

## Abstract

# Redressing Systemic Employment Discrimination against Women in Korea

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## I . Introduction

### Background and necessity of research

- This study aims to show that among the reasons that the correction system for gender discrimination in employment does not work, one is that there is no standard for judging the systemic character of employment discrimination, as well as the problem that a correction system that can be applied is not supported.
  
- In this study, “systemic discrimination” is defined as “a type of discrimination in which company's system, policy, or practices,

etc., result in widespread disadvantages in specific companies, occupations, industries, or regions in a complex and repeated way."

– In discourse related to discrimination, systemic discrimination can be understood as an instrument to better grasp and regulate the systemic nature of discrimination, rather than being a separate concept. As opposed to a legal concept, with separate parts divided into direct and indirect discrimination, it is an instrument for identifying and judging the systemic aspects and character of discrimination. Since it is an instrumental concept for grasping and judging the systemic nature of discrimination, it is a concept that is relevant for both direct discrimination and indirect discrimination, and can be utilized on both sides, not just one.

○ In Korea, the existence of discriminatory practices, tendencies, and discriminatory structures is asserted as the basis for rulings on discrimination, so discrimination has been difficult to recognize.

– The legal principles to infer discriminatory practices and trends from the collective, repetitive gender gap, and to confirm gender discrimination based on this background have not been sufficiently formed. Even when gender discrimination in hiring in the financial sector was confirmed in 2018, limitations in handling were visible; the perception was that it was an "exceptional" deviation of "some" managers or management. As can be known from the relevant regional labor office's statement on gender regarding the KEC workers, where it was stated, "Indirect evidence alone makes it difficult to confirm gender discrimination," the perception of

employment discrimination and labor supervision standards have stayed at the level of individual/direct discrimination. Accordingly, for the practical operation of the discrimination correction system, it is necessary to find criteria so systemic discrimination through indirect or circumstantial evidence can be confirmed; to see what systemic limitations and difficulties there are for ministries and institutions in charge of implementing policies on gender discrimination in employment for investigating, judging, and correcting cases of systemic employment gender discrimination; and to review the necessity of improving the correction system.

Research objective

- Review the possibilities and limitations of regulating systemic aspects of discrimination through current legislation and theory of interpretation, and relief procedures
- Research judgment criteria and that can regulate systemic discrimination and legal principles
- Propose a plan for improving the correction system to regulate systemic discrimination

## II. Current status of regulation of systemic gender discrimination in employment

### Legislation

- We reviewed the question of whether current laws and regulations can be effectively applied to the discipline of systemic gender discrimination. The current theory of interpretation regarding direct discrimination confirms that there is a problem of narrow application centering on the intent to discriminate. Indirect discrimination is so low in utilization that there are no explicit cases where it has been applied, and the parts of interpretation that need to be cleaned up in articles have been identified.

### Relief procedure

- Systemic discrimination requires special expertise for correcting bodies because compared to individual discrimination cases, the scale and level of factual relevance that should be investigated are high and methodologically complex. Since systemic discrimination harms the entire group of female workers, it is also necessary to expand the effectiveness of affirmative relief after determining that there is discrimination. The contents of affirmative relief should not only compensate individual victims, but should also be able to actively improve the structure and practices of the workplace itself. In addition, it is necessary to consider the problem that it is more burdensome for individual women, who are the victims, to come forward due to the nature of pointing out problems with the structure and practices within the company where they work.

- As a result of reviewing the procedures for gender discrimination relief by the National Human Rights Commission, the court, and the Labor Relations Commission (to be implemented in 2022), the insufficiency of the points mentioned above was confirmed.

□ Results of reviewing disputed cases

○ Characteristics of systemic discrimination confirmed through cases

- With the exception of the discriminatory dismissal of married employees at the National Agricultural Cooperative Federation and the incident at the Electrical Construction Association, it was difficult to specify the criteria and requirements that led to unfavorable results in recruitment, promotion, and retirement. In incidents at Daehan Mill, Hana Bank, Daejeon MBC, and an automobile company, people were hired and promoted as in the past, but it was not possible to specify which of the criteria and requirements considered in each employment decision were the cause of the gap between those employees and others.
- These are incidents in which it can be difficult to apply indirect discrimination theory in clauses; rather, direct discrimination theory can be suitable. In addition, although standards and requirements could be specified in cases at the National Agricultural Cooperative Federation and the Electrical Construction Association, this does not mean that this should be organized only by indirect discrimination. In other words, both direct and indirect discrimination theory can be applied to one case, and the one that is advantageous for damage relief

can be selected.

- The systemic nature of discrimination and lack of recognition of statistical evidence.
  - As a result of reviewing disputed cases and conducting in-depth interviews with people involved in gender discrimination cases, it was confirmed that cases are often handled without considering how severe the disadvantages are for the entire group of women and the context from which they originate. The phenomenon of greater disadvantages given only to certain minority groups can in and of itself be important grounds for assuming gender discrimination, but such statistical evidence was not considered to be important in the process of hearing the cases.
  
- Necessity of supplementing interpretation theory
  - Dispute cases show the need for an interpretation theory that can encompass the systemic, collective, and cumulative gender gap in employment. Depending on concrete factual relationships, the possibility of interpretations that can encompass direct discrimination should be expanded, and not limited to indirect discrimination.
  
- Problems of relief procedures
  - The need for institutional improvement that can support the expertise of labor supervisors and investigators in charge of gender discrimination cases
  - Limitations of existing cases of gender discrimination in employment, which were focused on criminal proceedings
  - The need for active affirmative relief that can improve the

structure itself

### III. Cases from other countries

We analyzed cases in the United States and Canada, which have developed legal principles related to systemic discrimination.

The United States

Statistical methodology

– If appropriate data and methodology are used, it is possible to suspect discrimination only on the basis of statistical evidence. Even without proving the intention of discrimination, there were a considerable number of cases in which U.S. courts acknowledged the existence of discrimination when there was a gap between groups which was statistically improbable of occurring unless there was discrimination. In addition, even if a situation had not escalated into a legal dispute, there were many instances where agreements for correction had been reached, as the EEOC has used an 80% rule to identify companies suspected of discrimination and recommend correction.

– Implication #1 from the U.S.: Securing data is essential for proving statistical discrimination. Information on candidates for jobs should be collected according to each different sector of the labor market. If job stratification analysis is not conducted, it is not possible to identify discrimination such as women being concentrated in jobs that are lower or non-regular, and men being concentrated in upper or regular jobs. If blind recruitment practices are irreversible, information collection

similar to the EEO-1 Voluntary Self-Identification Form should also be considered.

- Second, universal standards for statistical significance and practical significance should be presented. In addition, it is necessary to provide criteria and analytical tools to easily judge systemic discrimination in companies. Therefore, in this study, statistical significance is suggested based on 2 standard deviations with a p-value of 0.05, and practical significance is suggested based on an odds ratio of 1.2 and 0.8. Like the EEOC's 80% rule, it is reasonable that the 0.05 p-value is not an absolute criterion, but a criterion for initiating an investigation. That is, the standard of simultaneously applying the EEOC's 80% rule and the 2 standard deviations rule can be borrowed.

○ Relief procedure

- The U.S. correction system for systemic/customary discrimination is operated based on the Equal Employment Opportunity Committee's strong administration, authority for legal relief, infrastructure that can implement these, and the political will of decision makers. The 2006 recommendation based on TF activities in response to systemic/conventional discrimination was a turning point for laying such a foundation.
- Implication 1: In order to correct systemic/customary discrimination that broadly affects not only the individual who files a petition, but also the entire group to which the individual belongs, it is essential to have information about businesses' labor forces as a means of identifying potential discrimination. In the U.S., companies are legally required to produce and keep employment-related data regarding

recruitment, placement, promotion, and wages, and companies at certain levels must submit legal documents each year that can identify the number and distribution of personnel across occupational groups who are female or from racial/ethnic minorities. This kind of high accessibility and authority regarding the information of companies' labor forces is the starting point for identifying discrimination that cannot be identified by intent or direct evidence.

- Implication 2: Data on a company's past and current labor force is accumulated through an information system, then shared and utilized among related organizations. Each year, the committee analyzes its own data, announces the current situation of employment, and makes data public to increase its utilization by experts. In addition, it increases the effectiveness of data collection and utilization by sharing data with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), which manages employment equality compliance programs with businesses signing contracts with the federal government.
- Implication 3: It is important to have experts who can identify systemic/customary discrimination. Following the recommendation of the 2006 report, not only have regional offices in charge of relieving employment discrimination expanded their dedicated personnel for systemic/customary discrimination, but there is also support for the placement of social scientists and professionals in labor/economics with expertise in identifying discrimination by statistically analyzing company labor force data.

Canada

- In Canada, systemic discrimination toward certain minority groups within the structure of society, applied by institutions, regulations, and practices themselves, has the effect of discrimination. This is based on the awareness of the problem that the intent to discriminate and ignoring it may continue for a long time, so unless there is a special opportunity, it is not easy to grasp the concrete reality of systemic discrimination, recognize the seriousness of the problem, or take measures to correct it.
  - In Korea, surveys have been conducted occasionally in areas where discrimination is prohibited and when there were grounds for prohibiting discrimination, but it was difficult to find in-depth research on systemic discrimination in the field of employment due to gender on topics such as recruitment, promotion, wages, and legal measures for correcting discrimination.
  - To correct systemic discrimination, it is necessary to abolish or mitigate the subjective requirements (intention, awareness and will, or intent) that are required to establish discrimination. The Supreme Court of Canada established a ruling that the “intent” to discriminate is not required when systemic discrimination is established. This takes into account that in actual systemic discrimination, individuals may not perceive their behavior as discriminatory at the time they are acting, and moreover, in many cases, it is difficult to prove the intent to discriminate, so if the intent to discriminate is strictly required, it is difficult to correct discrimination even though discrimination does exist.
  - It is necessary to diversify corrective orders to correct systemic discrimination. Instead of abstract corrective orders

saying, “Improve the system so the petitioner will not be discriminated against,” it should be possible to improve a system where employers who have committed discriminatory acts can correct structural discrimination step by step; that is, corrective orders with active measures including specific content should be able to be issued.

#### IV. Policy recommendations

- Supplementing criteria for discrimination
  - The step of judging discrimination based on statistical evidence
    - Direct discrimination may be assumed if statistical inequality is confirmed and circumstantial evidence and is accompanied by situations such as users' discriminatory management decisions or remarks (Step 1). When direct discrimination is assumed, the user may break the assumption of discrimination by explaining that the statistical inequality appears due to legitimate reasons other than gender (Step 2). Discrimination may be recognized if the user fails in Step 2. This is a step in which the user submits data, etc., and the burden is placed on the user to explain. The complainant has an opportunity to review the data or explanation submitted by the user and may rebut it. Considering that the information that workers can access in employment discrimination lawsuits is limited, the criterion for reviewing the user's defense should go beyond “the degree that the user's explanation is reasonable” and ask “whether the explanation is reasonable enough that it can break the assumption based on statistical evidence.” This also means that the user is burdened with proving that the

statistical imbalance is due to legitimate reasons other than gender.

○ Reflecting employment gender discrimination in guidelines, manuals, educational materials, etc.

– It is an important task to establish criteria for assuming gender discrimination utilizing statistical gaps and reflect this in law enforcement guidelines, manuals, educational materials, and promotional materials for employers, etc. This should not be limited to the people in charge who are interested, but should be established as basic content that has to be become familiar with regard to judgments of gender discrimination in employment. Accordingly, it is necessary to reflect these in regulations dealing with equal employment for men and women and guidelines for labor supervisors, manuals, as well as guidelines and manuals for investigating discrimination cases, etc. by the National Human Rights Commission of Korea.

○ The necessity of distributing self-diagnosis tools for employment gender discrimination

– Statistical methodology to analyze the possibility of gender discrimination in employment may also be utilized by companies as a self-diagnosis criterion to voluntarily inspect the current status of employment and wages at their workplaces.

□ Aspects of relief procedures

○ The authority to identify and conduct ex officio investigations of bodies specializing in remedying discrimination

- The U.S. Equal Employment Opportunity Commission (EEOC) has the role of identifying whether there are discriminatory practices and patterns by reviewing employment and wage gap data at workplaces such as EEO-1, even if there has been no petition by the victim. On the other hand, in Korea, with the exception of the authority held by the National Human Rights Commission of Korea to investigate ex officio, bodies with expertise in remedying discrimination have no ability to identify systemic and group discrimination in advance based on statistical analysis. The Affirmative Action (AA) system under the Gender Equal Employment Act has been implemented to collect information on the current status of companies' employment of men and women and their wages, but they cannot identify the possibility of gender discrimination in individual companies.
- Therefore, referencing the U.S. Equal Employment Opportunity Commission, it is necessary to grant the authority to investigate or the ability to open a self-examination if an expert body such as the National Human Rights Commission identifies systemic discrimination patterns that appear collectively.
- Since the Labor Relations Commission is a relief procedure that operates based on the application of the individual victim, unlike other labor disputes, it might be difficult to allow the preemptive identification of only gender discrimination cases. Therefore, the correction notification system (regulated in Article 29-5 of the revised Gender Equality Employment Act) should be systematically supported so it can be actively utilized.
- In addition, for this kind of preemptive identification function

to be practically operated, the National Human Rights Commission or the Labor Commission should set up projects to prioritize the identification and correction of systemic discrimination, and they should establish and implement plans to achieve this. Referencing the EEOC's plans related to systemic discrimination, the National Human Rights Commission should establish step-by-step goals related to projects such as the identification of systemic discrimination, ex officio investigation, and filing petitions to the commission, and they should manage tasks and limitations, etc. to achieve these. The Ministry of Employment and Labor is obligated to establish and implement a Basic Plan every 5 years (Chapter 6 Article 2 of the Act) for the realization of gender equality and work-family balance, and one of the tasks inside this plan should include a plan for correcting gender discrimination through a correction and notification system, as well as managing performance.

- Strengthening the right of bodies with expertise in correcting discrimination to access and analyze data
  - As seen in the EEOC, in order for the body correcting discrimination to be able to identify systemic discrimination, it is necessary to be able to grasp the reality of companies where discriminatory practices are prevalent. It is necessary to establish a legal basis in the National Human Rights Act or the Gender Equal Employment Act so AA data can be utilized by referencing the cases of the U.S. and Canada.
  - The current AA system requires data to be drawn up by dividing occupations into three levels and two sectors in relation to employment status, but it is necessary to improve

job classification.

- It is also necessary to consider improving the obligation to draw up and store user information related to new recruitment. Referring to the U.S., it is mandatory to make a record of the gender of applicants who have newly applied for employment, and then submit it if an investigation related to gender discrimination is conducted. Applying this first to private enterprises of a certain size that enter into procurement contracts with public enterprises may be considered.

○ Activation of affirmative relief that can improve the systemic discrimination itself

- The Canadian Human Rights Tribunal can issue a special temporary measure order to improve systemic discrimination in the future, and it can actively utilize relevant powers, so the CN ruling has issued a special temporary measure for women to be hired at a certain rate until a 13% female employment rate is achieved. The U.S. Supreme Court stated that the Court “is obligated to make a ruling not only to correct past discrimination, but also to eliminate the possibility of discrimination influencing the future,” meanwhile emphasizing the importance of injunctive relief in employment discrimination lawsuits. Biased employment-related testing methods, manager retraining, posting promotion opportunities and introducing application systems can be ordered, and meanwhile, “affirmative relief” is the term for ordering employment goals related to gender or race and implementation deadlines in cases where past discrimination has been proven.
- Currently, the court's ability to hand down such an active

improvement order in civil lawsuits related to employment discrimination in Korea is only possible based on the Act on the Prohibition of Discrimination against Persons with Disabilities, and in this situation, it is impossible sue for gender discrimination. The revised Gender Equality Employment Act stipulates that the Labor Relations Commission's gender discrimination correction order can include the "suspension of discriminatory treatment, improvement of working conditions such as wages (including orders to improve systems such as employment rules and collective agreements), or corrective measures such as appropriate compensation." When considering the structural nature of employment discrimination, and that almost the same wording of "stop discriminatory treatment and improvement of working conditions such as wages" is interpreted as the basis for active orders in the Act on the Prohibition of Discrimination against Persons with Disabilities, and moreover considering the great need for affirmative relief in order to change structures themselves, The Labor Relations Commission's current interpretation seems to be too passive.

Research areas: anti discrimination law, labor law

Keywords: employment discrimination, systemic discrimination, indirect discrimination, statistical evidence, national equality body's directed investigation