

# V . Employment Promotion of People with Disabilities in Korea

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## I. Introduction

We can hardly conceive of human dignity without guaranteeing the basic human needs, so social welfare has been recognized as an important task of the state. The Constitution of Korea guarantees people the right to a humane livelihood, and additionally, it obligates the state to promote social welfare to achieve such humane living conditions. In relation to the Constitution, a number of statutes have been enacted and revised in order to promote social security and welfare; however, they are criticized for their insufficiency, from a substantial justice perspective, in protecting welfare rights.

In Korea disability rights are regulated as one branch of social welfare law<sup>1</sup>. In this article, after introducing some constitutional provisions on social security or social welfare, I describe the basic outline of the mandatory employment system promoting the employment of the disabled in Korea, and I examine a related decision of the Constitutional Court of Korea<sup>2</sup>. In conclusion, I believe the coexistence of two ways for promoting the employment of people with disabilities, the mandatory employment system and the anti-

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1 The current social welfare system in Korea consists of three components: (1) social insurance (National Health Insurance, National Pension, Employment Insurance, Industrial Accident Compensation Insurance) (2) public assistance (livelihood protection, medical aid, disaster relief) (3) social welfare services (for the disabled, the elderly, children). See the Framework Act on Social Security; Yoosung Kim, *Korean Social Security Law*, 125 (5th ed, Seoul: Bub-moon Publishing Co., 2002).

2 The Constitutional Court of Korea was established in 1988 as a key part of the constitutional system. The Constitution adopted a new constitutional justice system to safeguard the Constitution through special procedures including adjudication on constitutional complaint. The Constitution, Chapter 6 Articles 111-113, bestowed upon the Constitutional Court the adjudication on constitutionality of statutes, impeachment, dissolution of political party, competence disputes, and constitutional complaint.

discrimination system, would improve in the long run the employment conditions for people with disabilities.

## II. The Constitution and Disability Rights Law in Korea

First of all, as a foundation of other basic rights in the Constitution, Article 10 of the Constitution of Korea states that “All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.”

Furthermore, the Constitution of Korea has some explicit provisions about social security or social welfare, including disability rights. Basically, Article 34 (1) and (2) declares that “All citizens shall be entitled to a life worthy of human beings” and “The State shall have the duty to endeavor to promote social security and welfare.”<sup>3</sup> In particular, Article 34 (5) explicitly states “Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act.” In addition, regarding promoting employment, Article 32 provides that all citizens are entitled to the right to work, and the State shall make an effort to promote employment.

In order to clearly define the constitutional stipulations on social security, the National Assembly enacted the Framework Act on Social Security, articulating basic elements of a social security program. Article 3 of the Act defines “social security” as “social insurance, public aid, and social welfare services that guarantee income and services necessary to protect citizens from poverty, unemployment, disability, ageing, illness, death, etc., and to improve their quality of life.”

Under these constitutional provisions, in order to carry out such requirements in the realm of welfare for people with disabilities, the National Assembly has enacted some important statutes such as the Act on Welfare of People with Disabilities (1981)<sup>4</sup>, the Act on

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3 As to the matter of the relation between this Article and social welfare rights, see Yoosung Kim, Korean Social Security Law, 96-99 (5th ed, Seoul: Bub-moon Publishing Co., 2002); Kwangseok Cheon, Korean Social Security Law, 162-165 (9th ed, Seoul: JypHyunJae, 2012).

4 This act was enacted to make clear the responsibility of the national and local governments for ensuring the decent lives and rights of disabled persons. According to this act, government should

Employment Promotion and Vocational Rehabilitation for People with Disabilities (the former Act on Employment Promotion of People with Disabilities, 1990), the Act to Secure Convenience for People with Disabilities, Elderly Persons, and Pregnant Women (1997), the Act on Promotion of the Transportation Convenience of Mobility Disadvantaged Persons (2005), the Act on Special Education for People with Disabilities (2007), and the Act on Activity Assistant Services for People with Disabilities (2011).

The next chapter examines the outline of the mandatory employment system under the Act on Employment Promotion and Vocational Rehabilitation for People with Disabilities and the resulting legal challenges against this system in Korea.

### III. Mandatory Employment System and Legal Challenges in Korea

#### 1. Legal Approaches towards Employment Promotion of People with Disabilities

Each country attempts to respond to disability issues at every political level and in ways that are most congenial to background cultural patterns. States have pursued distinct policies predicated on their own political and social systems. Historically, many countries have followed a model, which emphasizes preventing disabilities and providing special, albeit circumscribed, benefits to people with disabilities. Others follow a model like that in the United States, which depends primarily on removing barriers to the exercise of the same rights others enjoy<sup>5</sup>.

In regard to the employment promotion system, the former model usually takes the form of a quota system, and the latter the form of an anti-discrimination system. For

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implement comprehensive welfare measures for people with disabilities by prescribing programs aimed at the prevention of disability, the guarantee of medical care, education, re-employment and the general improvement of living environment for people with disabilities. In addition, government should make contributions to the enhancement of a stable life, the promotion of welfare and full participation in social activities for people with disabilities by providing necessary measures concerning self-support and the payments of subsidies.

5 Peter Blank, Eve Hill, Charles D.Siegal, Michael Waterstone, *Disability Civil Rights Law and Policy: Cases and Materials*, 847 (Thomson/West, 2005). In this book, they label the former as “welfare model” and the latter as “rights model.” However, I don’t agree with these labels because nowadays some welfare benefits in those countries which adopted the former system also are guaranteed as a constitutional or statutory “right.”

example, most European countries have adopted programs to assist people with disabilities that have taken the form of quotas for the number of disabled employees entities have to hire<sup>6</sup>. On the other hand, for example, the Americans with Disabilities Act (ADA) of the United States uses the anti-discrimination system; Title I of the ADA prohibits discrimination against a qualified individual with a disability in regard to hiring. As examined below, initially Korea applied the former model.

## 2. Mandatory Employment of the Disabled and Subsidy in Korea

The Act on Employment Promotion and Vocational Rehabilitation for People with Disabilities (*former* Act on Employment Promotion of People with Disabilities) is a significant statute in protecting the human rights of disabled persons in Korea. This frequently revised act was enacted in 1990 for the purpose of contributing to the employment promotion and vocational rehabilitation of disabled persons so that they may live decent lives through jobs suited to their abilities and their integration into society. This act proclaimed that the State and local governments shall support people with disabilities and their employers, take measures for vocational rehabilitation that consider the characteristics of disabled persons, and comprehensively and effectively implement policies necessary for promoting the employment of people with disabilities (Article 3).

One of the main contents of this act is the mandatory employment of the disabled and a subsidized system for such mandatory employment.

According to the Act, an employer employing over a certain number of individuals must employ disabled individuals at or over the rate set forth by the presidential decree (the standard employment rate). If the employer employs a higher rate of disabled persons, said employer receives an employment subsidy. However, if the employer fails to meet the standard employment rate, such an employer must bear the disabled employment charge in a predetermined amount by paying said amount each year to the Minister of Labor.

Specifically, pursuant to the enacted Act of 1990, an employer employing over a certain number of individuals, as set forth in the presidential decree, must employ disabled individuals at or over the rate set forth by the presidential decree, between one-hundredth

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6 Supra 849, 903

and five-hundredths of the entire number of employees (Article 35). Should the employer employ a higher rate of disabled persons, said employer receives an employment subsidy (Article 37), but should the employer fail to meet the standard employment rate, said employer must bear the disabled employment charge in a predetermined amount by paying said amount each year to the Minister of Labor (Article 38). Pursuant to the Enforcement Decree of the *former* Act on Employment Promotion of People with Disabilities, an employer normally and constantly employing three-hundred employees or more must employ people with disabilities at or over the rate of two-hundredths of the entire number of employees (Article 33, 34).

The mandatory employment provisions have been revised, and at present, the Act and the presidential decree provide that the employers normally and constantly employing 50 employees or more shall employ disabled persons at or over the rate of 29/1000 of the entire number of employees (Article 28 of the Act, Article 25 of the Decree).

### 3. Legal Challenges against the mandatory employment system in Korea

The mandatory employment provision and the disabled employment charge provision of the Act on Employment Promotion and Vocational Rehabilitation for People with Disabilities<sup>7</sup> were challenged by an employer, who argued that they violated the freedom of contract and occupation<sup>8</sup> as well as the property right<sup>9</sup>. However, in *Mandatory Employment Case*, 15-2(A) KCCR<sup>10</sup> 58, 2001Hun-Ba96<sup>11</sup> (July 24, 2003), the Court held that both the mandatory employment provision and the disabled employment charge provision are not unconstitutional<sup>12</sup>.

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7 The basic contents of the provisions are the same as those of the enacted Act above mentioned.

8 Article 15 of the Constitution states "All citizens shall enjoy freedom of occupation."

9 Article 23 (1) of the Constitution provides that "The right of property of all citizens shall be guaranteed. The contents and limitations thereof shall be determined by Act."

10 Korean Constitutional Court Report

11 "Hun-Ba" means a constitutionality case filed by an individual complainant in the form of a constitutional complaint according to Article 68 (2) of the Constitutional Court Act. "2001Hun-Ba96" means that kind of constitutionality case the docket number of which is No.96 in the year of 2001.

12 The Court found the mandatory employment provision constitutional by four out of nine Justices and the disabled employment charge provision constitutional by a unanimous decision. Five Justices dissented, asserting that the mandatory employment provision is unconstitutional because it violates the principle against blanket delegation, which permits statutory delegation but does not permit blanket delegation. According to Article 113 (1) of the Constitution, a quorum of six Justices is

The summary of the opinion of the Court is as follows:<sup>13</sup>

『In reality, people with disabilities, due to their physical or mental conditions, often face extreme hardship in obtaining employment commensurate with their abilities. A measure at the social and national level is thus required in order to guarantee their right to work. From this perspective, despite the guarantee of business entities' freedom of economic activities and the declaration of the freedom of contract among private individuals under the Constitution, it is essential to restrict such freedom to a certain degree in order to recognize human dignity and value and to guarantee humane living conditions for people with disabilities, who are in a socially and economically weaker position<sup>14</sup>. Since the creation of jobs relies on general private business entities as well as the State, it is inevitable that private businesses be obliged, to an appropriate extent, to respect the guarantee of employment for people with disabilities. Therefore, the mandatory employment provision at issue does not excessively restrict the freedom of contract and other economic liberties of the employers.

The disabled employment charge is a means of effectively securing the application of the mandatory employment of disabled persons system, and, as such, is a contribution collectively paid by the employers in order to equally adjust the economic burden resulting from the employment of people with disabilities between the employer who actually employs people with disabilities and the employer who does not, in light of socially shared responsibility. This system is designed to equalize the economic burden incurred by the employment of people with disabilities among different employers, by monetarily penalizing the employers who do not meet the employment rate and subsidizing the employers who employ people with disabilities in excess of the required employment rate. Therefore, in this case, the legislative purpose of the disabled employment charge provision at issue is legitimate. Moreover, the means adopted to achieve this legislative purpose is appropriate, in that the above charge is used to adjust the economic burden of employment of people with disabilities and to subsidize such employers who employ people with disabilities.

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required for a decision holding a statute unconstitutional.

13 The Constitutional Court of the ROK, Decisions of the Korean Constitutional Court (2003), 223-228.

14 Article 119 (2) of the Constitution provides that the State may regulate and coordinate in order to ensure proper distribution of income and to democratize the economy through equilibrium among the economic agents.

Furthermore, the base line of the employment cost is set at six-tenths of the minimum wage or more. This neither excessively infringes upon the property right of employers nor neglects their relative legal interests in light of the public interest in the promotion of the employment of the disabled persons, as mandated by the Constitution. Therefore, the disabled employment charge system does not infringe upon the freedom of contract and occupation or the property right of the employers.』

As observed in this case, by providing some explicit special provisions concerning social security in the highest law, the Constitution itself truly lays a sound foundation for social protection. These special provisions become legitimate grounds for affirmative actions for minorities, including people with disabilities, and consequently, have an effect on the level of equal protection scrutiny<sup>15</sup>. For example, after this decision, other constitutional complaints concerning the constitutionality of authorizing massage licenses exclusively to blind people was presented. In 2008, in the *Visually Handicapped Massager (Masseuse) Case* [20-2(B) KCCR 1089, 2006 Hun-Ma 1098,1116,1117 (Consolidated), October 30, 2008], the Court held that it is constitutional reasoning that given the insufficient welfare policies for the visually handicapped, massage practice is perhaps the only occupation available for the visually handicapped. The Court held that the provision aims to guarantee the livelihood of the visually impaired based on Article 34 (5) of the Constitution that concerns the protection of the disabled, and it is necessary to take preferential measures in order to realize substantial equality for the visually impaired, a minority that has been discriminated against over the years in terms of both education and employment.

Even after the Court rendered the decision, a constitutional complaint concerning the mandatory employment system was filed again, but the attempt failed<sup>16</sup>.

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15 Bokgi Kim, "Constitutional Adjudication and the Protection of Minorities in the Republic of Korea", Center for Minority Studies, Kansai University, *Journal of Minority Studies* Vol. 3, 71 (2010. 3.)

16 Constitutional Court, 2010Hun-Ba432 (March 29, 2012). In this case, the main contested provisions were Article 28 and 33 of the Act of 2007, which provide that an employer employing over 50 employees or more shall employ disabled individuals at or over the rate set forth by the presidential decree within the extent of five-hundredths of the entire number of employees (Article 28), and if the employer employing over 100 employees or more fail to meet the standard employment rate, such employer must bear the disabled employment charge (Article 33).

## IV. Conclusion

For the people with disabilities, employment means much more than just having a job. Employment could be the foundation for human dignity and happiness for such people. It is one reason that employment promotion and vocational rehabilitation plays a great part in the domain of welfare for people with disabilities.

The Government endeavors to expand welfare institutions and improve the quality of their services to provide comprehensive protection for people with disabilities. The Government is also expanding the income maintenance programs for people with disabilities by providing welfare benefits as well as reducing taxes and fees. However, compared to its rapid economic growth, Korea's standard of social welfare seems to lag far behind other developed countries.

Answering the question of which model leads to better outcomes in promoting the employment of people with disabilities is not simple; many factors including political and social systems, economic resources, and the historical background of social welfare should be considered. The quota system, which Korea adopted in 1990, has been useful and effective in improving the accumulated unequal status of people with disabilities in the short term.

However, basically this system was criticized because the effectiveness appeared to be limited in the long view. The employment rate of the disabled is still not that high after years of enforcement of the quota system. Moreover, simply imposing quotas avoided recognizing the particular attributes of disability discrimination. In addition, the quotas stigmatize the disabled by implying that workers with disability could not compete for equivalent jobs absent the mandate<sup>17</sup>.

Therefore, it was desirable to add an anti-discrimination system to protect the disabled, which was done in 2007 by enacting the Act on the Prohibition of Discrimination against People with Disabilities and Remedies. Guaranteeing the equal protection truly lays a sound foundation for full participation of the people with disabilities. Real equality between the *present* disabled people and the *potential* disabled people can be realized by removing any

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17 Peter Blank, Eve Hill, Charles D.Siegal, Michael Waterstone, Disability Civil Rights Law and Policy: Cases and Materials, 849 (Thomson/West, 2005)

social barrier against people with disabilities and prohibiting discrimination against them<sup>18</sup>. Indeed, this corresponds with the intent of equal protection of Article 11 (1) of the Constitution.<sup>19</sup> In short, it would be the cornerstone for the equal opportunity and full participation of the people with disabilities.

However, even after the introduction of an anti-discrimination system, I believe the mandatory employment system needs to be maintained, at least partially, to promote the employment of a *so-called* unqualified or incompetent individual with disability. Otherwise, they have great difficulty in getting a job, the basic grounds for their human dignity and happiness. As discussed in the decision examined above, it shall not violate any constitutional provision. Moreover, it would answer the purpose of the current Constitution, which provides some explicit provisions about social welfare.

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18 Heung-jae Lee, "Protection of Disability Rights in Social Law", Statutes on Disability rights, 15 (Department of Justice, 1989)

19 The provision states "All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status."