

## **For an Equal Society where no one is left behind or excluded**

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### **I. Protection and promotion of human rights to achieve peace and co-prosperity of mankind**

Protection and promotion of human rights based on the idea of universal human rights is the main strategy adopted by the UN and its member states after World War II to achieve co-prosperity of mankind and peace. Accordingly, various international human rights standards and institutions have been developed, and member states were obligated to conform to these standards and be equipped with a system to guarantee human rights.

In line with these international trends, Korea started to guarantee human rights with enactment of the first Constitution, joined various international treaties and devoted its efforts to build infrastructure to protect and promote human rights. In 2001, the National Human Rights Commission of Korea was established and in 2007 the first National Plan of Action for the Promotion and Protection of Human Rights was established, which is in its third phase now(2017-2021).

### **II. History and necessity of enactment of an anti-discrimination act as infrastructure for promotion of equality and discrimination remedy**

1. Building infrastructure for correction and prohibition of discrimination which is major axis of human rights guarantee has been the main task and role of the NHRCK since its establishment. The same goes for

enactment of a comprehensive anti-discrimination act in terms of building infrastructure.<sup>1)</sup>

2. Although there exist sectoral acts on prohibition of discrimination such as the Equal Employment Opportunity and Work-family Balance Assistance Act, the National Human Rights Commission of Korea Act can be regarded as the very first act to correct discrimination in society as a whole. The NHRCK was established in 2001 and a mandate as a general and comprehensive human rights ombudsman was given to the NHRCK to provide remedy for violation of all fundamental rights including discrimination rectification. In order to overcome the limitation of the National Human Rights Commission of Korea Act which is more like an act to operate the institution, the NHRCK prepared and applied its own guideline to decide on discrimination. Starting from 2003, the NHRCK made efforts to enact a comprehensive anti-discrimination act and as a result, in 2007, a government legislation was proposed at the National Assembly, which failed to be enacted.

In the meantime, a number of acts to prohibit discrimination in each sector were enacted which include the Act on the Prohibition of Discrimination against Persons with Disabilities, Remedy against Infringement of Their Rights, Etc. in 2007(hereinafter “Act on prohibition of discrimination against persons with disabilities” ), Act on the Prohibition of Age Discrimination in Employment and Elderly Employment Promotion in 2008(hereinafter “Act on prohibition of age discrimination” ), Act on the Protection, Etc. of Fixed-term and Part-time Employees(hereinafter “Act on fixed term employees” ) and Act on the Protection, Etc of Temporary Agency Workers(hereinafter

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1) Before the establishment of the NHRCK in 2001, civil society organizations, especially activists for women’s rights, mostly led the issue of discrimination in Korea. Notable examples include movement to enact and amend the act on equal employment between men and women in 1987, movement to amend the family law in 1990s, movement to enact the basic act on women’s development in 1996 and movement to abolish Hoju system in civil code, create Ministry of women and enact the act on prohibition of discrimination between men and women in 2000.

“Act on temporary workers” ).

3. The National Human Rights Commission of Korea Act can be said as the beginning of a comprehensive anti-discrimination act, but as an act on the establishment and operation of an organization, it lacks nature as a substantive act on the specific scope of discrimination prohibited in our society. For this reason, enactment of a comprehensive anti-discrimination has been the major task to establish infrastructure for human rights protection since the establishment of the NHRCK. However, the first attempt to enact a comprehensive anti-discrimination act was frustrated while other sectoral anti-discrimination acts were legislated or failed due to political power, which led to creation of various special acts with different correction institutions and content of remedies.
4. Depending on the reasons of discrimination, the NHRCK and other correctional institutions take charge of the case, following different correctional processes, and measures to guarantee effectiveness of implementation differ as well. That is, as for discrimination based on disabilities and age, an order for correction is possible, while the Act on Equal employment provides for enforcement penalty and criminal punishment for non-compliance with a remedy order. The Ministry of Justice is in charge of corrective orders for discrimination against persons with disabilities and the Ministry of Labor deals with corrective orders under the Act on the prohibition of age discrimination. On the other hand, recommendation for correction under the NHRCK act does not provide authority for corrective order.<sup>2)</sup>

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2) Discrimination rectification except for disability discrimination and employment discrimination is under the jurisdiction of the Ministry of Labor, and the Ministry of Justice has authority to order for correction for disability discrimination and the Ministry of Labor orders for correction for employment discrimination. This can be interpreted that the policy of unification of institutions for discrimination rectification has failed in 2005. Individual act introduced punitive compensation damage in a protective legislation for non-regular employees(Article 13(2) of the act on fixed-term employees and article 21.2 (4) of the act on temporary agency workers) which is impossible through discrimination rectification under the NHRCK act and failed to be implemented during the course of enactment of acts that prohibit gender discrimination and disability discrimination, and introduced a right to order rectification(Disability discrimination act, age discrimination act and article 13 of the act on fix-term workers). The act on prohibition of age discrimination prohibits third party complaints unlike other

5. The attempts to enact a comprehensive anti-discrimination act, which have continued since the proposal of government legislation in 2007, have been suspended since 2013 when a draft legislation was withdrawn due to opposition. The issue of enactment of an anti-discrimination act emerged in 2017 during the presidential election, which led to presidential election pledge, but due to an attack centered on conservative Christian community, the 20<sup>th</sup> National Assembly could not even propose a bill. During the 21<sup>st</sup> National Assembly, a draft anti-discrimination act centered on the Justice Party was proposed on June 29, 2020 and on June 30, 2020, the NHRCK expressed its opinion on the need to enact an equality act and proposed a draft legislation of an act on equality and prohibition of discrimination(hereinafter “Equality Act” )<sup>3)</sup>.
6. The draft Equality Act, presented by the NHRCK, is an actual legal basis to practically guarantee the equal rights prescribed in the Constitution and international human rights standards, and it seems to be aimed at enhancing the effectiveness of remedy by diversifying remedy measures and making people act according to clear norms of conduct by presenting specific discrimination types in each sector while explicitly prescribing the concept and scope of discrimination. In addition, it reinforces the right to equality as an objective legal order and legal system by obligating the government and local government to promote equality.
7. An an OECD member, it seems late to enact a comprehensive anti-discrimination act, but it should be prioritized and resolved at the 21<sup>st</sup> National Assembly because it is essential in building infrastructure for the promotion of equality and prohibition of discrimination.

### **III. Impact of enactment of a comprehensive anti-discrimination**

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discrimination complaints.

- 3) The NHRCK stated that “the Equality act is a legal ground to realize the idea of equality prescribed under the Constitution and international human rights standards and will be a measure to guarantee everyone’s human right through effective remedy against discrimination damage.”

## act(Equality act)

1. As mentioned above, the draft equality act lists and concretizes discrimination grounds and area. In addition, it clearly states that no one should be discriminated against, and imposes responsibilities for the state and local government to promote equality.<sup>4)</sup> When this equality act is enacted, it will lead to enhanced standards of conduct by the general public regarding prohibition of discrimination. It will also encourage the state and local government to promote equality as an objective legal order.
2. Given the fact that the number of disability discrimination has almost doubled after enactment of the Act on prohibition of discrimination against persons with disabilities<sup>5)</sup>, enactment of an equality act will lead to increased number of discrimination based on all reasons in all sectors.<sup>6)</sup> This will make the issue of discrimination in our society more visible, thereby promoting equality. This will also make it easier for citizens to realize their right to equality as subjective public right, and then our

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4) Article 8 and 9 of the draft Equality Act of the NHRCK

Correction of existing legislation, decrees and rules, institutions and policies

Prevention of discrimination in the process of executing legislation and policy

Non-discrimination and protection of minorities in emergency measures in disaster

Rectification of discrimination and spread of equal culture through education and promotion

Establishment of a basic act on discrimination rectification(President and heads of central administrative bodies)

Article 10

Superintendent of the city and provincial education offices are required to establish annual implementation plan for the 5 year national basic plan and take necessary administrative and financial measures.

5)Currently, 50% of discrimination rectification of the NHRCK is about disability discrimination.

6) According to 2015 statistics by the NHRCK, the order of discrimination remedy was disability, gender (3%, and ranks the 2nd place at 17% when pregnancy, childbirth, marital status and family situation is included), social status, age, educational background, country of origin, and medical history. Social status will be further divided due to the reasons for discrimination listed in legislation in the future and reduced due to other reasons that do not fall into that category. However, it is expected that the number of complaints regarding discrimination based on all reasons in all sectors will increase.

society will move a step forward to a better world where no one is excluded from practical equality.

3. The role of the NHRCK serving as human rights ombudsman in the area between policy and judiciary in a soft way will increase. For citizens, effectiveness of individual remedy will be enhanced with easier access and more prompt decision than the judiciary in all discrimination area. While the judicial judgment's effectiveness on individual is tied to subjective impact of the ruling, when the respondent accepts a recommendation to correct discrimination, the effect of improved policy and institution as well as enhanced awareness will benefit not only the complainant but also everyone in our society.
  
4. Provisions of the Equality act such as the concept of discrimination, the reason for and area of discrimination, the exception of discrimination, and the type of discrimination regulated will provide the judiciary a standard of judgment on discrimination. Furthermore, it will enhance effectiveness of remedy for victims of discrimination by diversifying remedial measures for discrimination(litigation support and establishment · operation of a group of lawyers to support litigation) and increasing the effectiveness of the remedy(temporary · active measures order, estimation of damages, special cases of recognition of damages, weighted damages and allocation of burden of proof, prohibition of disadvantageous measures, introduction of criminal penalties and introduction of an obligation to disclose information)<sup>7)</sup>.

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7) Article 4. Remedy for discrimination and Article 5. Penalty of the draft act

A. Role of the NHRCK as a general institution for discrimination and measure to enhance effectiveness of remedy

○ General measure by the NHRCK regarding discrimination complaint is mediation and recommendation for rectification, and related investigation and remedies are pursuant to the NHRCK Act.

○ Litigation support and establishment and operation of a group of lawyers according to rectification recommendation/state covers the expense

B. Remedy of court regarding discrimination litigation(Article 33 of the draft act)

○ Appropriate temporary measure such as suspension of discrimination before main judgment

○ Ruling and implementation measure for suspension of discrimination and restoration

5. Lastly, the equality act in the area of correction for gender discrimination will be considered. Apart from enactment of the equality act as a general act, an act on prohibition of gender discrimination has to be enacted as a special act that considers special nature of gender discrimination area<sup>8)</sup>. The followings will examine in detail the expected impact in the area of correction of gender discrimination when it is assumed that the NHRCK will be in charge of a corrective role in principle when an actual act is enforced, whether it is general or special.
6. The followings are the major rectification cases of the NHRCK in gender discrimination area. 1) A case where it was concluded that limiting height and weight of applicants when hiring public officers in police, fire fighting, correction, adolescent protection and railway positions is discrimination and recommended for correction in 2005. 2) Recognition of infringement of right to equality when Seoul YMCA did not provide a voting right for female members in 2004. 3) Recognition of discrimination for a case of separated recruitment of fire fighting officers based on sex in 2007. 4) Recognition of discrimination against juvenile single moms in using educational facilities in 2010. 5) Recognition of employment discrimination for female crew of KTX of Korea Railway Corporation in 2006. 6) Recommendation to abolish attire and appearance restriction for female attendants in 2013. 7) Recommendation to Hyosung to address application of lower wage system to women after recruitment and allocation based on gender which constitutes discrimination in 2008. 8)

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C. Special provision for damage compensation (Article 34-36 of the draft act)

- Special provision of recognizing damage amount
- Weighted damage compensation
- Allocation of burden of proof
- Responsibility to disclose information

D. Prohibition of unfavorable measure (Article 37) and penalty (Article 5)

- 8) The Act on Prohibition of Discrimination between Men and Women and Remedy, which was a special act for rectification of gender discrimination was abolished when the Committee on the rectification for gender discrimination was abolished according to the policy to unify discrimination rectification institutions in 2005. Then at the 20th National Assembly, an act on prohibition of gender discrimination was proposed but automatically repealed.

Recommendation to correct discrimination by domestic airline companies under which only people taller than 162cm were allowed to apply for flight attendants in 2008. 9) Recommendation to a broadcasting company to devise measures to resolve sexually discriminatory recruitment practice which hires only male as a regular announcer and hires female as a contract-based or freelancer announcer. 10) With regards to a case where a female illustrator and webtoon artist were subjected to hate and harassment on the internet and threw out because they have expressed their consent regarding a feminism related issue, opinion was expressed to the Minister of Culture and Sports, President of Korea Creative Content Agency and the respondent concerned to enhance the practice of excluding female writers in game industry – expression of opinion to address hate and discrimination based on idea and political opinion.

7. Among the above cases, case N.2 and 5 were dealt before the court because of disapproval of the complainants and the results were complaint dismissed for case N.2 and complaint accepted for case No.5. As for the case 5, the court had different opinion from that of the NHRCK, but the recommendation of the NHRCK served as an evidence to enable the long-term fight by female KTX workers and they are provided with remedy recently. Case N.5 led to a concern that conservative court and absence of expertise regarding discrimination cases will not be overcome only through enactment of a legislation. However, I would like to hope that court will rapidly change followed by the enhanced perception on equality based on enactment of a legislation. There are also cases that directly went before the court without going through the process of complaint to the NHRCK. In the early 2000, due to the international financial crisis, financial institutions were busy firing female employees. In particular, Nonghyup and Allianz received letters of resignation from in-house couples after selecting them as priority for layoffs. In the case of Allianz, the court ruled in favor of the complainant saying that the letter of resignation was expression of untrue intention and thus it was substantive layoff. As for the case of Nonghyup, the court denied substantive layoff because it cannot be

regarded as expression of untrue intention or expression of intention due to fraud or coercion. I wonder what would be the result if these cases were received by the NHRCK as complaints for discrimination.

8. As can be seen from the above cases, there still exist direct discrimination based on sex, but most of discrimination is systematically carried out by derogating the value of woman's labor, and as case N.9 in 2020 shows, such discrimination exists. Therefore, rather than the judgment of the judiciary accustomed to individual remedy in a hard way, active correction by an institution specialized in correction that can better recognize the reality of discrimination and is familiar with policy and institution improvement is needed. Furthermore, cases of discrimination such as harassment, hatred and advertisement behavior as in the case No. 10, are important human rights issues and their impact is great, and thus active intervention is needed.
9. The issue of sexual harassment, which has become a type of gender discrimination was first raised 30 years ago in 1992, and more than 20 years have passed since it was legislated and regulated under the Act on Equal Employment between Gender. History of enactment and application of a legislation regarding sexual harassment has many implications regarding how a society should regulate institutionalized gender stereotype and discrimination. The issue of remedy for sexual harassment was raised before the establishment of the NHRCK, and thus it was legislated after going through a long process of litigation, and the remedy was entrusted to a discrimination rectification institution.
10. A system where standards for promotion of equality are discussed and accepted through social acceptance based on judgment of an institution with easy and prompt accessibility is desirable as in the case of discrimination rectification such as the rectification for qualification for flight attendants. The case of hate discrimination, other discriminatory harassment or advertisement behavior should not follow the suit of the case of sexual harassment which achieved current legal accomplishment

through individual struggle at the court. Through enactment of the equality act, everyone should be able to receive discrimination rectification easily. By doing so, we will be able to move one step closer to an equal world where no one is excluded.

#### **IV. Era of transition, pandemic and equality act**

1. When you take a look at the equality act draft by the NHRCK, you may be surprised at the severe opposition of the society to this level of common sense. A survey by the NHRCK conducted before announcing the draft act shows that the voice of opposition from religious groups regarding sexual orientation is over-represented and distorted. According to the survey, 90% of people are already in favor of enactment of an equality act, and social consensus on the need for such act is already created. Furthermore, there is a widely perceived social consensus regarding harassment and hate speech due to enforcement of a labor standard act regarding harassment in workplace since 2019. The National Assembly should not be intimidated by the inhumane voice of 10% of the population, but should promptly enact the equality act to meet the voices of the people.
2. It is said globally that this is an era that requires a paradigm shift. Enactment of the equality act is a task that should be resolved for this shift. New philosophy and bioethics are needed with the emergence of post-human due to the development of information science and life science technology. To respond to pandemic and large-scale climate change, environmental and ecological changes are also needed. Maybe mankind is living in a world filled with fake and hatred like an egg in a 0.1 square meter wide cage.
3. A system to guarantee human rights and promote and protect equality based on anthropology and humanism in modern terms has to be placed before we move to another legal discourse in the era for a sustainable society including overcoming post-humanism and anthropocentrism in

the long term. This is because the response to animal right, ecological right, AI, robots and algorithms can be started again by changing or expanding the universal human rights concepts and human rights infrastructure.

4. We are living in human security crisis where the universal concept of human rights and value is ever more needed in the situation of pandemic. In this era of human security, the issue of human rights should not be put behind the issue of survival. Rather we should fight against hate and discrimination and better guarantee non-discrimination and protection of minorities in emergency measures to respond to disaster as prescribed under the draft equality act.
5. In this era of change, transition and pandemic, guaranteeing human rights, correcting discrimination and promoting equality is the minimum condition required for human security. Enactment of the equality act is a pending task for us to realize an inclusive world where no one is excluded or left behind. (End)