments of both Taiwan and Korea enacted laws that grant exclusive permits for those with sight challenges to perform massage service. In 2008, this law was challenged in the Constitutional Court in each country. The Constitutional Court of Taiwan invalidated the law on the grounds that it excessively restricted the freedom of occupation of the non-visually impaired.<sup>1</sup> The Korean Constitutional Court, however, recognized the constitutionality of such a regulation, reaffirming the monopoly status of the visually impaired in the massage business.<sup>2</sup>

Two courts reached seemingly opposite decisions on similar laws. This legal regulation has triggered debates on affirmative action for the visually impaired. The rationales behind the discussion on these two cases are important not only because this is the first interpretation concerning affirmative action in Taiwanese constitutional history, but also because it provides the opportunity to reconsider the jurisprudence of equality from the viewpoints of people on the margin. The involvement of the “disabled”—the most ignored and disadvantaged minority in our society—provides an opportunity to reconsider the relationship between social welfare and affirmative action. While we welcome the first voice concerning the constitutionality of affirmative action from the Court, we also worry whether this voice can effectively eliminate the difficulties faced by minority groups such as the visually impaired.

In this article, we seek to reconsider how courts in Taiwan and Korea differently perceive the suffering of the visually impaired. This article also intends to rethink whether either of these different constitutional thinking and reasoning better serves the interest of the visually impaired. Specifically, this article is concerned with how we can construct better jurisprudence in response to the suffering of the disabled. The answers to these questions cannot easily be answered without examining the discourses surrounding “normal” jurisprudence.

By comparing the constitutional adjudication concerning the monopoly of visually impaired over massage service in Taiwan with that in Korea, this article analyzes underlying discourses and attempts to uncover the rationale. This article examines the different scenarios underlying the judgments, with the aim to develop a better legal approach for the well-beings of the visually

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1. See J.Y. Interpretation No. 649 (Oct. 31, 2008), available at [http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03\\_01.asp?expno=649](http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=649) (last visited Mar. 5, 2010).

2. See Visually Handicapped Massagists Case, 2006 Hun-Ma 1098, 1116-17 (Oct. 30, 2008) (S. Korea), available at <http://english.ccourt.gov.kr>.

impaired. The comparison between two cases presents a dilemma. The well-being of the visually impaired can be maintained due to the massage monopoly law. Or they can create more possibilities by themselves without the livelihood guaranteed by the law and little help from social welfare system. This article further illuminates the larger conversation about the definition of disability and demonstrates that the social model of disability can better delineate the reality. In order to develop legal framework corresponding to the social understanding of disability, this article believes the decision of Canadian Supreme Court in *Eldridge v. British Columbia* is inspiring for this dilemma.<sup>3</sup> Started with the constitutional mandate of substantive equality, the Court believes that the government is obliged to remove obstacles since the disabled is entitled to equal treatments given the unequal social structure. This perspective may free the court of Taiwan and of Korea from the dilemma of livelihood vs. equality, and develop better discourse that can eliminate the inequality faced by the visually impaired, as well as other people who are physically challenged.

Different courts in different countries use different terms to refer to people who have visual impairments. This note refers to these individuals as “the visually impaired.” For people who live on massage service, courts employ terms such as massagers, massagists, or masseurs to address them. This article refers to them as masseurs.

## II. THE PROTECTION OF VISUALLY IMPAIRED MASSEURS IN TAIWAN AND KOREA

### A. *Massage Monopoly Law in Taiwan and Korea*

According to the Council of Labor Affairs of Taiwan, among 23,253 visually impaired people, only 6,433 have a job in January, 2010.<sup>4</sup> The unemployment rate of the disabled is four times higher than that of the rest of the population.<sup>5</sup> Among those industries that are willing to provide job for the disabled, the benefits of hiring the visually impaired are the lowest. The situation of the visually impaired in Korea is no better than those in Taiwan. The employment rate of persons with visual disabilities is only 36.8 percent, less than half the employment rate of people without disabilities.<sup>6</sup>

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3. *Eldridge v. British Columbia*, 151 D.L.R. (4th) 577 (SCC) (1997).

4. The Council of Labor Affairs, The Annual Statistics of Labor Force in Taiwan, [http://www.cla.gov.tw/cgi-bin/Message/MM\\_msg\\_control?mode=viewnews&ts=4b42ee83:60d1&the me=](http://www.cla.gov.tw/cgi-bin/Message/MM_msg_control?mode=viewnews&ts=4b42ee83:60d1&the me=) (last visited Mar. 5, 2010).

5. *Id.* The unemployment rate of 2010 is 5.68 percent, while the unemployment rate of the disabled is more than 20 percent.

6. See Ik-Seop Lee & Soo-Kyung Park, *Employment Status and Predictors Among People with Visual Impairments in South Korea: Results of a National Survey*, 102 J. VISUAL IMPAIRMENT &

Society does not seem to do justice for the visually impaired who want to earn for their own living.

In order to improve the situation of the visually impaired, the governments of the two countries both granted the visually impaired monopoly status in massage service. Article 37, Section 2, of the Physically and Mentally Disabled Citizens Protection Act states that, “those who are not vision-impaired as defined by this Act shall not engage in the practice of massage business.”<sup>7</sup> The Korean Municipal Regulation on Masseurs, Article 3, Paragraph 1, Subparagraphs 1 and 2 asserts that “only the visually disabled persons qualifying as masseurs shall be admitted.”

While the visually impaired around the world participate in many other occupations, people with visual difficulties very much rely on massage service in Taiwan and Korea to support themselves. In Taiwan, according to the Council of Labor Affairs, 12.6 percent of the visually impaired possess massage licenses. In Korea, about 7000, 17 percent of the visually impaired population has massage licenses. The law allegedly helps many people with visual impairment.<sup>8</sup>

#### B. *Similar Law, Different Outcomes*

Interestingly, the massage monopoly law in both Taiwan and Korea were challenged in their constitutional court. How the Courts of both countries adjudicate the case is worthy of notice.

On April 4, 2003, two female hair stylists gave massages to their clients at a hair salon in Taiwan. The police arrested them and fined their employer forty hundred New Taiwan Dollars as a violation of the Physically and Mentally Disabled Citizens Protection Act. The charged workers and employer believed that “the law unreasonably restricts the non-visually impaired the right of work and violates the constitutional spirit of equality.”<sup>9</sup> Hence, they petitioned to the Constitutional Court.

In 2008, the Constitutional Court made Interpretation No. 649, the first case involving affirmative action in the history of Taiwanese constitutional law. Whether, and to what extent, affirmative action is constitutional and how the Court sets the boundaries between the privileges of the visually

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BLINDNESS 147, 159 (2008). *See also* MARIA KARAGIOZAKIS, REPORT OF THE 5TH LEADERSHIP TRAINING PROGRAM 17 (2009). Disabled People International, Seoul, Korea, 17-22 May 2009, <http://www.dpiap.org/reports/doc/korean-mission-may-2009.doc> (last visited Mar. 5, 2010).

7. *Supra* note 1.

8. According to JoongAng Daily, a 50-year-old blind masseur said that, “I’ve worked for 31 years, and I think I probably could not have come this far if there was no such arrangement.” Myo-ja Ser, *Blind Masseurs Fighting for Their Jobs*, JOONGANG DAILY, <http://joongangdaily.joins.com/article/view.asp?aid=2894645> (last visited Mar. 5, 2010).

9. *Supra* note 1.

impaired and the occupational freedom of other people are all highly controversial issues.

While the Justices in Taiwan pondered the hair salon case, similar regulations were twice challenged in Korean Constitutional Court. The complainants in 2003Hun-Ma715 received the relevant education in sports massage, but they could never receive the official qualification of a sports massage therapist due to the national act.<sup>10</sup> They filed constitutional complaint and argued that this regulation infringed their fundamental rights, including the right to choose occupation.

With a vote of 7 to 1, the Constitutional Court of Korea invalidated the provisions of the Municipal Regulation on Masseurs for two reasons.<sup>11</sup> First, the Court pointed out that, since the regulation limited the work that the non-visually impaired chose, it must be in the form of a law, not an executive order. The Court believed the regulation violated the principle of statutory reservation, since it was unclear in its standard and the scope of its delegation.<sup>12</sup> Second, the Court contended that the regulation was unconstitutional because it excluded non-visually disabled persons. The Court recognized the legitimacy of the purpose of the regulation, but indicated that the regulation violated the rule of the least restrictive means and the rule against excessive restriction in infringement of fundamental rights, since it completely prevented the entire population from entering a specific area of occupation.<sup>13</sup>

Perhaps unexpectedly, this adjudication triggered a nationwide protest of the visually impaired masseurs. They paraded on the street, claiming that the adjudication deprived them of the security of their jobs and the protection of their lives. It was reported that three visually impaired masseurs even committed suicide to express their anger and frustration.<sup>14</sup> The public pressure forced the National Assembly to revise the Medical Service Act on September 27, 2006, and reinstated the restriction upon the non-visually impaired in attaining massage qualification.

On similar grounds, the law was challenged a second time.<sup>15</sup> Without the excuse of the principle of statutory reservation,<sup>16</sup> the Korean

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10. The decision on Visually disabled persons' monopoly as massagers, 2003 Hun-Ma 715 and 2006 Hun-Ma 368 (consolidated) (May 25, 2006) (S. Korea).

11. *Id.*

12. *Id.*

13. *Id.*

14. Sang-Hun Choe, *For South Korea's Blind, Livelihood is challenged*, N.Y. TIMES, Sept. 17, 2008, <http://www.nytimes.com/2008/09/18/world/asia/18massage.html> (last visited Mar. 3, 2010).

15. *Supra* note 2.

16. The principle of statutory reservation is regarded as a basic principle of the constitution. The Constitutional Court of South Korea states that, "one of the basic principles of the Constitution is the rule of law. The rule of law centers around the principle of *statutory reservation*. . . . The principle requires that all essential issues having fundamental significance to people, and especially those

Constitutional Court could not circumvent the thorny issue of affirmative action and the balance of interests this time.

The Physically and Mentally Disabled Citizens Protection Act in Taiwan and the Medical Service Act in Korea (hereafter, Massage Monopoly Law), both protect the monopoly status of the visually impaired by excluding others from entering massage service. Given this similar context, how did the two Courts come to two different decisions? Most notably, the ways in which they developed the arguments are worthy of further inquiry.

### C. *The Judgment and Reasoning in Two Cases*

#### 1. *Interpretation No. 649 of Taiwan Constitutional Court*

Promoting the equality of minorities and their right to work is a common practice among democracies. Article 15 of the Constitution of the Republic of China (hereinafter “Taiwan Constitution”) enacts the right to work. Article 152 and the second paragraph of Article 155 also express the spirit of promoting job opportunity and social welfare.<sup>17</sup> Furthermore, the 10th Amendment of Taiwan Constitution declares the fundamental policy of the protection of disabled. It prescribes that, “the State shall guarantee insurance, medical care, obstacle-free environments, education and training, vocational guidance, and support and assistance in everyday life for physically and mentally impaired persons, and shall also assist them to attain independence and to develop.” These provisions have clearly demonstrated the principle for assisting the disadvantaged.

The first paragraph of Article 37, Paragraph 1 of The Physically and Mentally Disabled Citizens Protection Act, as amended and promulgated on November 21, 2001, is an effort to realize these constitutional goals. It states that “those who are not vision-impaired as defined by this Act shall not engage in the practice of massage business.”<sup>18</sup>

Under the aforementioned laws, the Constitutional Court of Taiwan made Interpretation No. 649, declaring Article 37 unconstitutional. Interpretation No. 649 started with the principle of equality, confirming the constitutionality of affirmative action. However, the Court also declared that

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concerning the realization of their basic rights, be decided by the legislature itself (parliamentary reservation).” See Television Broadcast Receipt Fee Case, 98 Hun-Ba 70 (May 27, 1999) (S. Korea), available at [http://www.ccourt.go.kr/home/english/decisions/mgr\\_decision\\_view.jsp?seq=258&code=4&pg=7&sch\\_code=&sch\\_sel=&sch\\_txt=&nScale=15](http://www.ccourt.go.kr/home/english/decisions/mgr_decision_view.jsp?seq=258&code=4&pg=7&sch_code=&sch_sel=&sch_txt=&nScale=15).

17. The art. 152 of Taiwan Constitution prescribes that, “the State shall provide suitable opportunities for work to people who are able to work.” The second paragraph of the art. 155 states the principle of promoting welfare for people who are unable to work. It states that, “To the aged and the infirm who are unable to earn a living, and to victims of unusual calamities, the State shall give appropriate assistance and relief.”

18. The Physically and Mentally Disabled Citizens Protection Act, art. 37 (Taiwan).



the principle of proportionality should be considered to enforce affirmative action and suggested the relevant provisions invade the freedom of occupation of non-visually impaired.<sup>19</sup>

The Court first interpreted the relevant provisions as an affirmative action to protect the right to work for vision-impaired individuals. The Court believed vision impairment has formed a variety of serious obstacles and resulted in their substantial inequalities. Thus, affirmative action based on physical difference is legitimate to fulfill the goal of assisting the disadvantaged.

The question is whether the principle of affirmative action—granting the visually impaired the exclusive access to massage business—constitutional. The court suggested that the policy be beneficial for the visually impaired since they have limited job opportunities. However, the court denied any essential connection between massage service and the visually impaired and believed the occupation reservation is not a proper means to accomplish the goal of protecting the visually impaired. Further, this regulation even exercised negative effects. The Court states that, “after nearly thirty years of the statute’s promulgation and in light of the multiple availabilities of various occupations, the social-economic condition of the vision-impaired has yet to see any significant improvement.”<sup>20</sup>

Although the measure is declared unconstitutional, the Court did not prohibit other forms of affirmative action. It requires the governing authority to “adopt multiple, concrete measures to provide training and guidance for occupations deemed suitable for the vision-impaired, retain appropriate employment opportunities.”<sup>21</sup>

## 2. *Visually Impaired Masseurs Case in Korean Constitutional Court*

The revised Article 61, Section 1 of the Medical Service Act excludes the non-visually impaired from massage service by allowing accreditation only for the visually impaired. If we follow the majority opinion of the Visually Disabled People’s Monopoly as Massagers, the provisions would violate the rule of least restrictive means and the rule against excessive restriction and unconstitutional because the new law continued the standard that excludes the non-visually disabled persons.<sup>22</sup> However, the Constitutional Court of Korea claimed the provisions constitutional in the

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19. The Principle of proportionality prescribes that all statutes that affects constitutional rights should be proportionate. The analysis of proportionality is made up of three sub-principles: adequacy, necessity, and proportionality *stricto sensu*. See Margherita Poto, *The Principle of Proportionality in Comparative Perspective*, 8 GERMAN L.J. 835, 836 (2007).

20. *Id.*

21. *Id.*

22. *Supra* note 10.

judgment of the visually impaired Masseurs Case, 2006 Hun-Ma1098, 1116, 1117.<sup>23</sup>

The court first adjusted its criteria of review. Instead of merely adhering to the principle of the least restrictive means and balance of interests, the Court considered some other elements, including the degree of restriction on people's basic rights. They also rethink characteristics of the basic rights of the visually impaired, and the status of welfare policies, including the institution of massage as the occupation for the visually impaired.

The Court then suggests that the law be legitimate because it fulfills the right of living prescribed in the Paragraph 1 and Paragraph 5, Article 34 of the Korean Constitution.<sup>24</sup> The Court further states that the law is adequate and follows the least restrictive means. The Court believes that the massage service barely requires spatial movement and mobility compared to other types of employment, and thus becomes almost the sole occupation available for the visually impaired. Moreover, the court-defined public interest of the provisions is to the right to livelihood of the visually impaired. In comparison with the infringement of "private interest," such as freedom of occupation, the protected public interest outweighs private interest.<sup>25</sup>

What is controversial is whether allowing monopoly in a particular business is about the application of the least restrictive means. As the Court had put it in the previous decision, the standard of exclusiveness deprives the right of non-visually impaired in choosing their occupation, which cannot be the least restrictive means.<sup>26</sup> Regarding this, the Court responded that the infringement is a mere policy measure that we must accept, "given our social reality where it is hard to find efficient policy means to guarantee the right to livelihood of the visually challenged, and it would be impossible to maintain the current status even when the socioeconomic conditions become advanced."<sup>27</sup>

Furthermore, the Court asked the government "to perform a more serious and active review of a plan to resolve the tension between the conflicting basic rights, that is the right to livelihood of the visually impaired and the freedom of occupational choice of the non-visually impaired, and to enable harmonious coexistence thereof."<sup>28</sup> In other words, the Court

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23. *Supra* note 2.

24. *Id.* Para. 1 of the art. 34 of the Korean Constitution prescribes, "All citizens are entitled to a life worthy of human beings." Paragraph 5 of the same article further emphasizes the protection of the disabled. Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age, or other reasons are protected by the State under the conditions as prescribed by law." The Court stated the law "rewarding lives and realization of the right to humane living conditions for the visually impaired."

25. *Supra* note 2.

26. *Supra* note 10.

27. *Supra* note 2.

28. *Id.*

believes that the livelihood of the visually impaired is in danger and the monopoly law is the proper and least restrictive measure we can take.

The argument of the judges was framed as the tension between the right of survival and the freedom of occupation. However, the Court ignore the dimension of principle of equality. The Court defined the policy as a “preferential measures” for the visually impaired, who “have been discriminated against over the years in terms of education, employment, and many others, to realize substantial equality, etc.”<sup>29</sup> Nevertheless, the Court articulates their argument primarily on the rationale of livelihood.

### III. A COMPARISON ON TWO CASES

#### A. *The Differences Between the Two Adjudications*

The Courts of Taiwan and the Courts of Korea reached completely different conclusions to the constitutionality of the Massage Monopoly Law, based on different arguments. The Court of Taiwan removed the monopoly status of the visually impaired because the law greatly restricted the freedom of occupation of others, while the Court of Korea maintained the policy since it is the “cannot but be accepted” means to protect the right of living for the visually impaired.<sup>30</sup>

These distinctive judgments triggered different social reactions. The Union of Masseurs of Taiwan paraded after the announcement of Interpretation No. 649, protesting that, the Justice deprives them of the means to survive. The chairwoman of the Union stated, “there is reason why more than seventy percent of the visually impaired choose massage to be their jobs.”<sup>31</sup> She further criticized that Justices wrongly expected the visually impaired to development other ways of living. “The non-visually impaired can choose any jobs, why they grab ours? If we could do other jobs, surely we would. But this unrealistic expectation should be imposed on the non-visually impaired, not us.”<sup>32</sup> In the meantime, the decision of Korean Court frustrated non-visually impaired masseurs. “It is sad to be thinking what I am doing everyday is a crime,” one said.<sup>33</sup> Allegedly there are hundred thousands illegal masseurs who have no visual impairment in South Korea. They are usually fined if got caught, with the fines ranging from \$450 to \$4,500, although the law calls for up to three years in prison.<sup>34</sup>

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29. *Id.*

30. *Id.*

31. Zhou-Yi Chan, Dafaguan Dapo Fabwan Shizhangzhe Jiang Youxing Qiu Shengcun, Nov. 19, 2008, [http://www.lhpao.com/news/in\\_p1.php?art\\_id=26067](http://www.lhpao.com/news/in_p1.php?art_id=26067) (last visited Mar. 5, 2010).

32. *Id.*

33. *Supra* note 10.

34. *Supra* note 14. According the New York Times, tens of thousands of so-called sports massage

In response to this social sentiment and resentment, is it the Court of Taiwan that should grant more protection for the visually impaired? Or should the Court of Korea reconsider its decision? Is there one argument better than the other?

1. *The Problem of Living or Inequality*

Interpretation No. 649 defined the monopoly law as the case of affirmative action for protecting the right to work for the visually impaired. The Taiwanese Court believes that, because affirmative action has a profound impact on the majority of population who are not vision-impaired, it shall not violate the principle of proportionality as well as the principle of equality. In an opinion contrary to that of the Taiwan Court, the Court of Korea does not carefully address the issue of affirmative action and equality. While defining the policy as “preferential measure” and confirms its contribution to substantial equality, the Court reviewed the provisions primarily on the basis of the right of living. The use of two distinctive approaches mirrors different understanding of the purpose of law. Further, it represents the predicament of the visually impaired. The Court of Taiwan especially emphasized the provision as an affirmative action to remedy the structural inequality. They believe that the visually impaired have limited occupation options due to many obstacles they consistently encountered. The court thus attempts to make efforts to the problem of unequal status.

The Court of Korea also noticed the unequal structure faced by the visually impaired and stated that they are “minority who have been discriminated against over the years in terms of education, employment, and many others, to realize substantial equality, etc.”<sup>35</sup> However, for Korean court, the problem is more than inequality. Without the monopoly status in massage service, the visually impaired would have difficulty earning their own living. It is because of the endangerment of livelihood, the Court seemed to loosen the standard of review, which can be clearly seen when comparing to the court’s previous judgment.<sup>36</sup> Simply put, for the Court of Taiwan, the predicament of the visually impaired is due to the unequal structure. At the same time, it is the livelihood of the visually impaired that the Korean Court take into consideration.

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centers, skin-care salons, barber shops, hotels and public bath houses employ sighted, but illegal, massage workers. Estimates of their number range from 150,000 to 700,000.

35. *Supra* note 2.

36. *Id.*

## 2. *Massage Monopoly or Social Welfare*

Due to the different understanding of the predicament of the visually impaired and the purpose of law, the two Courts value different dimensions of the massage monopoly law and means of welfare.

To eliminate the unequal status of the visually impaired, Taiwanese Court expects more on social welfare rather than the massage monopoly law. The massage monopoly provisions are unconstitutional not only because they infringe upon the freedom of occupation of non-visually impaired, but also because it does not seem able to solve the problem of inequality. Also, it might even constrain the development of the visually impaired.

For the Court, the nature of massage and the required skills are not limited to vision-impaired only. The massage business is merely an occupation the visually impaired traditionally depend upon.<sup>37</sup> Moreover, the Massage Monopoly Law has a reverse effect (on what?). It reinforces the stereotype that the talent of the vision-impaired can only be in the occupation of massage. The visually impaired tend to rely on massage as their only career, when the knowledge and capability of many visually impaired individuals likely goes far beyond this.<sup>38</sup> When the selectable occupation categories increase, the authorities also hide behind the excuse of massage monopoly and ignore other possibilities to eliminate the obstacles to work for them. Nearly thirty years after the statute's promulgation, the Court pointed out, "*the social-economic condition of vision-impaired has yet to see any significant improvement.*"<sup>39</sup>

While the Court takes seriously the improvement of the employment opportunities for the vision-impaired, the Court seems place much more emphasis on social welfare. It requires the authority to adopt multiple, concrete measures to provide training, education, and guidance for occupations deemed suitable for the vision-impaired instead.<sup>40</sup>

For the Korean Court, however, the masseur is "almost the only occupation available for the visually impaired."<sup>41</sup> There are no ample alternatives for the visually impaired to maintain their livelihood when the non-visually impaired are also authorized to engage in the massage business. Moreover, the Korea Court has little confidence in other means of social welfare. In reality, the Korean social welfare system does not offer many efficient policy means to guarantee the right to livelihood of the visually challenged. According to them, "*it would be impossible to maintain the*

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37. *Supra* note 1.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

*current status even when the socioeconomic conditions become advanced.*”<sup>42</sup>

### 3. *The Relation Between the Visually Impaired and Others*

Both courts reviewed the case on a dichotomy of the visually impaired and non-visually impaired. Both courts also defined the massage monopoly law as affirmative action. The question is, when the affirmative action for the visually impaired excessively restrict the right of others, how would court take a side?

The Court of Taiwan treated the Massage Monopoly Law as affirmative action and believed that principle of equal protection requires treating all citizens equally. The Court reviewed the disputed provision on a dichotomy of the visually impaired and others, emphasizing that the benefit of the former cannot result in excessive restriction of rights of the latter. The disadvantage of a minority may provide a legitimate reason for affirmative action, but does not necessarily adjust standard of review to a less strict one. Affirmative action, according to the Court, shall not be excessively restrictive to the rights of those who are not vision-impaired.

The Korean decision also understood based on the degree of restriction on non-visually impaired. The Court chose to protect the livelihood of the visually impaired, sacrificing the freedom of others in the massage business. The extent to which the visually impaired depend on massage business led the Court to review the case with a less strict standard. Furthermore, even when the least restrictive measure of sustaining the livelihood of the visually impaired significantly infringed upon the rights of others, “we cannot but accept.”<sup>43</sup>

#### B. *The Scenario of Livelihood and of Equality*

Different understandings of two courts on three aspects presented two different scenarios. The Court of Taiwan envisions a scenario of equality, in which the visually impaired encounter structural inequality and requires other social welfare rather than the massage monopoly law to reduce the suffering of visually impaired. When the affirmative action infringes the rights of others and results in an irresolvable conflict, the affirmative action is not allowed. On the contrary, the Korean decision presented a picture of livelihood, in which the visually impaired are struggling for living. Without the protection of massage monopoly law, their lives will be in danger. Even if the monopoly law restricts the right of others in an un-proportional way,

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42. *Id.*

43. *Supra* note 2.

we have to accept.

Following chart shows the difference between the two scenarios presented by the Interpretation No. 649 of Taiwan and the Korean decision of 2006 Hun-Ma 1098, 1116, 1117.

	Scenario of Equality	Scenario of Livelihood
Landmark Case	Taiwan, Interpretation No. 649	Korea, 2006 Hun-Ma 1098, 1116, 1117
The Predicament of the Visually Impaired	Structural inequality	Problem of living
The Effectiveness of Massage Monopoly Law	Ineffective and negative	The only available and effective measure
When Affirmative Action for the Visually Impaired Excessively Restrict the Right of Others	Unconstitutional	Constitutional (cannot but accept)

Form: Author.

The two cases provide two different scenarios and initiate the discussion about the law of equality and of the disabled. The question is, with the need of the visually impaired in mind, which decision is more appealing? Unfortunately, none of them pictures seems quite satisfactory.

### C. *The Distortion of the Livelihood Scenario*

#### 1. *Overstating the Problem of Livelihood*

The picture of livelihood provided by the Korean court may relieve the insecure feelings of the visually impaired. Yet it might incorrectly exaggerate the problems of the visually impaired as well as the right to living. In both countries, although many visually impaired live on massage wages, many do not. In Korea, as the dissenting opinion pointed out, only 6,000 to 7,000, or some 17 percent of those with severe visual disabilities, are registered as masseurs.<sup>44</sup> In Taiwan, only 12.6 percent to 18 percent are conducting massage services.<sup>45</sup> Except of being masseurs, the visually impaired live on other jobs such as telephone operators in call centers.<sup>46</sup> In other words, most

44. *Id.* (dissenting opinion of three Justices). The English translation is available at [http://www.ccourt.go.kr/home/english/decisions/rcnt\\_decision\\_view.jsp?seq=469&pg=2&sch\\_sel=&sch\\_txt=&nScale=15&sch\\_code=9&actype=](http://www.ccourt.go.kr/home/english/decisions/rcnt_decision_view.jsp?seq=469&pg=2&sch_sel=&sch_txt=&nScale=15&sch_code=9&actype=).

45. *Supra* note 4. The statistics of the Council of Labor Affairs.

46. *See* Lee & Park, *supra* note 6, at 147-59.

visually impaired people do not live on the monopoly in massage service. Whether solely providing others the opportunity to engage in the massage business infringes the livelihood of that 17 percent is also questionable.

### 2. *Mis-interpreting the Right of Living*

The typical meanings of “the right of living” can be analyzed on two levels. First, it refers to maintain the lives of individuals. If an individual is unable to sustain life on his or her own, the Constitution mandates the intervention of the state. Furthermore, people have the right to have a life of quality.<sup>47</sup> In the common judicial practice, the exercise of the right to live is rare, limiting to the minimal standard of living.<sup>48</sup> Along this line of reasoning, unless the visually impaired has no way to sustain their lives, their right of living is not infringed. According to the dissenting opinion of the Korean case, removing the monopoly of the visually impaired over qualification for masseurs does not make their business activities impossible.

Moreover, to fulfill the right of living does not usually require the extreme measure of occupational monopoly. There are many means to provide the visually impaired with opportunities to guarantee their living and occupational activities. Even without a job, the government can maintain their lives through pensions, funds, healthcare, and other social service. In this sense, the massage monopoly law contributes little to those who do not live off massage.

The language of right of living thus becomes a double-edged sword. When we narrowly explain it, the standard becomes convenient for the government to hide behind the monopoly law and make less efforts for the welfare of the visually impaired. But if we extend it, the full realization of the right may overwhelm the government, resulting in a useless rhetoric. The overuse of right of living may also raise the concern over the separation of powers since the decisions of resource distribution always require the discretion of the legislative and the executive. How far the right of living can be extended is also another question.

### 3. *Isolating and Underestimating the Visually Impaired*

The most important problem in the scenario of livelihood is the position

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47. See Luke Clement & Janet Read, *Introduction: Life, Disability and the Pursuit of Human Right*, in *DISABLED PEOPLE AND THE RIGHT TO LIFE* 16 (Luke Clement & Janet Read eds., 2008) (exploring how disabled people’s right to life is understood in different national contexts and the ways in which they are—or are not—afforded protection under the law, emphasizing the social, cultural and historical forces and circumstances which have promoted disabled people’s right to life or legitimated its violation).

48. *Id.*



of the visually impaired and their relationship with others. In the scenario of livelihood, the boundary between the visually impaired and the normal is a clear cut. While liberal constitutionalism assumes that the rational individual is capable of choosing a career and pursuing the goals, the livelihood scenario presents the visually impaired as a tragic part of liberal society. For the Court of Korea, the visually impaired are incapable of earning their living, and become an insular group in need of extreme protection. The scenario of livelihood, though guarantee of the monopoly status of the visually impaired, might run the risk of reinforcing the existing prejudice and discrimination against them. The visually impaired are continually regarded as incapable and unproductive, the tragic side of liberal constitutionalism. Through daily interaction with others, they tend to perceive their own situation negatively through their interaction with others. Eventually, they either live on massage or become the disabled who are always in need of others and incapable of participating in productive public life.<sup>49</sup> The disadvantage and discrimination against them are unlikely to be eliminated even when socioeconomic conditions are improved.<sup>50</sup>

#### D. *The Discontent of the Equality Scenario*

The picture of inequality developed by the Constitutional Court of Taiwan seems to be plausible, but it is still incomplete and unrealistic.

##### 1. *The Capability and Possibility of the Visually Impaired*

The scenario of equality correctly delineates the problem of the visually

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49. Sociologist Erving Goffman has developed a theory of Stigma to explain the consequence of social interaction between the stigmatized people and the normal. Stigma has been described as a dynamic process of devaluation that “significantly discredits” an individual in the eyes of others. At a conscious level, stigmatized people are discounted and discredited—reduced in the mind of others from being whole. When a person carries a severe social disapproval characteristics or beliefs, the society labels him and usually redefine the rule of interaction between him and other social members. Prior studies suggest that self arises through the process of interaction with others as the individual becomes an object to himself and takes the attitude of others toward himself. People with disabilities are easily to be stigmatized. When the visually impaired learned the social meaning of the impairment, they are likely to receive negative affective responses from others. Moreover, this acceptance of a negative designation, and subsequently a “spoiled identity,” often result self-deprecation and shame. See ERVING GOFFMAN, *STIGMA: NOTE ON THE MANAGEMENT OF A SPOILED IDENTITY* 30-46 (1963) (discussing the impact of stigma on human relationship). See also Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA L. REV. 397, 436-38 (2000) (arguing that stigma of disability cause subordination).

50. See Theodore P. Seto & Sande Buhai, *Tax and Disability: Ability to Pay and the Taxation of Difference*, 154 U. PA. L. REV. 1053, 1059-62 (2006) (arguing that disability benefits in the social security system is based on the “medical/charity paradigm”). See also MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 110-14 (discussing the social exclusion because of differences).

impaired and their connection with the massage business. Although the visually impaired in both Taiwan and Korea face many obstacles in pursuing their careers, the majority of them make their living through ways other than massage. Other countries further prove that the visually impaired can engage in various occupations of high social participation and economic rewards.<sup>51</sup> In the United States and Canada, the employment rate is much higher even without the protection of Massage Monopoly Law. In a 2009 survey, the unemployment rate of the disabled is 13.2 percent, only 5 percent higher than the non-disabled. In Canada and the United Kingdom, almost half of the disabled have a job, including the visually impaired.<sup>52</sup>

The significant association between massage and the visually impaired in Taiwan and Korea does not result from the nature of massage service or the physical limitation of the visually impaired. The high tendency for the visually impaired on the massage business is rather a consequence of historical coincidence. Japan colonized both Taiwan and Korea before World War Two. In order to increase the productivity of the visually impaired, the Japanese colonial government educated them with the technique of massage as a way of living.<sup>53</sup> Since the Japanese colony, the government of Taiwan has passed law to continue the policy of restricting non-visually impaired in providing massage service with an eye on the welfare of the visually impaired. This regulation persisted in Korea in the process of decolonization. The Korean law goes back to 1912 when Korea was under Japanese colonial rule. The US military government abolished the protection in 1946 but it was reinstated in 1963.<sup>54</sup> The legacy of Japanese colony makes the massage service a protective business for visually impaired in Taiwan and Korea.

As Interpretation No. 649 correctly pointed out, the massage business is only one occupation the visually impaired traditionally depend on. There is no inherent connection between the nature of massage and the

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51. The employment data of the disabled and visually impaired of United States, United Kingdom and Canada, <http://collections.banq.qc.ca/ark:/52327/bs47133>; [http://www.officefordisability.gov.uk/docs/res/factsheets/Factsheet\\_Employment.pdf](http://www.officefordisability.gov.uk/docs/res/factsheets/Factsheet_Employment.pdf); <http://www.bls.gov/cps/cpsdisability.htm> (last visited May 22, 2009).

52. The employment statistics, <http://collections.banq.qc.ca/ark:/52327/bs47133> (last visited Mar. 5, 2010).

53. In Taiwan, education for the visually impaired began in 1890s. Priest Rev. William Campbell established the first school for visually impaired, teaching them reading, calculating and making cloth. Japanese colonial government took over the school and taught visually impaired the skill of massage only. Although Priest Campbell claimed that the visually impaired need to learn more than massage in order to sustain their living, his suggestion was not accepted by the colonial government. In Korea, Japanese colonialists in 1913 introduced the idea of reserving the role of masseurs solely for the blind. The prohibition against people with healthy sight was abolished in 1946 by the United States military government but was later reinstated in 1963. WILLIAM CAMPBELL, FUERMOSA SUMIAO—CAMPBELL MUSHI TAIWAN BIJI 224 (2006). See also Choe, *supra* note 14.

54. BBC, *Blind S. Korea Masseurs Win Case*, Oct. 30 2008, <http://news.bbc.co.uk/2/hi/7699114.stm> (last visited Mar. 5, 2010).

vision-impaired. The Court correctly exhibited the capability and mobility of the visually impaired and stated that, “*with the knowledge and capability of vision-impaired enhanced gradually, and the selectable occupation categories increased by the day, the statutory provision in question tends to make the governing authority overlook the fact that the talents of vision-impaired are not limited to massage business alone.*”<sup>55</sup> As other citizens, visually impaired individuals have the potential to engage in various careers and fulfill themselves. This scenario removes the convenient guarantee of massage monopoly, but creates more possibility for the elimination of inequality and discrimination in the future.

## 2. *A Promise of No Use?*

Although noticing the structural difficulties of the visually impaired, the decision of Taiwan Court invited serious critiques. The visually impaired believe that the court underestimated the difficult living circumstances in which they consistently face in daily life and unrealistically expect them to develop different career trajectory. In response to the attacks, the court provided a remote and unreal instruction of “*adopting multiple, concrete measures to provide training and guidance for occupations deemed suitable for the vision-impaired, retain appropriate employment opportunities.*”<sup>56</sup>

In this scenario, the welfare of the visually impaired depends on whether legislative and the executive can develop effective policy and measures. However, as the Korean Court has indicated, the existing social policy is usually ineffective.<sup>57</sup> When the visually impaired person still feels frustrated after many years of ineffective policies, the instruction of the Court merely provides lip services. The effectiveness of social policy is questionable. The scenario provided by the Taiwan court seems to underestimate the constraints in the lives of the visually impaired, and presume unrealistic expectation towards social service and other welfare system.

Moreover, the scenario of equality fails to empower the visually impaired to improve their situation. Expect expecting and waiting, other legal claim may be fetal since the Constitutional does not enact positive right for them to exercise. Although the Court of Taiwan emphasizes the aspect of substantive equality, we do not know yet how this principle might be translated to exercisable legal claim. The scenario provided by the Court of

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55. *Supra* note 1.

56. *Id.*

57. *Supra* note 2. For example, the Korean Constitutional Court correctly pointed out the ineffectiveness of social policy. It stated that, “given our social reality where it is hard to find efficient policy means to guarantee the right to livelihood of the visually challenged, and it would be impossible to maintain the current status even when the socioeconomic conditions become advanced.”

Taiwan can not only be wrong, but also might be useless.

The scenario may get rid of the prejudice of inability and stopped seeing the visually impaired as insular. However, it failed to provide helpful tools to improve the inequality of them. The grand scenarios thus become a slow remedy that cannot meet urgent needs.

The two decisions of two courts reveal two scenarios. Each one reflects the limitations of the other. The scenario of livelihood of the Korean Court meets the urgent need of some visually impaired individuals, but likely limits the possibility of the visually impaired based on partial understanding of the situation they are facing. The scenario of equality provided by the Taiwanese Court, although recognizes the capability of the visually impaired, fails to facilitate the process through which they can eliminate these difficulties. Further, while the Taiwanese courts correctly delineate the problem and project the picture of a more equal future, they might not necessarily provide the right solution to the problems because of their limited underestimating the everyday life of the visually impaired.

For the visually disabled, the two scenarios create a dilemma. They either resolve immediate need by giving up future dreams of equality, or expect a better future in everyday suffering. The two scenarios seem to be disappointing. Is there a better solution? How can we imagine a jurisprudence to better promote the status of the visually disabled?

#### IV. RECONSTRUCTING AFFIRMATIVE ACTION FOR THE VISUALLY IMPAIRED

In the struggle between livelihood and equality, the visually impaired find they are in a dilemma. Neither choice can represent the living reality of the visually impaired and enable them to pursue a better future. Furthermore, they may find their voice is missing in the debate. The missing voice of them perhaps is exactly the needed perspective that can fix discontenting legal discourses. Different life experiences of the non-visually impaired demonstrate their perspectives on the world, and help us understand what we see and what we fail to see. Through the perspective of the visually impaired, we may find the limits of the normal and develop a better discourse.

Although scholars seldom address the issue of visual impairment, the studies of disability shed some lights. We might better discover the real problem and further develop better legal discourse to eliminate existing inequality with a better understanding of the “disability.”

##### A. *Traditional Understanding of Disability*

As Jesus passed by he saw a man blind from birth. His disciples

asked him, “Rabbi, who sinned, this man or his parents, that he was born blind?”<sup>58</sup>

The well-known story in the Bible describes how the visually impaired were perceived. Visual impairments are usually understood as a punishment. People with visual or other kinds of physical impairments are usually regarded as personal tragedy, a punishment from the God.

With the development of modern medical science, physical impairment, including visual ones, is regarded as a flaw of body. The flaw further defines visually impaired individuals as imperfect bodies who lack meaningful social functions and thus cannot perform some social roles. Barnes and Mercer, professors of Disability Studies, contend that the “disabled” would only perceive as dysfunctional from the perspective of the people with “normal” body.<sup>59</sup> The society tends to believe that people with disability are dependent on the normal, especially their family or the social welfare. As a result, disability is understood as a personal tragedy that also creates a burden for the normal and the whole society.<sup>60</sup> As a result, people with disability are separated from the world of the normal. They are seen as a different group of people who do not share the ability and possibility to live out life plan as the normal. The visually impaired, as a part of the disabled, thus become insular.

The fundamental problem of the two scenarios may be deeply rooted in this dichotomy between the disabled and the normal. Following this reasoning, people with impairment are either the normal who can independently earn their life, or the disabled who depend on others. The scenario of livelihood failed to envision a long-term solution because it treated the visually impaired as the disabled, incapable of developing useful skills and earn a living independently. The scenario of equality, although notices the unequal social structure, is trapped in the dichotomy between the visually impaired and others. So that the protection of the former cannot overly restrict the right of later, so that instead of treating them as dependent persons, the Court can only expect the visually impaired to pursue life plan with ineffective social policy.

Neither side of the dichotomy correctly portrays the reality.

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58. THE BIBLE, John 9:1-2, available at <http://www.usccb.org/nab/bible/john/john9.htm>.

59. Drawing on a burgeoning “disability studies” literature from around the world, and from a range of disciplinary perspectives, Barnes and Mercer argue that the concept of disability is evolving. It reflects the social construction. See COLIN BARNES & GEOFF MERCER, *DISABILITY 1* (2008).

60. *Id.* at 2-3.

### B. *The Social Model of Disability*

The recent discourse of disability may provide a way out of this dilemma. Hunt, a disabled writer, challenged the conventional wisdom of the dichotomy between the normal and the disabled. He believes that the problem of the disabled is not how functional impairment affects individuals, but their relationship with the normal.<sup>61</sup> The interest and social life is insular from the world of the normal, because they challenge some shared value of the society: unfortunate, useless, different, suppressed, and ill.<sup>62</sup> People with impairments are unfortunate because they have limited access to various social and material benefits, such as marriage and other social interactions. They are useless, since they cannot conduct mainstream economic activities. They are different, because they are not the normal. They thus become the fear of the normal world since they are defined as loss, suffered, and ill.<sup>63</sup> In other words, the disabled experience a process of exclusion through structural inequality, especially in comparison with the life experiences of the “normal.”<sup>64</sup>

The distinction between personal impairment and disability was further developed as the social model of disability. It defines “disability” as “disadvantage caused by the confluence of (1) personal impairment and (2) a social setting comprising architecture, economics, politics, culture, social norms, aesthetic values, and assumptions about ability.”<sup>65</sup> In other words, people with physical impairment suffer disadvantages from two sources. They have functional impairment derives from physical traits, but also suffer oppressions caused by social norms, environmental choices, and social structure.<sup>66</sup> Within this social model, people with impairments are not necessarily seen or defined as the disabled.

The social model of disability has been gradually accepted by the disabled and academics. The Union of the Physically Impaired against Segregation condemned society itself, saying: “*in our view, it is the society which disables the physically impaired people. Disability is something imposed on the top of our impairment, by the way we are unnecessarily*

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61. Paul Hunt, *A Critical Condition*, in STIGMA: THE EXPERIENCE OF DISABILITY 145, 146 (Hunt ed., 1966).

62. *Id.*

63. *Supra* note 51, at 155.

64. BARNES & MERCER, *supra* note 59, at 10.

65. The social model realistically dispel uncritical assumptions that disadvantage is nature and necessary. It opens an alternative to see disability social oppression more than personal tragedies. But we should not misinterpret the model as depreciating the disadvantage that physical impairment may cause; it only addresses the take-for-granted structural difficulties faced by the physical impaired. See Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1257 (2007).

66. *Id.* at 1258.

*isolated and excluded from full participation in society.*<sup>67</sup> Law Professor Samaha also put that, “it is one thing to be unable to walk. It is quite another matter to be unable to enter a building unassisted because the architect preferred stairs to ramps.”<sup>68</sup> The social model also provides normative basis for some international legal doctrines. The Convention on the rights of Persons with Disabilities, for example, stresses the “importance of accessibility to the physical, social, economic and cultural environment . . . in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms.”<sup>69</sup>

### C. *The Third Road—Canadian Experience*

Although the social model provides a better way to define disability and a field of inquiry, it is not a legal doctrine. Deciding how to respond to “disability” depends on a normative framework that cannot be supplied by the model. The between the model’s causation description and public policy remains.<sup>70</sup> The question is how this social model of disability may contribute to the legal discourse of equality and affirmative action. What kind of jurisprudence can better address the social oppression of the disabled?

*Eldridge v. British Columbia*,<sup>71</sup> a decision made by the Canadian Supreme Court in 1997, can be an illustration of how to apply the social model of disability to practical legal doctrines. Under the Medical and Health Care Service Act, provincial residents are entitled, free of charge, to benefits that are medically required. The plaintiff was a deaf individual who sought medical care. He believed that the hospital should provide free sign language service since it is medically required. The Plaintiff sued when the hospital refused to fund the service.

To deal with this case, the scenario of livelihood offers little help, since the payment of sign language can hardly be counted as a living problem. The scenario provided by the Taiwan Court, although the problem of substantial equality does not mandate concrete obligation of the state. Both scenarios fail to provide adequate remedy for the plaintiff. Based on the perspective of social and structural inequality, the Supreme Court of Canada created a

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67. The Union of the Physically Impaired Against Segregation and the Disability Alliance, *Fundamental Principles of Disability*, 4 (1976), <http://www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/fundamental%20principles.pdf> (last visited May 22, 2010).

68. Samaha, *supra* note 65, at 1259.

69. Convention on the Rights of Persons with Disabilities, preamble, Mar. 30, 2007, Doc.A/61/611, available at <http://www.un.org/disabilities/convention/conventionfull.shtml> (last visited Mar. 3, 2010)

70. BARNES & MERCER, *supra* note 59, at 1251-53.

71. *Supra* note 3.

practical remedy for people who are facing structural disadvantages.<sup>72</sup>

The decision of Canadian Supreme Court is situated in a detailed examination of the social, political, and legal environment experienced by people with hearing difficulties. The Court recognized the “*unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization*”<sup>73</sup> and “*their entrance into the social mainstream has been conditional on the emulation of able-bodied norms.*”<sup>74</sup>

The Court interpreted Paragraph 1, Section 15 of the Canadian Charter of Rights and Freedoms as a constitutional mandate of substantive equality. The Supreme Court further elaborated the meaning of substantive equality in medical service. The Court ruled that rather than being ancillary to the benefit, communication is indispensable to the delivery of medical service. However, “*under the system of British Columbia, deaf individuals must pay for means of communication to receive the same quality medical care.*”<sup>75</sup>

The Court suggested that in introducing the benefit program at issue the government had a responsibility to ensure that the benefit was equally accessible to all. The government has to take positive action and special measures to ensure that disadvantaged groups are actually able to benefit equally from government service and benefits.<sup>76</sup> The Court then concluded that the failure to provide free sign language service for the deaf British Columbia resident where necessary for effective communication in the delivery of medical services violated Section 15 of the Canadian Charter.

Neither by distorting the inequality issue into a problem of living, nor by presenting a beautiful but unreal picture, the Court of Canada exhibited a more pragmatic thinking in dealing the inequality of the disabled. In the Eldridge case, the Court focused on the structural obstacles faced by the deaf and required active action from the government. For the Court, the legitimacy of affirmative action does not lie in the crisis of livelihood or the proper restriction on the freedom of other. It is the structural disadvantage of the disabled in our society requires state’s active action. Substantive equality based on the social model of disability suggests the Court to separate individual’s impairment from disability, and re-assess how the disabled are entitled to equal opportunity and fair treatment without obstacles imposed by the society. Even with physical or mental impairment, the disabled, including the visually impaired, are able to stand on equal basis to develop their capability and make their living when social oppressions are eliminated. The perspective also shifts the focus from short-term remedy for immediate need

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72. *Id.*

73. *Id.* at 613.

74. *Id.* at 614.

75. *Id.* at 620.

76. *Id.* at 621-24.



(as the Korean Court did) and consider long-term solution. It urges the state to put its effort in combating discrimination and eliminating social unequal obstacles.

D. *Social Model and Substantive Equality*

The discourse of the Eldridge case deserves our serious consideration because it provides the mechanism through which we can change the misunderstanding the disabled.

First, the discourse of the Eldridge case critically distinguishes the difference between impairment and disability. As the social model of disability argues, people with physical impairment may have some functional difficulties, but impairments do not disable them. People with impairment have equal value as others and usually are capable to envision and pursue their life goal. Without underestimating the inequality faced by the disabled in daily life, the discourse believes their primary disadvantage derives not from their impairment, but from the social norms, environment, and structure. In other words, the unequal status of people with impairments is usually an outcome of social inequality, which the law of equality should step and intervene in.

Second, the Eldridge case exhibits how the social model of disability may be translated into practical legal framework. By distinguishing whether impairment stems from social oppression, the Court shifts the focus of law of equality to the social obstacles. The disabled are better able to live up their life dream once those obstacles result in their inequality has removed. Removing existing obstacles thus becomes both the legitimate basis of affirmative actions and concrete strategy to eliminate inequality. In addition to waiting and encouraging actions from the legislative and the Executive, the court can review whether laws, policies, and concrete treatments result in obstacles that the disabled experienced and decide how to eliminate these obstacles.

Most importantly, the framework empowers people with impairment, and can trigger future social change. Under existing social structure and legal framework, people with impairment usually attribute their disadvantages to “bad luck” or God. When the visually impaired cannot find a job or get on a bus, they easily perceive the experience as a natural consequence of their impairment rather than injuries. Even if they may feel unfair or uncomfortable, they may not be able to find someone to blame, except the God or bad luck. They seldom transform perceived injuries to a grievance, and attribute to the fault of another individual or social entity since the disability is regarded as personal tragedy. Furthermore, when they perceive their injuries and believe they are entitled to a remedy after

blaming, they usually find frustrated since it is not easy to develop a solid legal claim from existing legal system.<sup>77</sup> As a result, people with impairment seldom seek legal remedy and thus social inequality remains.

The perspective of removing obstacles as substantive equality enables people with impairment to review their daily experience and identify obstacles causing their inequality. In stead of self-pitying, they may also transform their personal stories to social issues that need to be structurally rather than individually resolved. Moreover, the substantive equality can empower people with impairment to develop legal claim in the court, creating the room to eliminate existing discrimination and unperceived suppressions. They are also encouraged to review infrastructure, public service, every law and policy, and rethink whether all these seemingly neutral rules and materials are all created for “the normal” and actually result in unequal obstacles for the disabled. In that way, the hidden social inequality can be revealed, and the improvement of substantive equality for the disabled can be expected.

#### V. CONCLUSION

The visually impaired are having difficulties in getting jobs and making a living. In Taiwan and Korea, governments of both countries adopted laws that grant them a monopoly status in the massage business. Two country's Constitutional Courts reviewed the constitutionality of the law and reached two contrary conclusions. The Court of Taiwan invalidated the law based on the principle of equality and proportionality, while the Court of Korea sustained the law grounded on the right of living of the visually impaired. A comparison on the understanding of the predicament of the visually impaired, the effectiveness of the monopoly law and the relationship between the visually impaired and the others represents two different underlying scenarios. The Court of Taiwan presented a scenario of equality, claiming the massage monopoly law is improper in eliminating inequality and expecting on other social welfare. The Court of Korea, on the contrary, developed a scenario of livelihood and stood behind the massage monopoly law as the only effective as means that we have to accept. However, the two projects are not satisfying. The scenario of livelihood may meet immediate needs of the visually impaired, but it only deters them from envisioning a

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77. Felstiner, Abel and Sarat provide a framework for studying the process by which people transform their unperceived injury to disputes. They suggest that the emergence and transformation of disputes can be categorized into three stages: naming, blaming, and claiming. Each of these stages, according to their study, is subjective, unstable, reactive, complicated, and incomplete. See William L. F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming . . .*, 15 LAW & SOCIETY REV. 631, 632 (1980-1981).

more equal future. The scenario of equality by the Taiwan Court, although correctly delineating the real problem, fails to provide useful and concrete direction for further efforts. In response to the predicament of the visually impaired as well as more disabled, both judgments offer little but poor argument. The root of the failure, I believe, lies in the traditional dichotomy of the disabled and the normal people with physical or mental impairments are usually regarded as the disabled, who are unable to earn a life independently and rely on the mercy of the society.

The article resorts to the discourse of disability in an attempt to reconstruct the proper legal approach regarding to the affirmative action for the disabled. The social model of disability has distinguished impairment from disability and reinterprets the problem faced by the disabled as social oppression. The disadvantage of people with impairments comes from the functional losses of impairment and social norms, environments, and social structure. This perspective shed light for a more pragmatic legal approach of structural inequality. As the Canadian decision in *Eldridge* exhibited, the perspective of structural inequality facilitated the Court to uncover the real problem and develop a more pragmatic long-term solution. This article offers an initial discussion, hoping to trigger future discussion on this issue and reconstruct a better legal framework for affirmative action and the law of disability.

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