

# UNDERSTANDING POSITIVE MEASURES IN AN EQUALITY FRAMEWORK ON THE GROUND OF DISABILITY

## MEMAHAMI LANGKAH-LANGKAH POSITIF BAGI PENYANDANG DISABILITAS DALAM KERANGKA KESETARAAN

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### Abstrak

Tak dapat dipungkiri bahwa selama ini penyandang disabilitas kerap mengalami diskriminasi pada aneka bidang kehidupannya. Kenyataan ini secara umum terjadi akibat *stereotype* dan stigmatisasi di tengah masyarakat yang maujud dalam bentuk pandangan yang keliru tentang penyandang disabilitas. Prinsip kesetaraan (*equality*) dan nondiskriminasi sebagai prinsip dasar Hak Asasi Manusia menjadi landasan pijak dalam menghormati hak-hak penyandang disabilitas. Prinsip kesetaraan, dalam arti kesetaraan substantif (*substantive equality model*), mengandung makna kesetaraan yang memberikan ruang bagi penyandang disabilitas untuk beroleh kesempatan yang sama dengan non-disabilitas pada seluruh lapangan kehidupan. Konsep Kesetaraan substantive ini mendorong dibuatnya langkah-langkah positif (*positive measures*) yang menekankan pada akomodasi kekhasan yang ada untuk menyingkirkan rintangan (*removing barriers*) yang selama ini dihadapi. Hingga para penyandang disabilitas sejalan dengan martabat yang melekat, terpenuhi hak-haknya, dan untuk dapat berkontribusi di tengah-tengah masyarakat sesuai dengan pengembangan potensinya masing-masing, sebagai bagian tak terpisahkan dari masyarakat.

**Kata kunci:** penyandang disabilitas, langkah-langkah positif, kesetaraan, hak asasi manusia

### Abstract

*Persons with disabilities have mostly been experienced a long history of discrimination, exclusion, deprived of liberty, and even dehumanization. A sequence of various stigmatisation and stereotype concerning disability were taken into account. They have been suffered from discrimination on both direct and indirect ways. It was a social model of disability which subsequently led to human rights based approach of disability; appoint a new horizon to perceive disability within a comprehensive pathway in the society as a whole. It comes from human rights values which accented on equality and non-discrimination as the main principles of human rights. Equality in terms of substantive equality model drives its robust landscape of disability in light of protection and fulfilment of the rights of persons with disabilities as disadvantaged group, toward the uttermost participation in the society. Substantive equality is the notion of worth and benevolence. It is sustain to conferring the positive measures as a means to achieve the genuine equality of persons with disabilities, as well as a driving force to make their rights real.*

**Keywords:** *Persons with Disabilities; Positive Measures; Equality; Human Rights*

The<sup>1</sup> notion of equality is extensively encouraged to be the champion to combat discrimination. The broader view will be provided on which models of equality which will largely contribute to disadvantaged group in gaining the advantages. Subsequently, this

writing is going to explain to what extent the equality address the disadvantage groups as well as on how it can work through the respective tools of 'positive measures' to apply, particularly in the ground of disability in which those have been suffering from discrimination since ages.

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### Can Equality Cope With Injustice and Unfairness?

Equality is a notable value of life. The concept of equality is essentially linked to the particular conceptualization of justice. Enhancing equality can be determined to fulfilling justice.

In regard of the virtue of fairness it is necessary to allocate the equal opportunity. Equality can be achieved when all the advantages are equitably allocated to all people without distinguishing who or what they are. All persons in the community should be entitled to these advantages equally. Thus it also covers on how to conferring equality as a matter of sharing advantages which including removing any barriers. Rawls pointed out that Justice can be seen as fairness in the context of genesis of equality in underlying the theory of social contracts (Rawls, 1971, p. 11) .

Why pursue fairness? Because fairness is an essential component of justice. And homo sapiens is so constituted that unjust treatment offends not just its victims but its bystanders as well. Only in a setting where fairness prevails can we manage to live satisfying lives (Rescher, 2002: 15).

People ask to be treated equally amongst each other is mostly due to the need of justice. The word 'justice' is become the norm to discuss about standard and how it will be implied broadly in practice. What is considered as justice? Justice to whom? What about justice for one individual but on the other hand is injustice for others? Rawls in *A Theory of Justice*, argued that a justice can be ruled out for the sake of great advantage to be achieved or to avoid higher injustice, even though, in a genuine means it should not be generally bargained.

For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising (Rawls, 1971: 3-4).

In equality, as will be discussed later, the substantive equality that rooted from removing barriers of a disadvantaged group could be

considered as 'justice' insofar as it raises social participation to this disadvantaged group. In line with what conceived by Rawls above, it is possible to enhance greater advantage meanwhile to avoid higher injustice to those disadvantaged group which is often raised. Disadvantaged groups may need more assistance, more facility, and even more accommodation as a means of removing barriers which otherwise others are not. This could be seen as a 'potential injustice' to those non-disadvantaged groups due to 'different treatment' or 'discrimination' in terms of a favourable treatment given to disadvantaged groups. It could also be perceived by non-disadvantaged groups as reducing their opportunity in sense of having less facility than those disadvantaged group. However in this perspective of '*an injustice is tolerable only when it is necessary to avoid an even greater injustice* (Rawls, 1971: 3-4)', it is admittedly 'tolerable' to conferring a preferential treatment as can be seen as 'injustice' in order avoid greater 'injustice' yet by conferring similar treatment to those who are actually different in nature. Whereas giving the same treatment will be considered as raising higher injustice. The disadvantaged groups then receive their opportunities because of existing, value-laden social structure.

Persons with disabilities as disadvantaged group can be the best example to describe the explanation above. Allocating them a reasonable accommodation which enables them to participate to social life will inevitably require a higher budget compared with what being allocated to those non-disabled persons. However "injustice" here as measured as an unbalanced budget can be ignored to avoid the greater injustice as when the disadvantaged groups can not participate largely because of it. Indeed Rawls highlighted that the main subject of justice is to distribute "*the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation* (Rawls, 1971: 7)." Essentially, ensuring the distribution of rights and duties as advantages to all element of society is the most important aim of justice. Hence each person would feel secure that through these rights and duties entitled, they can highly contribute to the society, no matter what the situation is. Following that importance subject of Justice, Rawls showed that "*In justice as fairness society*

is interpreted as a cooperative venture for mutual advantage (Rawls, 1971: 83).

Equality which is construed as “to be treated equally or similarly” is widely understood and requested all over the world. It was awakened by the common awareness of inconvenient misery of being discriminated. The ancient history told us how people revolt to addressing equality. It was the battle against unfairness to strive in getting their own advantages among the society. Peter Westen explicated that Equality is an “undeniable” and “unchangeable” moral truth (Westen, 1982: 547). It can be drawn from the common understanding of human being in which equality is the virtue of civilisation. It is not only a body but also a soul.

Since so long time ago, there were so many people in the history who were revolt to addressing equality. It was, again, a battle against unfairness. This awareness rises not all of a sudden. It was needed long experience of being repeatedly neglected and even humiliated in an excluded circumstance of the society. The disadvantaged groups who were not get their advantages sufficiently as their counterparts (as most likely caused by their differences among the society) then consolidate their effort to strive following the discrimination they suffered.

In a broader sense, equality of opportunity is endorsed to distribute particular advantages to each social element. It provides the same chance to all individuals to have access of particular advantages. Rawls noticed that through equality of opportunity no one will leave behind while he criticized that meritocratic society is not in line with the principles of justice. “*Equality of opportunity means an equal chance to leave the less fortunate behind in the personal quest for influence and social position.... Thus a meritocratic society is a danger for the other interpretations of the principles of justice but not for the democratic conception* (Rawls, 1971: 106).”

Justice is an essential part of law explained in An Introduction to the Philosophy of Law by Roscoe Pound as “justice according to law” which has to be referred in delivering support of individualisation (Harris, 1997: 278). It is also viewed by JW Harris that justice is measure of law’s virtues (Harris, 1997: 279). These two notions are unrelated one to another to regulate society into well organised order. Nevertheless the ideology of justice invited

sceptical idea that justice could lead to conflict due to various interest of each parties to battle (Ross, 1959: 275). These ideas all play a crucial role in developing horizon of what could be done by justice in drawing up social arrangements.

Two senses in which law may be condemned for flouting substantive justice should be distinguished. They concern ‘remedial’ (or ‘commutative’) justice, on the one hand, and distributive’ (or social) justice, on the other. By the first measure, law is just if it affords remedies for, and only for, all true wrongs by one man to another; and if it attaches the just, and no more than the just, retribution to crime...The justice of law is dependent on how it, along with other social arrangements, allocates all the good things at life such as wealth, power, and liberty. The distributive justice appealed to in the case of tax, welfare or planning law is ‘social justice’ rather than ‘remedial justice.’ (Harris, 1997: 280).

The justice of law which is heavily seen as a social justice in ways of ‘allocating all the good things of life’ (Harris, 1997: 280) is in a row with the soul of the notion of equality. It is in which equality rooted its goal, since equality in terms of substantive equality is attempt to achieve distribution of advantages to each member of society, notably to those disadvantaged groups. It is persistently looked as on whether disadvantaged groups can access the advantages in order to enable them to widely participate. Not only saying the importance of allocation of advantages, but equality also emphasize on how to ensure it through various ways of what called as a positive measures provided.

## **Direct and Indirect Discrimination, Formal Equality Model, Substantive Equality Model, and Anti-Subordination Model of Equality**

### **A. Direct and Indirect Discrimination**

The discussion about models of equality is naturally aimed to combat discrimination. There is a common understanding that discrimination is wrong. People must be uncomfortable to be discriminated. Moreover, discrimination is unlawful. What discrimination can be explained by defining two types of discrimination: direct discrimination and indirect discrimination. Direct discrimination is a way to treat people from protected ground differently, or less

favourably than another person of non-member of that protected ground. While an indirect discrimination is where a situation is set up not to enable member of protected ground to participate through, for example, certain requirements provided (Bolger et al, 2012: 12).

Indirect discrimination looks therefore to substantive equality rather than formal. It recognises that treating individuals in the same manner... might create inequality because of differences between individuals exhibiting particular protected characteristic. (Bolger et. al, 2012: 12. See also Forshaw & Pilgerstorfer. (2008). "Direct and Direct Discrimination: Is there something between" *Industrial Law Journal*, 37 (4), 347-351)

From the explanation above it is acknowledge that these two types of discrimination is often raise. An indirect discrimination is sometimes not defined as discrimination since there is no intention directly to exclude a member of a protected ground. However by setting up a certain requirements it might hinder persons of protected ground to participate. We can put an example of job requirements here. Since, for instance, the company targeted 'a health persons physically and mentally' could be then misleading stipulated that disabled persons are not meet this requirements by definition. Even though they are not stated mention the prohibition of persons with disabilities. It can be said that the formal model can only deal with direct discrimination, while the substantive model can address indirect discrimination as well.

## **B. Formal Equality**

The first model of equality emerges as the notion of treating people similarly regardless who and what they are, as long as they are in similar situations. This first model of equality derived from Aristotle known as the sameness approach, the symmetrical approach or formal equality model which centred on the idea.(Bolger et. al., 2012: 1-2)

Marguerite Bolger argue that "*This model of equality is premised on the idea that there are no important and immutable differences between individual that justify their different treatment. Therefore all legal and other distinctions based on gender, race, religion and so on should be eliminated*" (Bolger et.al., 2012:

2). All individuals, no matter what and who, will be treated similarly.

The implementation of formal equality model meets its impediment since it is not well reflected the real circumstances in which different characteristics of individuals are exist. It is called the diversity of human being. In addition, people may differ in their own certain characteristic on the ground of gender, race, disability, religion and so forth, which are all worth it. These types of different characteristics should properly have taken into account to respect that diversity. In some ways, the different characteristics need particular treatment. For instance, persons with disabilities in the context of workforce might need different treatment in order to accommodate their ability to deal with their job. The sameness approach would lead to unfairness to those who have particular characteristic likewise. Hence the concept of "will be treated similarly due to the particular similarity" cannot largely be adjusted as such. There should be a different treatment to disadvantaged groups in terms of conferring them an access to gain those advantages equally with others.

Given that all individuals in the same race have to reach the same target to winning the race at the first position, it will be then severely achieved by those who are not in "the same capacity" to run. The formal equality model assumes that all individuals are equally able to compete and participate, but ignores differences of others due to their specific situation (e.g. disability). The formal equality model, which highly endorsed "a meritocracy approach," is not compatible with the real life in which there are many various characteristics of individuals who are, in some extent, need a certain treatment in consequences of their particular differences. Meritocratic concept otherwise measures how to provide the same opportunity to compete in exactly the same manner. There is indeed a standard provided to examine which is applied to all cases without considering any particular situation (Devins & Douglas, 1998: 53).

Westen (1982) states: "*Without moral standards, equality remain meaningless, a formula that can have nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can do nothing but repeat what we already know*" (Westen, 1982: 547). Hence it can be said that

categories of a likeness is not denied naturally. “Categories of morally alike objects do not exist in nature; moral likeness is established only when people define categories (Westen, 1982: 545).”

There always be a requirement to compare to whom equality will be counted. The comparison in which woman should being treated equally is “the man.” However, so far the comparator is not always “equal” in some ways of characteristics. From the feminist perspective, MacKinnon highlights that the male is mostly used as the standard of comparator, saying that man is likely being a standard of measurement (MacKinnon, 1987: 34)

There is a politics to this. Concealed is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man...Gender neutrality is thus simply the male standard (MacKinnon, 1987: 34).

Sandra Fredman concluded that formal equality in these regards might put forward at least at four sets of problems: **The first**, despite two individuals are relevantly alike, treating them differently are not always considered as a discrimination depend on some reasons of its distinction. **The second**, in the construction concept of “*two similarly situated individual be treated alike*” is unexplained whether they should be treated the same “bad” or the same “well.” **The third**, there is shortcoming of having a comparator who are strictly in the same situation to compare, but otherwise treated more favourably. **The fourth**, “equal treatment” have no means of the notion of worthy. It is not considered the appropriate measures of unique characteristics that may be applied in a particular context.” (Fredman, 2011: 8).

All those four problems may figure out a short-sighted of the sameness approach, the symmetrical approach or formal equality in ways of addressing the real equality particularly to those disadvantaged groups. Otherwise it can apply effectively only in the ‘equal’ situation where all human being are presumably have the same capacity, condition, and more or less the similar ‘feature.’ Hence it is certainly very well measurement of such ‘similar treatment’ applied to them. Whilst in the real world we face, there are many features of human being applied to their own characteristics which may vary one

another. Person with disability as mentioned as part of commonly said a disadvantaged group, might require much more different facilitative needs to support their life. In this context, it should demand a different approach of equality which commonly prescribed as a formal equality.

### C. Substantive Equality

Formal equality law, in ages, has been carrying on such problematic implementation in practice. It can be said that this approach failed to address the specific feature of wide variety of characteristic of human being. Since then, the notion of substantive equality approach emerged to count a promising insight of uncovered area of formal equality. It demonstrated the awareness to confer “fairness” to individuals therewith each unique characteristics. In this model, it is widely enhance the participation of all the various characteristic of the social reality such as accepted and granted diversity. It applied through the consequences of positive measures which embedded in this model. This model of equality is dedicated to achieve the real equality goal mainly taking into account concerns of disadvantaged groups.

Substantive model of equality addressed the unique feature of all human being. This idea is come up to overcome the problems raised by the common understanding of equality (as a formal equality) which stressed on sameness, symmetrical and identical treatment. Formal equality failed to distribute the advantages to peoples within the society, particularly to those who have a ‘specific’ feature such as vulnerability. This specific feature, in some extent, hinders them from gaining the same chance to compete. It is not because they are not able to do it, but the opportunity is closed as they are considered as not competent to do certain work due to their special feature. They are, said, discriminated both directly and indirectly. Disability is a good example as a reason of discrimination. In the context of employment, if company conceive that disability is incapability, it would lead to the serious consequence of discrimination to persons with disability. For example in the selection process in which persons with disabilities are often exempted. It is because they are not perceived as the common various features of human being which have to be highly respected. The notion of substantive equality then develops insight to removing the

barriers of those who have specific feature on any grounds. All differences are well accepted as the wide various feature of human being. Moreover, it should be done to enlarge participation of all those 'vulnerable' or disadvantaged groups.

Sandra Fredman examined the Four specific of substantive aims of equality (Fredman, 2005: 167) as:

- (1) Substantive equality should aim to **break the cycle of disadvantage** associated with out-groups.
- (2) It should **promote respect** for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an out-group.
- (3) It should **entail positive affirmation** and celebration of identity within community, and,
- (4) It should **facilitate full participation** in society. An explicit commitment to redressing disadvantage, combatting social exclusion and facilitating positive participation all require positive provision. (Fredman, 2005: 167)

In brief, those all four aims of substantive equality are to accommodate disadvantaged groups meanwhile redressing disadvantages. It is also devoted an affirmative action to removing barriers. It can be stated that it is a means of protection to those disadvantaged groups. It aims to largely enhancing participation of disadvantaged groups. It is point an essential notion of respectfulness on regard of equality.

The development of the critical point of view of disability, as example of disadvantaged groups, go through significant changes from previous paradigm of 'medical approach' (as over-medicalised, pathological) to social model of disability. The medical disability approach counts on the disability as a merely medical problem to date which is most likely lead to social oppression and environmental barriers. (Traustadottir, in Quinn, 2009: 3-4) Conversely, the social model of disability expand the horizon of equality underlying notion to paradigm shifting in the way to viewing disabled persons from 'object' to 'subject' on the basis of social understanding of disability. (Oddnây Mjöll Arnardóttir & Gerard Quinn, 2009: 8) It builds a new hope to widely include persons with disability to the society rather than perceive them as a 'medical problem.' It is an overview of

common understanding of a dignity that should be embedded in all mankind, particularly persons with disability. Those rights are definitely entitled to human being thus should be protected and fulfilled. In brief, the medical model to some extent limits the application of equality in terms of substantive equality model. It does not give a room for person with disabilities to access their advantages as their rights otherwise they are right holders. It was happened due to a built in significant point of view of this medical model that as a medical problem, the disability has to be reduced.

Nevertheless, a substantive equality model, in this ground of disability, might more reliant with social model of disability in which both notion are largely considering disadvantaged group to participate in the society. Rannveig Traustadottir outlined some of the characteristics of Social Contextual Model of Disability as: "(1) *Focus on the social context and environment*, (2) *Emphasis on the relationship between the individual and society*, (3) *Emphasis on social barriers*, (4) *Views discrimination, exclusion and prejudice as the problem*, (5) *ending discrimination, segregation and removing barriers is the answer*." (Traustadottir in Quinn, 2009: 8). These characteristics in some extent are walk hand in hand with the notion of substantive equality model. It is assuredly compatible in ways of providing the positive measures as a means of removing barriers that will enable persons with disabilities to maximise their contribution to the society.

Vulnerability, in the context of human rights, might lead to discrimination. Fredman explore that the formal equality model legitimized the sameness treatment to all people, otherwise substantive equality emphasized on vulnerability of disadvantaged groups (Fredman, 2005: 170). Substantive equality, aims to provide a positive duties in terms of state obligation which firmly related to anti-poverty and social exclusion policies (Fredman, 2005: 168). Hence, according Fredman, substantive equality model in some extent more likely resembled the principles of welfare state which is intent to redress disadvantage. (Fredman, 2005: 170) The specific feature of this model is a duty to provide. (Fredman, 2005: 167)

It can be concluded that substantive equality model, so far, is notably appropriate to overcome challenges of equality problems in

practice, because it enables a disadvantaged group (who are considered have a particular feature or specific characteristics) to access equality through various tools as a means of conferring the equal chance to others. The nature of substantive equality is redressing disadvantages of the society as well as providing the positive duties to date. Structural disadvantage should be best addressed by substantive equality. It is not only a breakthrough of failure of previous model of formal equality in terms of dealing with disadvantaged groups but also much more guide towards the equality goal. It confers the opportunity to all persons including disadvantaged groups, assuredly, by providing an affirmative action to enable them to participate.

There are two objective types of substantive equality (Fredman, 2005: 167):

### 1. Equality of Opportunity

Equality of opportunity is briefly perceived on how opportunity will be given to the disadvantaged group. These opportunities are in a way to ensure that those disadvantaged groups could easier have advantages. Learning from the previous hardship of experience in attaining advantages, there should be an action to conduct. Hence an opportunity should properly be allocated to enable them gaining those advantages. It is on how to access to social goods as had been mainly discussed. It is not about to expand the opportunity itself but also to ensure those disadvantaged groups can access this opportunity equally with others. The disadvantaged groups previously often suffer discrimination due to their different characteristic to others. To be placed in the same stage, therefore, needs a duty to provide which is named as positive duties.(Fredman, 2005: 167) Positive duties can provide, for examples, education and trainings, accessibility measures, and other alternative measures of some features applied to particular characteristic that entail its tailored made-requirement to be equal (Fredman, 2005: 167).

An opportunity has to be provided to disadvantaged groups in ways of conferring equality to them. Yet they are not in the same stages to compete with others. Accordingly, it has to be allocated to facilitate them to participate. Hence the notion of equality of

opportunity is well described on regards of granting the certain portion of advantages to share. Suppose the disadvantaged groups can not access a certain social goods by treating them exactly the same with others, thus the positive duties become a proper pathway.

According to Jacobs, the debates about how equality of opportunity addresses the real equality raise among egalitarians are mostly about two ways. Formal equality often nullifies the real opportunity to persons who are differ in characteristics (such as due to gender, class, race, and so forth), The other criticism is about the ignorance of "*morally natural contingencies of birth and talent* (Jacobs, 2003: 11)" The latter is considered to lead to natural inequalities to distribute natural resources as benefit in the society. (Jacobs, 2003: 11) In addition, she argued that the principle of merit and meritocracy could not be referred to this models of equality of opportunity (Jacobs, 2003: 9) This principles of merit, in some ways, tend to give "the same size" to all people whereas a certain situation each of them might not probably be fit with that "all size" measure. In the context of vulnerability, for instance, they are considered as a tailored size. Given the natural circumstances that people may differ one another, there should be a "tailor made" to suit each of them in order to accommodate the persons who have differ in characteristics.

This equality of opportunity objective is likely made sense to apply in terms of achieving the original intent of substantive equality itself, though. It is ensure all individuals particularly those of disadvantaged groups can largely participate to the society without any barriers. The positive duties, says, is imposed in ways of removing barriers through its duties to make those disadvantaged be on the same stage to others.

Naming an employment opportunity of persons with disabilities might be a good example, in which persons with disabilities having excessively experience of being ignored. In this case, a supplementary opportunity has to be created in ways of enhancing more chances to them to be selected in the workforce. Positive duties here can be provided to put on a special treatment in accommodating them. For instance, disclosing an opportunity to blind persons through providing a Braille text in the selection process. It would rise up the opportunity to them

indeed. Besides, it is also attributed to indirect discrimination. Once the unfair-condition being set up (for example by not allowing a reasonable accommodation to blind persons) it greatly leads to an indirect discrimination.

## 2. Equality of Result

Unlike equality of opportunity which is emphasize on the procedural fairness to have the same opportunity of those disadvantaged group, Equality of result count heavily on the fairer distribution of benefits. In a very unbalanced society in which there is likely a large gap proportion of the disadvantaged group, this equality of result approach will be much help. It is surely dedicated to reach the “normal” proportionality of disadvantaged groups in certain field of social goods. Roughly saying, this objective of equality of result will ensure certain proportionality that has to be achieved in society. It is by all means to confirm the participation of those particular disadvantaged groups. A quota system can be the best example in explaining this notion of equality of result. The quota system define the proportionality of certain disadvantaged groups must be achieved. Woman representative in parliament can be intensified by applying quota system in such a political election. In Indonesia, for instance, quota system entails 30% of women aspiration in the parliament. The quota currently has not been met because of many factors. However, representativeness can be inflated significantly in periods of election.

Nevertheless both objective of equality of opportunity and equality of result require positive provisions. Equality of result is not merely sufficient to view on how it distributes the existing resources. The distribution of result might impact that the advantage of one individual must be loss of another. Fredman noted as “*real change entails enlarging the cake*” (Jacobs, 2003: 9) It simply means that the positive provisions here is devoted to ensure the available place of participation of disadvantages groups. It has to be created a certain portion as a “place reserved” to meet the desired result, whilst the equality of opportunity is aimed to guarantee the open opportunity that enable disadvantaged groups to attend. In brief the equality of result focus on **the outcome** that has to be met, whereas the equality of opportunity emphasizes **the process**, which enables participation of disadvantaged groups. Strauss

concluded that the notions of equality of opportunity and equality of result are basically resided in the same foundation. It is somewhat not going to be essential to contrast these two notions (Strauss in Devins & Douglas, 1998: 63).

## D. Anti-subordination Equality

This notion appears in answering the lack of an outlook of disadvantage as an outset departure. (Bolger et.al., 2012: 18) MacKinnon first introduced equality as an issue of dominance and subordination (Bolger et.al., 2012: 19) in the relation to sex equality. She explained that anti-subordination principle is aimed to removing barriers which is focus on equality of result therefore there should be some significant changes in social and political structure of the state (MacKinnon, 1987: 32–45).

Unlike the previous model of equality which are much more talk about sameness versus difference, this model of equality centred its thought on subordination point of view. Equality is seen as tools of anti-subordination of the disadvantaged groups. It promotes equality to abolish social hierarchy in the society by redressing social/historical disadvantage. Disadvantaged groups considered as subordinated by the dominance of majority or common “universal” norms. Hence, in this point, affirmative action is widely required to removing disadvantages.

Unfortunately the notion of anti-subordination in light of equality is considered as unrecognisable (Bolger et. al., 2012: 23). It is because the subordination principle in some extent contradicts with most of the settled equality jurisprudence. This model cannot measure to define on which groups are subordinated as impact of certain policies applied. Still, it is required a court as the appropriate institution that has its broader authoritative mandate to decide whether the policy and law are on least or much affect the existence of disadvantage in some reasons (Bolger et.al., 2012: 23–24).

The equality jurisprudence is wider than the notion of anti-subordination itself. Additionally, it can be misleading in defining who are going to have a protection and in what criteria they have to meet (Bolger et.al., 2012: 23) The explanation of this notion of anti-subordination seems simplify the context of advantage sharing. It is perceived that if the social hierarchy gone, there will be automatically no more discrimination to

the disadvantaged groups. Supposed, in some extent, it is aimed to abolishing the social hierarchy by which equality is being used to achieve it. Moreover, confronting *vis a vis* the dominance norms is not always worthwhile. In some ways, the 'battle' would not be only in the connection between majority and minority norms but it might be in a broader sense. It seems jump to conclusion to counting that the majority norms, in light of equality, are not concord with the purposes of disadvantaged groups. An analysis might need to be conducted to see what advantages should be shared to the disadvantaged groups and what channel will be chosen. To sum up, equality must be ensured in all circumstances regardless of the structure of social hierarchy.

### Positive Measures as an Instrument of Substantive Equality

As discussed above, substantive equality is aimed to accommodate disadvantaged groups by redressing disadvantages. It encourages positive measures in terms of preferential treatment to removing barriers in order to enhancing participation of disadvantaged groups. Accordingly, it is the main concern on how this substantive equality model works. Hence, positive measures can be said as a means to ensure the equality in use, in terms of substantive model of equality.

#### A. Reasonable Accommodation

Reasonable Accommodation is a concept of "difference" model of discrimination in which individuals who are different in characteristics may not be treated similarly, instead, to treat them similarly will cause an unfairness that might induce a discrimination (Bell & Waddington, 2011: 1517). We can put a selection process of job vacancies as an example here. In this process of selection in which one of the tools of selection is an paper-examination. The company should provide a braille examination version also to those who have visual disability (blind persons). They cannot argue the symmetrical approach in this case. That is why reasonable accommodation or adjustment needed to provide service individually to those each disadvantaged person/group to enable her/him to participate in certain field of society.

The notion of "reasonable accommodation" can be regarded as based on a "difference" model of discrimination. This model recognizes that individuals who possess the relevant characteristic are different in a relevant respect from individuals who do not, and that treating them similarly can lead to discrimination (Bell & Waddington, 2011: 1518).

#### B. Positive Action

Looking at the positive action's provisions from various legislative definitions in EU Law, Lisa Waddington and Mark Bell sum up the notion of Positive Action (Bell & Waddington, 2011: 1505–1506) as:

- (1) Consistent with the realization of equality (It can be seen as a growing acceptance of substantive equality)
- (2) Facilitative than mandatory
- (3) Flexibility with regard to which measures fit within the definition of positive action by member state. (Bell & Waddington, 2011: 1505-1506)

Waddington and Bell also mentioned McCrudden's typology of positive action which should include **preferential treatment**, such as considering any grounds of disadvantage, for example, in recruitment decisions. "*Positive action should include practices where merit is redefined as including the protected characteristic such as deeming it relevant to take into account ethnicity in police recruitment on the basis that the police service would function better with greater representation of ethnic minority communities.*" (Bell & Waddington, 2011: 1509)

Lizzie Barmes also noted that "*a positive action is designed to improve the position in terms of distribution of benefits or dis-benefits of a given of social group or sub group on the basis that its member suffer systematic disadvantage in that regard.*" (Barmes, 2009: 623) It is underlying the 'proportionality principle' of positive action which said that the more a group go through severe disadvantage, the more positive action has to be done (Bell & Waddington, 2011: 1514). These all have to be adjusted because positive action is born to be skeletonized assuring 'full equality in practice' (Bell & Waddington, 2011: 1515).

Although reasonable accommodation is often associated with forms of positive action as mentioned by O'Conneide above (Lawson &

Gooding, 2005: 220), Anna Lawson has her own insights. She highlighted that **Reasonable Accommodation** often described as a form of **positive action** is actually **different** in feature. Hence she simply suggests that reasonable accommodation can be categorised as a form of

non-discrimination requirement, to direct discrimination and indirect discrimination, rather than as a form of positive action (Lawson, 2008: 224) because of these reasons which are asserted by Lawson that can be summarized into the following table:

Lawson's insights can be summarized (Lawson, 2008: 224–225) as in the following table:

No	Reasonable Accommodation	Positive Action
1	Form of non-discrimination requirements (direct and indirect discrimination)	Measures is taken in policy of organisational level (to reduce hindrance of disadvantaged groups rather than accommodating individual)
2	On-going nature	A time limited in nature
3	Disadvantage is caused by an aspect of organisation's criteria, provisions practice or physical feature	The nature of disadvantage is caused by general societal factors.
4	Duties not to discriminate (breach of unlawful discrimination)	

### C. Positive Duties

Colm O’Cinneide defined a positive duty as:

*“A legal requirement that organisations promote equality in all aspects of their work in a manner which involves employees, employers and service-users. Such duties are often viewed as the ‘next generation’ of equality legislation. In essence, they are attempts to require that organisations implement a proactive mainstreaming approach.”* (O’Cinneid in Lawson & Gooding, 2005: 219).

Therefore a positive duty is not only about to treat individuals fairly (by developing parameters of social practices) but also to ensure the various policies would promote substantive equality (Lawson & Gooding, 2005: 220). A positive duty is dedicated to addressing disadvantages which appear in the society. O’Cinneide noted that positive duties as *“can be regarded as an extension of the principle underlying ‘reasonable adjustment’ requirements* (Lawson & Gooding, 2005: 220) Because of the importance of the elements to eradicating discrimination, Cinneide mention not only public sector duties but also private sector duties who are responsible to ensure distribution of advantages to all disadvantaged group (Lawson & Gooding, 2005: 239). In brief, I summarise that O’Cinneide considered the features of positive duties as following (Lawson & Gooding, 2005: 220):

- (1) Form of positive action;
- (2) Full range of policies and practices, such as policy development in an organisation;
- (3) Anticipatory in effect;
- (4) Complement to reasonable accommodation. (Lawson & Gooding, 2005: 220).

According to him, a positive duties as a form of positive action is made to govern, hence it has to be filled with broad range of policies and practices (as implementation of the certain rule/policies) in organisation level. It will prevent discriminatory treatment may appear in the organisation. (Lawson & Gooding, 2005) We can raise an issue of discrimination that might affect disadvantaged groups in diminishing participation in the organisation by raising this up to the represent of organisation, which is responsible in this area of policy making. Disadvantaged groups can express all the voices in the organisation to take a part and to be included in the policy making process through their capacity. This policy will impact widely inside (member) and even outside organisation. The latter can be illustrated by the example of the selection process in recruitment. It figures out on how a policy of organisation inevitably impact to the outsiders.

There are some features in describing the notion of **positive duties**, as I summarize from Waddington and Bell (Bell & Waddington, 2011: 1521) which could be best to distinguish it into the notion of positive action:

- (1) Aim to incorporate the promotion of equality into decision making and delivery;
- (2) Promote the participation of affected community in the policy making process as seek to improve governance rather than conferring as specific benefit;
- (3) Ensure discriminatory elements of existing or proposed policy are identified and dismantled, or otherwise mitigated (Removing or avoiding discrimination does not necessarily imply the taking of positive action) (Bell & Waddington, 2011: 1521).

These three features of positive duties are not automatically considered as positive action as long as it is not essentially contain the **direct intention** to confer specific benefit to disadvantaged groups. Both the two concepts of positive duties and positive action are eventually requisite one and another. A positive action require circumstances proceed by a positive duties as written *“If positive duties are designed to deliver concrete improvements in equality outcomes, then taking positive action might be an indispensable means of reaching these objectives.”* (Bell & Waddington, 2011: 1521) All those two concepts are means to achieve equality. Then called not necessary to distinguish it strictly since as stated by Waddington and Bell that *“clarifying the difference between the broad model of positive duties, and the more discrete notion of positive action, is more than a matter of linguistic semantics”* (Bell & Waddington, 2011: 1521).

#### D. Reverse Discrimination/Affirmative Action

The notion of reverse discrimination could be mostly accused a contradictory thought to the concept of non-discrimination Law. Indeed, reverse discrimination or affirmative action (the same meaning of notion however different only in wording) rose to benefit the disadvantaged groups.

The term affirmative action has been used since the early 60s when President Kennedy employed it in Executive Order #10925 to describe public policy intended to overcome the present effect of past racial discrimination. (Bruce E Williams, 1984) Also known as “preferential treatment” or “**reverse discrimination**,” affirmative action is based on arrangements whereby the law sanctions special measures or differences

in treatment that, when certain condition exist, depart from the principles of formal equality (Lerner, 1991: 163).

Yet Sandra Fredman argued that quest of this “breach” of notion is counting on what model we perceived whether formal equality model or substantive model of equality. Considering formal equality, yes this “reverse discrimination” can be categorized as an infringement of equality. However in the perspective of substantive equality, “reverse discrimination” is primarily envisaged in ways of conferring preferences of those disadvantaged groups. It therefore can be visualised as the painting of the entire equality view (Fredman, 2011: 233,259) Due to its aim to conferring the advantages to disadvantaged groups, a reverse discrimination is somehow permissible and indeed is granted. Thus, these deliberated preferences is described to confer the same chance to others in order to achieve the real equality. Accordingly, reverse discrimination or affirmative action is legitimate.

Fredman denote that there three aims of affirmative action (Fredman, 2011: 259–260):

- (a) Removal of barriers and redressing past disadvantage;
- (b) Representation and perspective of previously excluded groups;
- (c) Creation of role models and fostering diversity (Fredman, 2011: 167).

These three aims of affirmative action are more likely analogous with overall concept of substantive equality in redressing disadvantages of disadvantaged groups. It can be seen as tools of achieving substantive equality, as mentioned by Fredman that the aims of substantive equality is to entail “*positive affirmation*” (Fredman, 2005: 167). In addition, an affirmative action in light of substantive model of equality will magnify the participation of disadvantaged groups through removing barriers that hindering them from taking a part to various activities of social life. This is constituted as cherishing diversity that in fact exists in the society.

This is admittedly the core of substantive equality model in providing an affirmative action as tools of achieving its goal. The different treatment to disadvantaged groups in terms of positive measures is widely recognized. It is a strong point to presenting the same opportunity to disadvantaged groups to

participate in the society within a special treatment or preferential measures called positive measures.

equality model, thus we need to define on the strong point of each term and on what certain situation where these terminology will be most appropriate. The explanation of the previous section above denotes the generic definition, characteristic and the usage of the particular term which can be summarized as the followings:

### E. What is the Determination Point of Each Term of Positive Measures?

Looking at the terms which are apply in the positive measures as a tool of a substantive

No.	Reasonable Accommodation	Positive Action	Positive Duties	Reverse discrimination/ Affirmative Action
1	Providing service individually (Bell and Waddington)/ Accommodating individual (Lawson)	Contain Preferential treatment (considering any grounds of disadvantage) (McCrudden's Typology of Positive Action)	Form of positive action (O'Conneide)	Affirmative action is to describe public policy intended to overcome the present effect of past racial discrimination (Bruce E. Williams)
2	On-going nature (Lawson)	Improving the position in terms of distribution of benefits or dis-benefits (Barnes)	Full range of policy and practices, such as policy development in organisation (O'Conneide)	Affirmative action known as preferential treatment or reverse discrimination is based on arrangements whereby the law sanctions special measures or differences in treatment that, when certain condition exist, depart from the principles of formal equality (Lerner)
3	Disadvantage is caused by an aspect of organisation's criteria provisions practice or physical feature (Lawson)	Policy of organisational level (Lawson)	Anticipatory in effect (O'Conneide)	Removal of barriers and redressing past disadvantage (Fredman)
4	Form of non-discrimination requirements rather than a form of positive action (Lawson)	Time limited in nature (Lawson)	Aim to incorporate the promotion of equality into decision making and delivery (Bell and Waddington)	Representation and perspective of previously excluded groups (Fredman)
5	Duties not to discriminate/breach of unlawful discrimination (Lawson)	The nature of disadvantage is caused by general societal factors. (Lawson)	Promote the participation of affected community in the policy making process as seek to improve governance rather than conferring a specific benefit (Bell and Waddington)	Creation of role models and fostering diversity (Fredman)

No.	Reasonable Accommodation	Positive Action	Positive Duties	Reverse discrimination/ Affirmative Action
6		Contain direct intention of conferring specific benefit to disadvantage group. (Bell and Waddington)	Ensuring discriminatory elements of existing or proposed policy are identified and dismantled, or otherwise mitigated (Bell and Waddington)	

From the table which colligated from those prominent experts in the field above, I sum up to make notes below:

**(1) Affirmative action/Reverse Discrimination/ Preferential Treatment**

Is the broaden concept of positive measures as mainly discussed on the substantive model of equality that aims to create the role models and fostering diversity by removing barriers and redressing past disadvantage, and to represent the excluded groups' perspective.

**(2) Reasonable Accommodation**

The term is used as more technical in conferring benefit of such disadvantaged groups by providing service individually/ accommodating individual or certain disadvantaged group. Then again the disadvantaged is caused by an aspect of organisation's criteria provisions practice or physical feature. It is on-going nature.

**(3) Positive Action**

The term of positive action is policy of organisational level that is determined when it contain a preferential treatment (considering any grounds of disadvantage/ protected grounds) in order to improve the position in terms of distribution of benefits or dis-benefits. The nature of disadvantage is caused by general societal factors, and it is time limited in nature.

**(4) Positive Duties**

Positive duties are form of positive action. It is full range of policy and practices, such as policy development in organisation which is anticipatory in effect, aiming to incorporate the promotion of equality into decision making and delivery, promoting the

participation of affected community in the policy making process as seek to improve governance rather than conferring a specific benefit, and ensuring discriminatory elements of existing or proposed policy are identified and dismantled, or otherwise mitigated. The special feature, which distinguishes a positive duty from positive action, is to define a **direct intention** of conferring specific benefit to disadvantage group.

The term of Positive action amongst other fruitful notion of "affirmative action" or "reverse discrimination," "positive duties," "Reasonable accommodation" is notably to sharpen the role of equality. Since these all notion are in the same "locker" of substantive equality model which is in a broader sense to achieve equality, meanwhile in same time to combat discrimination (both direct and indirect), It is pivotal way to place these terms into well arrangement to empower each other in order to achieve a real equality. It can be concluded that all these notions are positive measures as an affirmative action that required achieving the goal of (substantive) equality. The use of a particular approach or strategy will depend on the cases. Yet it need some steps to be taken in ways of conferring advantages to the disadvantaged groups. It is complementary one another in meaning. In one case it can be drawn a reasonable accommodation which suit the best whereas in another case providing a positive action or a positive duties will be eminent.

**Equality Model on the Ground of Disability**

It can be concluded that substantive equality model so far is the best to explain how it cope with real equality and justice. Formal equality model otherwise has far left behind since it was fail to rectify unfairness due to disadvantages suffered by those disadvantaged

groups. Substantive model of equality indeed portray the panoramic view of different characteristic of human being who's actually the same rights to participate in the society in which all the features of difference should be well accepted normally.

Here we will challenge the concept of substantive equality model to address the disadvantaged groups of persons with disabilities. As mentioned in explanation above that substantive model of equality is considered the best way to deal with disadvantaged groups. In addition, persons with disabilities are categorised as disadvantaged groups, therefore we can now analyse how the notion of substantive equality can deal with the concerns of disability issue.

Learning from the history in which persons with disabilities had being ignored, it drives them to carry out a certain scramble to fight their rights to participate in the society. As they are preserving highly awareness that they are obviously part of society so why exclude them? Suffering discrimination in any fields of life is no longer surprised them. There were old school paradigms where they are seen as "social problem" 'impaired', so that labelled as not capable' unavoidably send them to extensive disappointment from time to time. They are trapped in a stigmatization otherwise. In a situation where there are unbalanced values which usually defined by advantaged groups or, saying, persons without disabilities, therefore positive measures has to be set up. This is the essential point in which the substantive equality model works. We can here though introduce two forms substantive equality model, the equality of opportunity and equality of result. Both forms require positive measures. It is a means to confer the preferential treatment to enhance their participation.

Entitling an employment opportunity, as an example, might describe significance of the notion of equality for persons with disabilities. It was a common situation where persons with disabilities are assumed as not able or not capable to do the workload of any type of job offered. It yet guides to a misleading action to neglect persons with disabilities. In this unbalance situation, a positive measure should be introduced. *Firstly* is how the awareness raising has going to be disseminated among stakeholders, both public and private sectors.

*Secondly*, is to ensure the policy making process has adopted the persons with disabilities groups interests as a 'disability mainstreaming', which will be reflected in the policies that are going to be acted. *Thirdly* is to activate a tools of positive measures that might applied such as, in this context, enabling an equal condition of a selection process in a workforce through providing preferential treatment to those persons with disabilities to participate. Braille, for example, must be provided in such paper examination for the blind persons. A place of selection can be accessed by wheelchairs. In addition, in the sense of equality of result it can possibly be set a certain quota for those persons with disabilities to acquire a certain position considering their capacity.

### **Convention on the Rights of Persons with Disabilities (CRPD), its Important Roles on Equality towards Human Rights Based Approach**

Michael Ashley Stein and Janet E. Lord note the importance of CRPD in addressing the rights of person with disability at least in three areas such as "*potential catalysts for progressive change include the Convention's ability to trigger expressive values, prompt national level action, and advance the social integration of persons with disabilities in society through its inclusive development mandate.*"(Stein & Lord in Quinn, 2009: 43)

The principles of equality and non-discrimination, which is mainly similar in aim as argued by Oddný Mjöll Arnardóttir as "*connote the same idea and can be seen as simply the positive and negative statements of the same principle*" (Arnardóttir in Quinn, 2009: 43) as basic human rights principles, are highly referred by the CRPD to turning human rights values into the life of disadvantaged group as vulnerable groups or marginalized groups.

The Convention's whole leitmotif is to address this imbalance. In doing so it is firmly based on the principle of equality, but it represents a deeper and more profound understanding of equality as the principle of equality reflected in the Convention clearly requires the express adaptation of what is perceived as universal rights to the unique situation of persons with

disabilities (Arnardóttir in Quinn, 2009: 47).

It is an important thought that the prominent values contain in the convention should be performed to the ground. This is the core, a living law of disability.

CRPD as the lex specialist of the human rights provisions in particular of persons with disabilities acknowledged that this deepen values of human rights is aimed to perceive disability in the right based approach which depart from the social model of disability. These two notions are subsequently appeared from the criticism of the old paradigm of medical model of disability which in some extent had led to the charity based approach. The latter was inevitably leading to discrimination which had been experienced by persons with disabilities. Thus the right based approach goes to develop the human rights values in light of diversity as well as emphasizing on the dignity embedded in every human being. It was clearly mentioned the importance of promoting equality to eliminate discrimination. It was also highlight the State obligation (obligation to conduct and obligation of result) to respect, to protect and to fulfill the rights of persons with disabilities.

### **Indonesia, Where Are We Now?**

In the international arena, United Nation-Convention of the Rights of Persons with Disabilities 2006 was the first treaty which in particular ruled the protection of person with disability specifically focus on human rights based approach. It was came along after decades on full length of discussion from the medical model of disability to social model and subsequently transformed into human rights model of disability which acknowledged rights of person with disabilities in terms of human rights. Not only aimed to removing barriers in light of substantive equality as social model of disability converse about (Lawson, 2008: 11), but it also highlight the state obligation in the lens of international human rights law (“Convention on the rights of persons with disabilities,” 2006). It was bringing about the new transformed perspective of disability in the human rights law which changed the old-paradigm approach into a human rights approach. It is considered as the most progressive model of disability at recent time.

Indonesia has ratified the UN-CRPD in 2011, through National Act Number 19 Year 2011 on Ratification of the Convention of The Rights of Persons with Disabilities. Following the ratification, several excellent initiatives raised from certain Local Governments which attempt to carry out this provision into their local acts. Some of the Local Government Act concerning Disability rights was then born. It was admittedly encouraged by persons with disabilities movement come from Disabled People Organisations (DPOs) who consistently voice the awareness rising on regard with the rights of person with disabilities. Along with the international disability movements around the globe, they utter the rights of persons with disabilities in the law, policy and the social basis. “*Nothing about us without us*” is being the common used watchword around the globe. (“UN Enable - International Day of Disabled Persons, 2004 - United Nations, New York,”)

Before the ratification of UN CRPD, actually we already have some provisions on regard with person with disability. The particular act was Act Number 4 Year 1997 regarding Handicapped Persons (Undang-undang Nomor 4 Tahun 1997 tentang Penyandang Cacat) however this act was being critiqued due to this ‘charity based’ approach instead of ‘rights based approach’, where by inevitably imply the stereotype and prejudice as impacted by medical model of disability (Komnas HAM, 2012).

Additionally, we have also The Consitution 1945 (1-4 Amendements) which also contain the protection of person with disability in a general, at the chapter XA Human Rights in second amendment in article 28H(2):

**Every person** shall have the right to obtain facilities and special treatment in obtaining equal opportunities and benefits for achieving equality and justice.

Constitutional Court, through the three decisions: Putusan MK Nomor 10-17-23/PUU-VII/2009 (Mahkamah Konstitusi, 2009); Putusan MK Nomor 143/PUU-VII/2009 (Mahkamah Konstitusi, 2009); and Putusan MK No. 16/PUU-VIII/2010 (Mahkamah Konstitusi, 2010) is highlight the disadvantaged groups as the purposes of the rights of “every person”, as mentioned below:

Constitutional rights in the article 28H(2) of the Constitution 1945 is a

constitutional guarantee to those who experience marginalisation, seclusion, restriction/limitation, discrimination, participation barrier in the political arena and public sphere which rooted from structural and socio-cultural gap in a constant basis (discrimination), both formal and informal, in public and private field, which is notable as an affirmative action. (Free translation. See also Nursyamsi, 2015: 17,23)

Furthermore, Indonesia had a long list of act which inserts a small piece of disability provisions. These are spread over in the Acts/Laws both national and local (Undang-undang dan Peraturan Daerah), Government Regulation (Peraturan Pemerintah), and Presidential Decree (Peraturan Presiden). Pusat Studi Hukum dan Kebijakan Indonesia (PSHK/ Indonesian Centre for Law and Policy Studies) listed overall 114 of regulation related persons with disabilities (Nursyamsi et. al, 2015: 24-28). Unfortunately, these all provisions are most likely were neither on the right based approach nor comprehensive in scope.

The reasons why do we need a new law in which the provision comply with the UNCRPD are, inter alia, the new perspective of an evolved disability thought to switch the old paradigm rooted from medical model of disability into human rights model. The latter widely prohibit the discrimination following stigmatisation, stereotype, and prejudice surround disability within a very physical basis. Another reason is to enhance a state obligation in terms of duty barrier to the rights holder. Through the philosophical, sociological, juridical reasons of the importance the new law making concerning the rights of persons with disabilities, National Commission on Human Rights (Komnas HAM) in 2012 introduced an academic paper towards a new law draft making of the rights of persons with disabilities following the ratification of UNCRPD in the previous year (Naskah Akademik Rancangan Undang-undang Penyandang disabilitas, Komnas HAM, 2012) That paper was become the bases of bill of act the rights persons with disabilities which was drafted during 2012 and being finalised in 2013 (Rancangan Undang-undang Penyandang Disabilitas, Komnas HAM, 2013). Komnas HAM conducted this study along with stakeholders across disability issues experts among Government, DPOs, and Scholars. It was submitted by Komnas HAM to the Legislation Body of Parliament on 10 December 2013

(Komnas HAM, 2013). Draft which was being sent by Komnas HAM (besides other valued drafts from DPOs) was taken into account for the further discussion. On the early year of 2014, It was decided by the parliament to become one of the list in the National Legislation Programme (Program Legislasi Nasional/Prolegnas) which means a funnel to further worth discussion toward enactment.

In pursuance of prolonged discussion and mostly profound debates encircled, The Act was finally passed on 17 March 2016 in the plenary session of the parliament, and signed by President of Republic of Indonesia on 15 April 2015. It is the Act Number 8 Year 2016 concerning Persons with Disabilities. It can be said as a milestone of the evolvement of disability framework in Indonesia, from the old paradigm into the human rights model. It is extract the primary provisions in the UNCRPD which therein the act is enriched with sanction norms. The human rights approach aimed to empowerment of persons with disability in an equal basis of participation in the society. Hence the state should ensuring the protection and fulfilment of these rights through taking some necessary, appropriate and effective measures.

The positive measures in the convention are taken into account to ensuring full enjoyment of the rights in light of equality and non-discrimination in order to enable full participation of persons with disabilities in the society. These are some of the acknowledgment of positive measures in the convention, most of which is being adopted to the newest Indonesian Act. The reasonable accommodation as appear repeatedly in some articles of the Act (for instance, in article 1(9); 10d; 11c;16c;18b;19a; 50(4) 109 (2), along with the provisions which are not literally mentioned however contain positive measures) is denote a pivotal devices of positive measures in order to achieve substantive equality for persons with disabilities. It is obviously the law written on the book, yet at the time being ahead, the challenges are wait for this this fruitful notion to bring about an eminent of fulfilment of the rights of persons with disabilities across Indonesia.

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