
Korean Women's Activities for Legislation to Guarantee Gender Equality in Employment

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Abstract

This paper examines from the perspective of feminist jurisprudence how Korean women have pursued law reform for securing gender equality in employment. It stresses that legislation for these purposes in Korea has mainly been propelled by the cooperative activities of women workers, many activists of women's organizations, and feminist law scholars. It demonstrates their movements for amending or enacting laws such as the Constitution, Labor Standards Act, and Gender Equality Act in Employment as leading cases among those various activities. Also, it shows the current legislative tasks women are struggling for.

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I. Introduction

Legislation is mainly formed by the following forces. The first are political, economical, social and cultural circumstances. The second are the values of peoples such legislators and bureaucrats who have power over the legislation.¹⁾ The third is the influence of the persons concerned. The fourth are popular opinions.

Incidentally, democracy and gender equality were stated as important legal principles in the Constitution of the Republic of Korea first promulgated in 1948.²⁾ However, Confucian patriarchy had more actual influence over Korean society. As the result of this, the administration, legislature and judicature were mainly composed of men. Therefore, the absolute majority of those who had authority over the legislation, interpretation, application, and the enforcement of laws were men. On the other hand, women's scope of activity and their role were restricted to tasks in their home, and social customs involving gender discrimination and segregation existed.

Women's social participation was low until women's economic activity increased after 1961 with the government's policy for rapid economic growth. By the way, many women became sweat laborers by the economic policy intended for cutting down the cost of labor. Although there were legal provisions that prohibited gender discrimination and especially protected women laborers, the government and employers made these into useless provisions. Owing to this circumstance, most women laborers became the main objects of sex discrimination, sexual harassment and sexual violence. Most of their income was appropriated for the education of male brothers or family living expenses, and for gaining higher earnings, women who were engaged in sexual service businesses increased. Labor and student movements for democratization protested the dictatorship and growth-oriented policies of the military government which resulted in these situations. Thus, improvements of the coarse working conditions of women had been an important

1) Many feminist law scholars have endeavored to disclose that legislations and case laws are seemingly gender-neutral, but practically gender discriminatory and reinforce women's subordination (for example, see, Nadine Taub and Elizabeth M.Schneider, "Women's subordination and the Role of Law, *Feminist Legal Theory*, (ed) D. Kelly Weisbarg, Temple University Press(1998), pp.9-21 ; Tove Stang Dahl, *Women's Law, Norwegian*, University Press(1998), pp.11-17.)

2) For an in-depth analysis of Korean constitutionalism, see Chaihark Hahm, "Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?", *Journal of Korean Law*, Vol. 1 No. 2 (2001), pp. 151-196.

slogan for realization of social justice until the 1970s.³⁾

Since the 1980s, policies of government and legislation for extending women's social participation and for guaranteeing gender equality have developed greatly. This marked change was affected by international instruments made by UN or ILO, and a global trend emerged in which national legislation for gender equality was expedited. Korea ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in December, 1984. Furthermore, as for the internal situation, the increase of education level and awareness of human rights of women and active movements of women's organizations and feminist law scholars have been a major contributor to this change. Feminist law scholars have acted not only as professors or lawyers but also as researchers of KWDI (Korean Women's Development Institution) founded in 1984 as governmental funded institution for research and education on women's issues.⁴⁾ Feminist law scholars and activists of women's organizations have cooperated to develop legislation campaigns as a major strategy to change the Korean society into a democratic and equal society. For this, they have made various legislative bills to abolish discrimination, sexual violence and sexual harassment and to enhance women's social participation and maternity protection, In addition, they drove forward various activities for legislation such forums, mass demonstrations and petition campaigns and also struggled for changes to court decisions.⁵⁾ The government and the National Assembly also recognized that this demand of women accompanied the global trend as well as the internal change towards democratization, globalization and knowledge industrialization. Many politicians actively began to react to this demand in order to obtain the support of women electorates. The people's awareness and the press came to be amicable to legislation for gender equality. By this change since the 1980s, many laws aimed at realizing gender equality have been legislated.⁶⁾

3) For an in-depth analysis of Korean women workers' situation, see Yisoo Kang, The Changes of Korean Economy and Women' Work Experience after 1945' Liberation, *Women and History*, Vol.2, The Korean Academic Society of Feminism and History(2006), pp.41-76.

4) For general information on the Institution, see <http://www.kwdi.re.kr>.

5) For an in-depth analysis of Korean women organizations' activities, see HyunBack Chung, Korean Women' Movement since 1945, *Women and History*, Vol.2, The Korean Academic Society of Feminism and History(2006), pp.21-42.

6) For an in-depth analysis of women's legislation movement in Korea, see Elim Kim, Legislation Movement of Korean Women Since National Liberation, *Women and History*, Vol.2, The Korean Academic Society of Feminism and History(2006), pp.119-128.

II. Enactment and Revision of the Constitution

A. Motives for Enactment and Characteristics of the Constitution

Since it was enacted in 1948, the Constitution has stipulated: “All citizens shall be equal before the law, and there shall be no discrimination in political, economic, or social life on account of sex, religion or social status”.⁷⁾ Also, it has had a provision providing: “Special protection shall be accorded to working women and children”.⁸⁾ This provision is rare in the constitutions of foreign nations. This legislation was made not only by the influence of international instruments stated the protection for working women, but also by the pursuit of de facto gender equality.

B. Women's Activities for Revision of the Constitution

As the Constitution is the fundamental and highest law, all statutes against it are nullified, and enactment and revision of all statutes shall be based on it. Notwithstanding this legal principle, gender discriminatory laws have existed, including the family law enacted in February 1958. To remedy this problem, when the Constitution was revised in the Fifth Republic in 1980, women organizations and feminist law scholars submitted a revision bill and struggled for realization of it. As the achievement of this movement, a new article was inserted in Constitution: “Marriage and family life shall be entered into and sustained on the basis of individual dignity and gender equality”.⁹⁾ But the family law was not revised.

In 1987, when the Sixth Republic Constitution (the current Constitution) was revised by the popular movement for democratization against the military government, women organizations and feminist law scholars again made a revision bill to give concrete shape to the provisions on gender equality in the Constitution. Revision bills submitted by the progressive women organization's union (KAWU) and by KWDI were greatly reflected in the revised Constitution. As a result of these movements, the Korean Constitution has more provisions for gender equality and women's rights than any other country. New articles inserted in the Constitution are

7) Article 11(1) of the Constitution which was last revised in 1987.

8) Article 32(4), (5) of the Constitution.

9) Article 36(1) of the Constitution.

as follows:

- (1) Article 32 (4) Special protection shall be accorded to working women, and they shall not be subjected to unjust discrimination in terms of employment, wages or working conditions.
- (2) Article 34 (3) The State shall endeavor to promote the welfare and rights of women.
- (3) Article 36 (1) Marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal. (2) The State shall endeavor to protect maternity.

III. Enactment and Revision of Labor Standards Act

A. Motives of Enactment and Characteristics of LSA

The Labor Standard Act (LSA,) prescribes the minimum labor standards for the human dignity of workers on the basis of the Constitution. LSA was firstly enacted in 1953, at the end of the period of war between South Korea and North Korea. Despite the circumstances at the time when industrial fundamentals were not equipped, LSA was made by referring to the labor laws of advanced countries and the international labor standards of ILO.

Especially, in relation to women's work, it banned sex discriminatory treatment in chapter 1 ("General Provisions") and established Chapter 5 ("Females and Minors") which had provisions for the protection of working adult females and children under the age of 18.

The provisions for the protection of working adult females were classified as follows:

- (1)The first type prohibited employers from engage any female in hazardous and dangerous businesses in terms of morality and health and from working inside pits.
- (2)The second type restricted the working hours of women. Thus, women were prohibited from working at night (from 10 pm to 6 am) and on holidays, and overtime work exceeding 2 hours per day, 6 hours per week, and 150 hours per year.
- (3)The third type related to maternity protection. Employers had to grant one

day's menstruation leave with pay per month for maternity protection to females, and provide pregnant female workers with paid vacation for 60 days before and after childbirth. Also, employers had to accord to a female worker who had an infant under twelve months time to nurse for two daily periods of more than 30 minutes each period.

- (4)The fourth type was about protection against dismissal. Employers could not dismiss any female worker during, before or within 30 days after childbirth, and had to give travel expenses if she went to her hometown within 14 days of her dismissal.

Incidentally, these provisions were made almost identically to those in the Japanese LSA enacted in 1947. Thus, peculiar protective provisions such as menstruation leave and travel expenses for women also came to exist in Korea, In their legislation process, particularly controversy heated up over menstruation leave. At that time, a female member of National Assembly insisted on menstruation leave with pay for a reason that if women overworked in their menstrual periods, their healthy pregnancy and childbirth could not be expected, and if unpaid menstruation leave be enacted like Japan, sweated(overworked?) women laborers could not take it. Owing to this, the provision for menstruation leave with pay could be inserted in LSA.

However, few employers observed these provisions in spite of criminal penal provisions against the violation. So there has been a great discordance between law and realities.

B. Women's Activities for Revision of LSA as to Gender Discrimination

The LSA was revised in February 1998, the provision that an employer shall not discriminate on the ground of sex in the case of selecting workers for dismissal for managerial reasons was newly established.¹⁰⁾ This legislation was accomplished because women's organizations and labor organizations sought to establish legal measures to prohibit enterprises from carrying out unjust and sex discriminatory dismissals against women and altering their status forcibly to non-regular workers in times of national economic crisis.

10) Article 31(2) of the current LSA.

C. Women's Activities for Revision of LSA as to Maternity Protection

1. Revision of 2001 for Reinforcement of Maternity Protection

a) The Background of Revision

Women's organizations, labor organizations, and feminist law scholars have continuously sought legislation for the efficacy and reinforcement of maternity protection provisions since 1980s. But provisions for the protection of women in LSA, except for the nullification of travel expenses provision in February 1999, remained nearly unchanged and a dead letter.

In spite of this situation, employer organizations and some male law scholars asserted that reform should ease or nullify provisions for women protection for the reason that they had become a financial burden to enterprises and the cause for enterprises to avoid employing women. Also, they asserted that there was a clear contradiction between gender equality and the protection of women.

Feminist law researchers in KWDI established fundamental principles of legislation for gender equality and the protection of women in employment through study on international instruments and foreign legislation. Women's organizations and labor organizations reorganized legislation strategies according to these principles. These principles were as follows.

- (1) The essential difference between males and females is a biological difference that only women can experience pregnancy, childbirth, and nursing. Therefore, according to the idea of relative and real equality, the maternity function of women should be treated differently. Incidentally, the maternity function has an important social function which offers manpower not only to a family, but also to enterprises, community, and the state. Moreover, maternity protection is necessary to realize women's right to work. So, the maternity function of women must be socially protected. Women should not be discriminated due to it.
- (2) Unlike maternity protection, protection for the health and safety of workers should be accorded equally to women and men. The same applies to the support for workers in balancing between work and family life, such as in child rearing, because it is not work which only women should be responsible for and men should participate and share the duty.

(3) Affirmative Action which temporary gives preferential treatment to particular gender aimed at accelerating *de facto* equality is not a discrimination,

On basis of these principles and the revision bill made by KWDI, female members of the Assembly who had been leaders of women's organization and officials of the Division for Female Workers in the Ministry of Labor actively propelled the revision of the law. As a result, by August 2001, LSA had changed greatly in the 48 years since its enactment along with the Gender Equality in Employment Act (GEEA,) and Employment Insurance Act (EIA).

b) The Major Contents of Revision

The basic direction of the 2001 revision was: (1) to meet the international labor standards; (2) to promote women's employment; and (3) to increase the effectiveness of the Act. Accordingly, provisions directly related to pregnancy, childbirth, and nursing were reinforced, whereas provisions generally applying to women were somehow abridged. The major contents were as follows:

- (1) In the protection of the first type, there was an increase in the kinds of jobs in hazardous and dangerous businesses prohibited for a female during pregnancy or within one year after childbirth. On the other hand, a female not given specific protection was banned from working only in jobs that use material harmful to pregnancy. Also, the provision that prohibited all females from working inside pits would not apply when the work was temporarily needed to perform jobs pertaining to health, medicine, news reporting, etc.¹¹⁾
- (2) In the protection of the second type, a female during pregnancy or within one year after childbirth is allowed to work during nights and holidays only once the employer has obtained either the consent or request from the employee and received permission from the Minister of Labor after having consulted in earnest with workers representatives from the relevant workplace. On the other hand, an employer needs the consent of women in general in order to employ them during nights and holidays. Special restriction of overtime work applies only to a female within one year after childbirth.¹²⁾

11) Article 70 of the LSA.

12) Article 68 of the LSA.

- (3) In the protection of the third type, the period of maternity leave was increased from 60 days to 90 days. Also, among those 90 days, 30 days are unpaid leave, though during that period, a specific sum of money is paid from employment insurance.¹³⁾

2. Revision on Provision of Menstruation of 2003

Since the 1990's, labor organizations have demanded the reduction of legal working hours per week from 44 hours to 40 hours. Against this, employer organizations suggested a bargain to abrogate menstruation leave.

Women's organizations and labor organizations protested this for the reason that the menstruation leave scheme not only had a practical and symbolic function for maternity protection but also, if it was nullified, a female laborer who conventionally had taken allowance instead of menstrual leave would consequently receive a lower wage. On the other hand, women working in better circumstances had no sympathy with the movement against the nullification of menstruation leave, and they preferred the increasing of equal opportunity in employment.

Finally, when LSA was revised in September 2003 to reduce working hours, menstrual leave became unpaid leave. Also, the request of the female concerned would be a necessary condition.¹⁴⁾

3. Revision of 2005 for Reinforcement of Maternity Leave

Women's organizations and labor organizations have demanded legislation for reinforcement of maternity protection. But the government and the Assembly have showed inactivity.

Incidentally, as the average birthrate of Korea decreased to 1.16 in 2005 and the low birthrate became a serious social problem, legislators have actively pushed forward legislation for the encouragement of pregnancy and childbirth.

Thus, when LSA and EIA were revised in May, 2005, two provisions were newly

13) Article 72 of the LSA.

14) Article 71 of the LSA.

established. One is that an employer had to grant protection leave in case of a female in pregnancy having a natural abortion or stillbirth after 16 weeks in pregnancy. The other was that female laborers in small and middle firms could be paid for 90 days leave before and after childbirth from employment insurance. These revisions came into force from 2006.

IV. Enactment and Revision of Gender Equality in Employment Act

A. Motives for Enactment and Characteristics of the Act

The Gender Equality in Employment Act (GEEA) was enacted in December 1987. The main causes of its enactment were women's lawsuit battles and the legislation movement to abolish discrimination against women in employment. The first lawsuit against gender discrimination in employment was initiated by a female telephone operator in January 1983. She sued her company for setting a retirement age limit for operators (composed of females) 12 years shorter than other jobs and claimed this measure violated provisions of the Constitution and LSA relating to the prohibitions of sex discrimination. However, a district court and a high court decided against the plaintiff for the reason that it was not gender discrimination, but a reasonable measure in consideration of the job characteristics. After that, the company recruited many unmarried females as telephone operators. After that, six years had passed before the Supreme Court ruled in favor of the plaintiff in February 1988. On the other hand, when an unmarried woman, a victim of a car accident, filed a damage suit, a district court ruled in 1985 that the taxi company responsible should compensate her for lost wages which she could have obtained until she was 25 years old, and then only for a housewife's wage equivalent to the minimum cost of living for the reason that the average female would work as a worker only before marriage.

Women's organizations in alliance with progressive lawyers protested these court decisions and they argued for the enactment of GEEA to guarantee gender equality effectively and concretely. Thus, KWDI accomplished its research on the enactment of GEEA in December 1985, but the government as regulatory agency suspended publishing it for the reason that it was not mature yet.

However, in 1987, the ruling party and the administration decided to enact GEEA for winning the support of women ahead of the elections.

The enacted GEEA had provisions prohibiting an employer from discriminating against women in all processes of employment including recruitment, hiring, retirement and dismissal and had penal provisions against violators. Also, it had provisions to the effect that an employer had to grant childcare leave up to a maximum of one year if a female worker with an infant aged less than one year so requested. Also, an employer qualifying as a large corporation had to set up a nursing facility at the workplace for female workers. Furthermore, when disputes as to GEEA were brought between women labors and employers, administrative organizations established in local labor administrations could fix up problems by means of mediation.

B. Revisions Owing to Women's Activities for Legislation

1. The Revision of 1989

However, women's organizations such as the Korea Women's Associations United (KWAU) in alliance with female law scholars including law researchers of KWDI, voiced criticisms of the fact that because GEEA was enacted roughly as an electoral strategy, it did not have the essential and valid provisions. Also, they made a revision bill and campaigned actively for the legislation. At that time, male lawyers and labor leaders who had participated in the democratization movement and had become members of the Assembly assisted to realize this legislation.

Thus, GEEA was revised in April 1989. This revision newly inserted into the GEEA definition provisions on discrimination, equal wage provisions for work of equal value, provisions on employer's burden of proof and a provision on the period of childcare leave that had to be included in the total service period of the employee. Also penal provisions were reinforced.

After the enactment and revision of GEEA, women actively filed suits against gender discriminatory practices in employment. An example of these cases was that a council of college women in Seoul made allegations to the Prosecutor's Agency against companies which had advertised recruitment in 1989 only for males; consequently, those companies were punished. Owing to this case, discriminative advertisements disappeared.

2. The Revision of 1995

However, gender discriminatory consciousness and practices remained entrenched. So, women carried out activities to abolish them. As in the example case, women's and labor organizations jointly made allegations to the Prosecutor's Agency against companies which had suggested certain physical conditions including appearance, height and weight as the important recruit conditions for employing female workers in 1994. To point out the problems of this recruiting practice, a professor's forum for gender equality was organized and it held a seminar. Nevertheless, the prosecutor did not indict most of the companies concerned. Thus, female members of the Assembly sought to revise GEEA and consequently, in August 1995, a provision preventing any employer from demanding certain physical conditions in recruiting women such as height or weight which were not necessary for performing a certain job was inserted into GEEA

3. The Revision of 1999

a) Revision on Indirect Discrimination

After the enactment of GEEA, many companies granted the equal chance to choose one among two job classifications and demanded that employees who chose the job classification with better conditions obey the employer's direction to transfer to another province or abroad at any time. As a result of this condition, women could not help but choose the job classification with inferior conditions.

Thus, women's organizations and labor organizations demanded the prohibition of this indirect discrimination. Consequently, in 1999, a provision on indirect discrimination was inserted in the discrimination definition provision of GEEA.

b) Revision on Sexual Harassment at Work

In Korea, women's activities to combat against sexual harassment at work were sparked by a case where a female assistant filed a civil lawsuit against a professor and the university in 1993. She asserted that the professor had dismissed her in retaliation for he rejection of his sexual conduct to her and that the university had ignored her petition on these facts.

The students union of that University, women's organizations, feminist law scholars and progressive lawyers cooperated in raising social consciousness about sexual harassment and in making legal measures to prevent and prohibit it. Thus, provisions as to sexual harassment at work were established in the Basic Act for the Advancement of Women enacted in December 1995, in the revised GEEA and in the Gender Discrimination Prevention and Relief Act enacted at the same time in February 1999. GEEA defined the concept of sexual harassment and imposed three obligations on employers.¹⁵⁾ One was to conduct education at least once a year to prevent sexual harassment at work; the second was to take disciplinary measures against the sexual harasser; and the third was to relieve victims.

4. The Revision of 2001

14 years after its enactment, GEEA was greatly changed in August 2001. Its major revisions were as follows.

a) Reinforcement of Gender Discrimination Prevention

A provision which defined the concept of indirect discrimination and a proviso allowing deferential treatment between men and women were further actualized. Also, penalties against a discriminatory employer were reinforced.

Furthermore, provisions which prohibited discrimination against women were changed to prohibit discrimination against women and men for the reason that discrimination is a violation of the rights of all people. For the same reason, the name of the Basic Plan for Welfare of Female Workers which the Minister of Labor had to set up under GEEA was changed to the Basic Plan for Gender Equality in Employment.

b) Reinforcement of Sexual Harassment Prevention at Work

A provision providing that employers, senior workers and workers should not engage in sexual harassment at work and a provision that imposed an administrative

15) Article 2(ii) of the GEEA.

fine on the owner of an enterprise in the case that he committed sexual harassment were newly established in GEEA.

c) Reinforcement of Provision on Childcare Leave

According to this revision, a male worker also could take childcare leave. This legislation aimed to improve stereotypical views on gender roles and to enhance male participation in child rearing.

Moreover, the provision by which the state could provide support for part of the costs of the workers concerned when an employer allows childcare leave was enacted to support the reconciliation between work and family life. So, a worker during childcare leave can receive an allowance from employment insurance.

d) Reinforcement of Provision on Counseling and Solving Disputes

According to this revision, Minister of Labor could set up counseling service rooms for discrimination not only in the local labor administration, but also in labor organizations and women's organizations. Moreover, the Minister could appoint honorary employment inspectors for helping the observance of GEEA among workers or personnel managers in all workplaces.

Also, a worker or an employer could directly apply for mediation to the Equal Employment Commission without going through the local labor administration or labor inspectors.

5. The Revision of 2005

a) Establishment of Provisions on Affirmative Action

At present, affirmative actions that allow the quota system to promote effectively women's social participation and to enhance gender equality practically are utilized on the basis of various laws which were legislated owing to women's demands.

In GEEA, a provision was established in 1989 that in case the State and local government or employer temporarily took special measures to give preference to a particular gender to remove existing discriminations, it would not be considered as discrimination. But there have been no affirmative actions taken under the GEEA

until now.

The revised GEEA in 2005 defined “affirmative action” as “temporary special measures to be taken to give preference to a particular gender to remove the existing discriminations” and actualized its content. According to this, the Minister of Labor could demand an employer who employed female workers below the standard employment rate to submit a plan aimed at removing the existing discriminations and enhancing the employment rate of female workers. In this case, an employer had to submit the plan with materials to show the present employment situation of male and female workers. The Minister of Labor shall evaluate the performance results submitted and award or support enterprises who got good results in the evaluation.

b) Abolition of Equal Employment Commission to Restructure Discrimination Relief Organizations

The present Government established a policy to restructure discrimination relief organizations. According to this, the Gender Discrimination Prevention and Relief Act and Gender Equality Commission were abolished in June 2005. Also, the National Human Rights Commission Act was revised in July 2005 to take measures to give the Commission exclusivity in inquiries and relief regarding gender discrimination complaints.

Along with this change, the revised GEEA of 2005 abolished provisions concerning the Equal Employment Commission.

c) Expansion of the Scope of Workers Eligible to Take Childcare Leave

The revised GEEA expanded the scope of workers eligible to take childcare leave from a worker with a infant less than one year old to a worker with an infant or a child less than three years old. This revision becomes effective from January 1, 2008.

IV. The Current Tasks Concerning Women’s Activities for Legislation

As stated above, women laborers, women’s organizations, labor organizations and female law scholars have jointly carried out various activities for legislation to

guarantee gender equality in employment. It has been predicted that these activities will be a good propellant for reducing gender discriminatory practices and regulations in employment and for enhancing social consciousness about gender equality.

Despite this change, there exists a great gap between law and reality. Thus, women have sought to actualize the law. Also, as non-regular female workers, foreign female workers, and female workers engaged in the sex industry have increased since the 1990s. Their estrangement from the protection of the existing law has become a current problem. Thus, women's activities for legislation to cope with this problem have begun to heat up.

KEYWORDS : gender equality in employment, women's legislation movement, women' human rights, gender discrimination, sexual harassment at work, Affirmative Action, maternity protection, child care.