

Equality-Oriented Policies (EOPs) in Korea

Kwang Seok Cheon*

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* Professor, Yonsei University Law School, Seoul, Korea. Email: cheon@yonsei.ac.kr

Abstract

Implementation of equality requires various dimensions of policies and they should be structured into the normative framework. Expectedly, it helps to go beyond simple and total equality and to understand and systemize equality in a refined form. It is tried first to define the concept of equality in order to handle basic elements of equality: equality as a target and interrelation between equality oriented policies (EOPs) and social policy, actors, orientation of EOPs, and addressees. To systemize the implementation of equality, various dimensions and their interaction are worked out, such as regulatory policy, redistributive policy, discretionary spending, and “soft” policies. Finally, potential application of the framework should be unfolded to indicate possible functional equivalence (policy choice or preference) as well as interdependence between EOPs (complementarity or incompatibility).

Key Words: equality-oriented policies, equality, general clause of equality, social policy, anti-discrimination, affirmative action, social security law, tax law

I. Introduction

Equality is a political idea and also wide-spread constitutional principle which was and is strived to achieve eternally. We know, however, that it is often too radical, intrinsically difficult, even impossible to treat or make alike all the like circumstances for all. This article presupposes that implementation of equality requires various dimensions of policies that should be, then, structured into the normative framework. It is titled with “equality-oriented policies.” According to the broad and deep political impact inherent in the concept of equality, the expectation to it goes far beyond the normative discourse. For that reason, it should be differentiated for the refined discourse between politically ideal terrain and expectation on the one hand and normative possible achievement on the other hand. It would hopefully lead to the stable and meaningful base for a further discourse on equality. To achieve this goal, this article begins with the historically emerged understanding of equality in Korean history and its incorporation into the constitutional law and describes the enhanced expectation stemming from the law and its limit of realization (B). Before going into systemized equality oriented policies (EOPs), it is required to restate the concept of equality. Understanding various elements of equality in terms of target, policy instruments, actors behind policies, and addressees of policies would provide a forum for systematic discourse of the problem (C). In this article, four dimensions are proposed: regulatory, redistributive, discretionary and “soft” policy. It would explain how these four dimensions cooperate with each other to overcome the normative deficit of one dimension in comparison with the other to achieve the goal. Prospectively, this analysis would also contribute to assess and assist the independent equality policy and functional cooperation with another policy (D). This article concludes with the functional equivalences in general as well as policy choice and independent *raison d’être* of each policy (E).

II. For a Refined Understanding and Systematic Implementation of Equality

A. Equality in Korea's Modern History

With the élan for equality on their minds,¹ the quest of the Korean people for equality is deeply rooted in society and the state, both normatively and factually. Both the normative and factual dimensions of equality have a background in modern Korean history, the epochal “waves” of which are in chronological order as follows: first, the collapse of the last Chosun dynasty in the vortex of international politics (1910),² second, the Japanese colonial period (1910-45), third, the unexpected presence of the American and Soviet troops in the southern and northern Korean peninsula to disarm the Japanese Army, i.e. for military purposes, fourth, the division of the Korean Peninsula due to political reasons (1945-48), fifth, the Korean War that destroyed the facilities and infrastructure of the new born republic and which geographically changed the population (1950-53), sixth, two military coups d'état in the early 60s and 80s (in 1961, 1980), and finally, democratization strived by the people's power against military regime (1987).

After all these events, it was no longer acceptable to sustain the traditional values and attitudes, which had been taken for granted morally and normatively in Korean society. During the vortex of Korean modern history, people began to expect that the emerging “new world” would provide the same opportunities or the same starting position that could enable them to obtain their ideal status in society. These were factual dimensions of the development toward equality in Korea, and they were thought to bring about freedom and equality in a similar and related way in the hope that through the idea of equality, a vertical level of freedom could also be achieved.³

1) See SONG HO KEUN, HANKUKUI PYEONGDEUNGJUUL, GEU MAEUMUI SEUBGWAN [EGALITARIANISM ON THE MINDS IN KOREA] (2006) (S. Kor.) (a sociological analysis of the mindedness of the Korean people).

2) GREGORY HENDERSON, KOREA: THE POLITICS OF THE VORTEX (1968) (describing the dynamics of modern Korean history).

3) From a historical perspective, freedom generally precedes equality. This is also logical because equality demands for a (re)construction of society and the relationship between the state and its society. In the Western World, they were achieved in this order, but this was not the case in Korea. This aspect has often been mentioned in Korea with regard to freedom and welfare. See HAHN TAE-YEON, HUNBEOBHAK [CONSTITUTIONAL STUDY] 941 (1983) (S. Kor.).

B. Expectation by the Constitution

This peculiar position of equality found normative recognition in the first Korean Constitution of 1948. Apart from the basic provision on equality of all people before the law (Article 8), the Constitution prescribed social fundamental rights in the fields of education, labor, industrial relations, and social security (Articles 16,17,18, and 19). These fundamental social rights were intended to factually realize equality in the aforementioned fields or to provide individuals with the necessary preconditions for freedom. In this sense, the goal of fundamental social rights was not only to vertically fulfill the welfare of individuals, but also to horizontally achieve social equality for all, at least to some degree.

The Constitution also recognized the necessity of establishing the macro structure that would provide the framework for the relationship between the state and the individuals. After the vehement discussion on the specific contents, it was generally agreed in the Constituent Assembly to introduce Chapter VI pertaining to the economic and social order.⁴ Article 84 of this chapter made it clear that social justice in terms of social protection precedes freedom in social and economic orders: “The economic order of the Republic of Korea should be based on social justice protecting basic necessities of living, and balancing the growth of national economy. Economic freedom of individuals shall be guaranteed within these bounds.”⁵

C. Imbalance between Reality and Norms

In fact, the élan and demand for equality had another origin in Korean Society. Historically, the year of 1945 marked the end of the Japanese colonial period. Korean society and its people now faced the new task of nation-building but this was disturbed by the Korean War, and political and economic development was delayed until the late 50s.⁶ It eventually led to the student

4) See Kwang Seok Cheon, *Jehun Uihoeui Hunbeob Gusang* [*Constitutional Concepts in the Constitutional Assembly*], 15 YONSEI L. REV. 1 (2005) (S. Kor.).

5) The latter part of this clause was taken from the Constitution of 1962. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] (Dec. 26, 1962) (S. Kor.).

6) See DONG CHOON KIM, JEONJAENGGWA SAHOE [WAR AND SOCIETY] (2009) (S. Kor.) (comprehensive analysis of the impact of the Korean War). See also PARK MYUNG LIM, HANKUK JEONJAENGUI BALBALGWA GIWON 1 [THE OUTBREAK AND ORIGIN OF THE KOREA WAR VOLUME 1] (1996) (S. Kor.); PARK MYUNG LIM, HANKUK JEONJAENGUI BALBALGWA

revolution in 1960, which resulted in the collapse of the First Republic (1948-1960). Since then, subsequent governments prioritized economic development in their policy until the end of the 70s. From the beginning of the 80s, the government changed the title of the development strategy from the “economic development plan” to the “social and economic development plan.” However, the change in title did not entail a real change in policies.

This imbalance of development once again distorted the true understanding of equality. Political stability was thought to be essential for the purpose of economic development. This also included the stability of industrial relations. This generally put pressure on freedom as well as on industrial relations. The constitutional postulate of social justice lay solely on paper. This culminated in the Constitution of 1972, which could not be labeled a democratic Constitution. Without a general protection of freedom and without a guarantee of equal opportunities to approach the related freedoms, individual achievements were considered to be the result of selectively given benefits and advantages from the state for their own purposes, which allowed for unfair competition (and even corruption). Under these circumstances, individual achievements and individual status in society were not respected as something attributable to individual capacities, but as something made artificially, i.e. the result of political decisions. The prevailing exercise of political discretion was thought to favor economically successful individuals. There seemed to be no rationale for the prevailing inequality.

Following the arrival of democracy in 1987, there was an increased demand for equality for the purpose of enabling people to reach positions, which, as mentioned above, was thought to have been distributed politically. Hence, the concept of equality assumes a new meaning. Equality is understood to be an instrument to achieve something at the expense of other policy goals. In this light, the concept of equality is burdensome.⁷ This understanding of equality is simple as well as total.⁸ Yet, equality is complex in the sense that it has

GIWON 2 [THE OUTBREAK AND ORIGIN OF THE KOREA WAR VOLUME 2] (1996) (S. Kor.).

7) See Rory O’Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa*, 6 INT’L J. CONST. L. 267 (2008) (overburdening of equality as a result of another value, such as human dignity, being attached to it).

8) This reminds one of simple equality in the sense of Michael Walzer. It means equality with regard to a certain value, which dominates a certain sphere. But the dominant value may be subject to change. For this reason one cannot have an accurate understanding of equality without the various dominant equalities in spheres being at stake. This implies the notion of complex equality. Cf. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 13 (1983).

different criteria and demands in each sphere of life. As a result, this makes it difficult to implement equality systematically in a refined form.

D. Beyond Simple and Total Equality

Here, the need for a comparative perspective in the study of EOPs is addressed. The ultimate question is which forms of equality have been realized in society and in the relationship between state and society. In light of these evaluations, dependence, interchangeability, and the effectiveness (or efficiency) will be compared. However, this presupposes an array of questions. How are the ideas of equality understood - in a libertarian, egalitarian, or welfarian fashion? As for targets, does equal treatment before the laws mean just equal opportunity or even equal outcome? As for spheres, which aspects of equality are involved - equality of income, health, leisure, education, labor, industrial relations, family, and so on? Which policy instruments should be used in realizing equality - a general equality clause, anti-discrimination laws, affirmative action, quota systems, bonus systems, and the like?

Without a plausible assessment regarding those diverse questions, equality would continuously destabilize society and the attitude of its people.⁹ A comparative perspective is expected to provide an objective framework in this complex context of equality. However, a comparative perspective could also raise new issues. To answer all these questions, one should have an intermediate framework that has a normative and a factual dimension. The constitutional framework and normative hierarchy complement or collide with each other. However, this framework suffers from a fatal flaw because equality exists not only in the normative, but also in the factual world that is not regulated by normative direction. Discretionary and soft policies, as described later in this article, are good examples. The framework should therefore, be supplemented by a factual perspective. In this dimension that includes interaction between factual and normative elements, one should not only comprehend the role and contents of the norm, but also the vertical relations between norms as well as the relations between related norms and facts.¹⁰

9) *Id.*

10) See Danny Pieters, *Reflections on the Methodology of Social Security Law Comparison*, in *VERFASSUNG, THEORIE UND PRAXIS DES SOZIALSTAATS: FESTSCHRIFT FÜR HANS F. ZACHER ZUM 70. GEBURTSTAG* [CONSTITUTION, THEORY AND PRACTICE OF THE WELFARE STATE: FESTSCHRIFT

III. The Concept of Equality

A. Equality as a Target

1. The General Clause of Equality

The concept of equality is applicable when comparing two or more situations. If they are assessed as alike, they should be treated alike. Equality also prohibits arbitrarily treating different situations as the same. The differential treatment can only be legitimized if a rational reason for it can be presented (prohibition of arbitrariness). In this sense, equality does not relate to a material substance, but concerns the relations between compared situations or persons. Therefore, it largely depends on the criteria used when evaluating whether various situations are alike or unlike. In this abstract dimension, equality is almost blind to the material outcome resulting from the equal treatment.¹¹ Rather, it can amount to conflict with substantive equality, and worse, make substantive inequality persistent. This blindness can be illustrated by the example of the principle equal opportunities, both prospectively and retrospectively. Retrospectively, equality of all before the law is not plausible at all because of the diverse characteristics of individuals and the diverse circumstances surrounding them. So understandably, Amartya Sen calls it “rhetoric of equality.”¹² Prospectively, the pursuit of equality by one criterion and in a specific sphere can result in completely different situations, because according to the converting process, equal opportunity is likely to result in disparate outcomes for different individuals. As described below, the benefit for the disabled in terms of quota system in the field of employment does not yet guarantee the decent standard of living of them so it should be supplemented by a complex of measurements of other kind.

FOR HANS F. ZACHER ON HIS 70TH BIRTHDAY] 715, 731 (Franz Ruland, Hans-Jürgen Papier, Bernd Baron Baron von Maydell eds., 1997) (Ger.) (for this methodology in the field of comparative social security law).

11) On the vain attempt to derive normative meaning from equality, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982); Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1211 (1997). But see Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 Mich. L. Rev. 575 (1983) (responding to Westen and Peters).

12) AMARTYA SEN, *INEQUALITY REEXAMINED* 1, 30 (1995).

2. Principles

Equality can be a purpose itself in the sense of equality of opportunity. Beyond this function, equality must contribute to enhance the “real” opportunities for individuals and groups to enjoy freedom. Today, the state is obliged to realize freedom for individuals. Freedom cannot be achieved solely through constitutional provisions. In order to achieve freedom, certain preconditions must be met. The state should actively provide individuals with the material, procedural, and organizational conditions for real freedom. This normative structure of freedoms and rights has been realized in European countries¹³ since the industrial revolution and for Korea since the inception of the Republic.¹⁴ The Korean Constitution has implemented this idea that the state is obliged to protect basic rights of the individual (Article 10). The principled character of a basic right ultimately contributes also to equality to some degree. In requiring the state to guarantee certain minimal conditions, protection or measures beneath those standards are declared as unconstitutional.¹⁵ However, this aspect has very little to do with EOPs. First, its essence is related to freedom rather than equality. Second, it is too abstract to extract any substance from it. Therefore, until now, it is hard to say that individual rights were strengthened on the ground of this argument.¹⁶

3. Sectors

In the Korean Constitution, several sectors of social life were selected in which it was considered necessary for the state to intervene in order to guarantee the conditions for real freedom. These sectors include education, labor, industrial relations, social security, marriage, and family (Article 31 ff.). Fundamental social rights differ from the general equality provision in that

13) See Michael Stolleis, *Die Entstehung des Interventionsstaates und das öffentliche Recht [The Emergence of the Interventionist State and Public Law]*, in KONSTITUTION UND INTERVENTION: STUDIEN ZUR GESCHICHTE DES ÖFFENTLICHEN RECHTS IM 19. JAHRHUNDERT [CONSTITUTION AND INTERVENTION: STUDIES ON THE HISTORY OF PUBLIC LAW IN THE 19TH CENTURY] 253 (Michael Stolleis ed., 2001) (Ger.).

14) See Cheon, *supra* note 4.

15) See Constitutional Court [Const. Ct.], 90Hun-Ma110 & 136 (consol.), Jan. 16, 1997, (9-1 DKCC 90, 119) (S. Kor.); Constitutional Court [Const. Ct.] 2005Hun-Ma764, Feb. 26, 2009, (21-1 DKCC, 156) (S. Kor.); Constitutional Court [Const. Ct.] 2006Hun-Ma788, Aug. 30, 2011, (23-2 DKCC, 386) (S. Kor.).

16) *Id.*

they pursue substantive targets of equality. It is not always clear, however, in how far and in what way equality is actually pursued in a given sector. This means that making fundamental social rights part of the constitution does not immediately indicate whether or not social justice or social equality is realized. Even in the Constitution itself, various questions related to social justice and social equality still remain open, viz., to what extent, in which way, and through which entities equality should be pursued. In the end, the answers to this largely depend on legislative decisions.¹⁷

4. Substances

Corresponding to the different understandings of equality and the different emphases placed on its various dimensions, EOPs can be shaped to have different substantive goals. In a legal sense, equality may be limited to guaranteeing equal chances so as to motivate individuals to achieve their own destiny. As mentioned above, this perspective is, however, not particularly helpful in policymaking since it has little to do with substance.¹⁸ Alternatively, EOPs can be conceived of as “planned (positive) action” to reach a certain outcome. In the category of regulatory EOPs and the general clause of equality with its selective criteria, anti-discrimination and affirmative action are indicative examples that should not only be compared with each other, but also with experiences from foreign countries and with international and supranational institutions. As far as EOPs in Korea are concerned, the lessons to be drawn from the aforementioned comparisons appear to be instructive on the relative as well as on the absolute dimension. In Korea, the Human Rights Commission Act (HRCA) was introduced in 2001 as a basic anti-discrimination act. Pioneer legislation in this sphere was the Equality of Men and Women in Employment Act 1987 (EEA). This act has been revised and changed many times now into the Equality of Men and Women and Support for the Family and Employment Act 2007 (EFEA), intending to, at the same time, support employment and the family in a harmonized way. This was followed by the Disability Discrimination Act (DDA) in 2008 and the Age Discrimination in Employment Act (ADEA) in 2009. It is yet to be explored how the demands for these regulations can be harmonized with the legal

17) See Kwang Seok Cheon, *Bokjigukgawa Hunbeobjaepan [Welfare State and Constitutional Review]*, 20 HUNBEOBHAK YEONGU [CONST. STUD. REV.] 338 (2014) (S. Kor.).

18) See *supra* note 11.

position of the involved parties like employers and facility owners. The implementation of these regulations is expected to be supported by the state and local government, both administratively and financially. Furthermore, it is unclear how these new policy instruments interact with the existing welfare laws addressed to the same persons.

B. Equality-Oriented Policy versus Social Policy

Typically, EOPs are also social policies. However, both concepts are not entirely congruent. Their relationship can be approached from the perspective of EOPs and from the perspective of social policies.

Starting from the perspective of EOPs, these policies concern not only to reach the goal of social policy, but also to provide protection against social risks for all people or for the confined circles of the socially weak. EOPs also concern socially neutral policies, such as education and labor. The primary aim of these policies is to provide individuals with access to institutions or procedures. Tax policies have an intermediate position. Taxes basically burden an individual's income and wealth within the limits of the individual's economic capacities. In this regard, equality is dominant in tax policies. The equality pursued by tax policies does not necessarily entail the protection against social risks, i.e., the goal of social policy. In order to make tax policy and tax justice work as an instrument of social policy, supplementary political decision-making is required.¹⁹ Such decision-making would chiefly concern the revenue element. On the one hand, equality in levying could mean an equal tax rate if oriented towards more formal equality, or it could mean a progressive tax rate if oriented more towards social equality. On the other hand, tax can be reduced or even exempted in certain areas where it is necessary to protect the individual from social risks.²⁰ This aspect of tax policies, however, has been neglected in Korea so far.

Social policy, conversely, is also partly related to equality. In countries

19) See PAUL KIRCHHOF, *BESTEUERUNG IM VERFASSUNGSSTAAT* [TAXATION IN THE CONSTITUTIONAL STATE] 28, 53 (2000) (Ger.).

20) See Kwang Seok Cheon, *Sahoe Bojangbeobgwa Sebeobui Gineungjeokin Sanggwangwangye* [*Functional Intercourse of the Social Security Law and Tax Law*], 32 GONGBEOB YEONGU [PUB. L. REV.] 207 (2003) (S. Kor.). This problem was also discussed systematically in various decisions of the German Federal Constitutional Court. See Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 82, 60, 198; 87, 153; 89, 346; 91, 93; 99, 216, 246, 268, 273.

where social policy relies predominantly on social insurance, its main aim is to protect against social risks. Social equality, in the sense of interpersonal equality, is then not per se a goal of social policies.²¹ In Korea, where social policies are largely achieved through social insurance, equality is still adequately considered in a part of this. When social insurance was introduced, it was originally thought that the equality dimension of the social insurance scheme made it attractive to people, and hence, easier to accept. This idea continued to influence the social insurance policy from the outset of which path can be since then characterized as “low level equality in welfare production.”²² By contrast, regulation pertaining to a minimum standard of living or universal social services was introduced relatively late in Korea compared to other countries.²³ This sounds paradoxical, as these kinds of regulation should be expected to be the very place where social equality should be able to develop. This is particularly true for the Social Democratic Regime type of the welfare state.²⁴ Also, in the Continental European Regime type, the guarantee of a minimum living standard is the field where equality should be dominant. In other words, the idea of equality is most closely linked to the domain of social services, whereas, in the field of social insurance, equality is more or less an incidental consequence. Nonetheless, it was not until 1999 that Korea was able to guarantee a universal minimum standard of living.²⁵

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- 21) See Uwe Wagschal, *Deutschlands Steuerstaat und die vier Welten der Besteuerung* [Germany's Tax State and the Four Worlds of Taxation], in *WOHLFAHRTSSTAATLICHE POLITIK: INSTITUTIONEN, POLITISCHER PROZESS UND LEISTUNGSPROFIL* [WELFARE STATE POLICY: INSTITUTIONS, POLITICAL PROCESS AND PERFORMANCE PROFILE] 124 (Manfred G. Schmidt ed., 2001) (Ger.) (the tax policy regime is somewhat different from the regime of the welfare states).
- 22) See Kwang Seok Cheon, *Sahoe Tonghabgwa Sahoe Bojangbeob* [Social Security Law in Activating Social Integration], 5 *SAHOE BOJANGBEOBHAK* [SOC. SECURITY L. STUD.] 113, 146 (2016) (discussing the path inherent in Korean social insurance).
- 23) See Kwang Seok Cheon, *Sahoe Bokjibeobui Gyubeomchaegyewa Gwaje* [System and Prospects of the Social Welfare Law], 41 *BEOBJE YEONGU* [J. LEGIS. RES.] 7 (2011) (S. Kor.).
- 24) See GÖSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 47 (1991).
- 25) See Jin Young Mun, *Kukmin Gicho Saenghwal Bojangbeob Jejungui Jaengjeomgwa Oonyoungbangane gwanhan Yeongu* [On the Legislation of the Guarantee of the Minimum Living Standard], 38 *HANKUK SAHOE BOKJIHAK* [KOR. SOC. WELFARE STUD.] 100 (1999) (S. Kor.).

C. Actors behind EOPs

The multiple perspectives of the EOPs' approach allow for policy comparisons along various dimensions. This, however, renders it a challenge to carry out such a comparison, both in terms of defining its target as well as the relating such a perspective to social policy. This problem is salient also with regard to the actors behind EOPs. Three aspects are worth considering.

The first aspect concerns the public sector and, more specifically, central government. In this context, we need to focus on the functional division between the legislature, the executive, and the judiciary. Korea belongs to the type of government in which the legislature provides the executive with relatively loose guidance in the realm of the social policy.²⁶ This is true, above all, in guaranteeing a minimum standard of living and providing social services, which are both equality-oriented fields of social policy. So even if the universal character of the act concerning the protection of the minimum standard of living for all was envisaged by the legislative decision 1999, it was hardly implemented because the administrative regulation and practice regarding familial responsibility as well as conversion of assets into income worked against it.²⁷ Under these circumstances, active judicial intervention is also hardly to be expected.²⁸

The second aspect is related to the role of the local government. While equality, by its nature, is universal, its implementation depends on the role of the entities that apply the respective policies in each individual case. Local governments are among these entities. As was mentioned above, because normative guidance is relatively relaxed in Korea, local governments can

26) See Kwang Seok Cheon, *Beobyul Yuboui Munjewa Wiim Ibbeobui Hangye* [Legality of the Administrative Action and the Limits of the Delegation], 26 GONGBEOB YEONGU [PUB. L. REV.] 221 (1998) (S. Kor.), for a constitutional approach to this problem.

27) See Ji Hye Kim, *Kukmin Gicho Saenghwal Bojangbeob Buyang Uimuja Gijunui Wiheonseong* [The Unconstitutionality of the Criteria Regarding Family Responsibility in the Protection of Minimum Living Standard Act], 41 GONGBEOB YEONGU [PUB. L. REV.] 111 (2013) (S. Kor.); Sun Hu, Mi Gon Kim & Hyun Sang Yu, *Kukmin Gicho Saenghwal Bojang Jedoe Iteseo Jejanui Sodeuk Hwansan Jedoe Daehan Pyeongga: Hyeongpyeongseongeul Jungsimeuro* [An Evaluation Study of the Methods for Converting Assets into Income in National Basic Livelihood Security Program], 25 SAHOE BOJANG YEONGU [SOC. SECURITY REV.] 3 (2009) (S. Kor.).

28) It is also true for the constitutional review, so in the Korean Constitutional Court equality-oriented arguments in the realm of the social policy were hardly handled. See, e.g., Constitutional Court [Const. Ct.], 93Hun-Ga14, Mar. 27, 1997, (7-2 DKCC, 30) (S. Kor.); Constitutional Court [Const. Ct.], 97Hun-Ga10, Feb. 27, 1998, (10-1 DKCC, 30) (S. Kor.).

often act on their own initiatives. According to the prevailing view, this applies in both guaranteeing the minimum standard of living and providing social services. The Korean Constitution also prescribes good ground for this view. According to Article 117 I, local governments shall deal with administrative matters pertaining to the welfare of local residents, property management, and enactment relating to local autonomy within the limit of the laws and subordinate statutes. This clause is interpreted to mean that local governments are authorized to introduce any measures by way of local regulations as long as they do not violate the standards enacted in the National Assembly.²⁹ Hence, the local governments' capacity of implementing such measures themselves is broad. This becomes even more apparent when one considers that local regulations do not require a delegation of competence by the National Assembly.³⁰

The third aspect that should be analyzed is whether and to what degree the private sector could be oriented towards the EOPs. In this context, we may discuss three constellations. First, there has been a vehement discussion about the privatization of the provision in advanced welfare states since around the 1990s.³¹ Both, policymaking and assessment should address the question of whether this trend brought about social inequality, which the public sector has thus now been required to compensate for. Second, advanced welfare states, influenced by neo-liberal thought since the 90s and have recognized the limits of state burdens, also tried to limit their provision of welfare from the outset. This has resulted in a "welfare mix," i.e. the co-existence of public and private sector arrangements. Korea is a case on point, which was generally observed inter alia since the end of the 90s in the last century. Third, developing countries also continue to rely on traditional instruments to solve their social problems. These instruments mostly belong to the private sector, such as family, town communities, charitable organizations, churches, and etc.³²

These various categories of the public and private sector and the different

29) See Supreme Court [S. Ct.], 2000Chu29, Nov. 24, 2000 (S. Kor.).

30) See Constitutional Court [Const. Ct.], 92Hun-Ma264, Apr. 20, 1995, (7-1 DKCC, 572) (S. Kor.); Supreme Court [S. Ct.], 90Nu6613, Aug. 27, 1991 (S. Kor.).

31) See Bernd von Maydell, *Die „Krise des Sozialstaats“ in internationaler Perspektive — Denkanstöße für die Bundesrepublik Deutschland [The "Crisis of the Welfare State" in an International Perspective — Food for thought for the Federal Republic of Germany]*, 46 SOZIALER FORTSCHRITT [SOC. PROGRESS] 1, 2 (1997) (Ger.).

32) See Hans F. Zacher, *Traditional Solidarity and Modern Social Security — Harmony or Conflict?*, in HANS F. ZACHER: ABHANDLUNGEN ZUM SOZIALRECHT [HANS F. ZACHER: TREATMENTS ON SOCIAL LAW] 455 (Bernd von Maydell ed., 1993) (Ger.).

actors playing in each sector make EOPs approach complex or even impossible to manage. Any application of it, therefore, will require a specific perspective to focus upon. A focus on the public sector could be legitimized on the basis of pragmatic and normative reasons. With the exception of the third category in developing countries, the public sector is the primary domain in which EOPs may be pursued even if the role of the private sector should not be overlooked. In addition, the role of the private sector and public sector vary considerably in each country. From a normative viewpoint, the public sector has the task of orientating itself towards equality. It is also able to do so. The private sector, by contrast, is dominated by the vertical interest of freedom so private actors can hardly be mobilized to serve equality.

D. Determining the Orientation of EOPs

It has recurrently been mentioned that equality is, by its nature, universal. Taking a close look, however, achieving equality is also an inherently selective process because it is impossible to realize equality for everyone and in every sphere at the same time. Historically, this contradiction between the idea of equality (or rather the “hope for equality” because it is impossible) and its implementation motivated people to complain or even revolt in the name of “equality” or “inequality”. In other words, EOPs are, paradoxically, the main origin of inequality. This logic requires policy makers to be clear about which standard or intention they are pursuing with their EOPs. Even if they do so, one should bear in mind that EOPs cannot have an immediate universal effect. Therefore, the successive realization of equality and the present/temporary inequality resulting from this process cannot be considered unconstitutional.³³ For this reason, the intention and the effect of EOPs should be observed and assessed in a long-term perspective. This reasoning has been the main basis for the Korean Constitutional Court to legitimize current inequality as “yet” constitutional.³⁴ For how long this inequality should be tolerable is another question. This issue raises another difficulty for EOPs researchers, namely, the time factor questioning how EOPs could be compared in the long run.

33) See Constitutional Court [Const. Ct.], 90Hun-Ga27, Feb. 11, 1991, (3 DKCC, 25 ff) (S. Kor.); Constitutional Court [Const. Ct.], 2004Hun-Ma207, Mar. 29, 2007, (19-1 DKCC, 285) (S. Kor.), for a constitutional review by means of equality based on this characteristics.

34) See Kwang Seok Cheon, *Social Fundamental Rights and the Judicial Review*, 19 J. CONST. L. 749 (2008) (S. Kor.).

E. EOPs and their Addressees

EOPs can provide programs that allow individuals to establish and realize their rights under favored conditions. Looking closely at the addressees of EOPs, they could be “atomized: individuals, i.e. single persons, or individuals within a group (small or large), or the entire population. This categorization of addressee types is useful for the formation, analysis, evaluation, and innovation of EOPs. Individuals in groups have a strong political impact. They are sensitive to new disadvantages or burdens whereas this is generally not true of advantages or exemptions from duties. This sensitivity concerns the formation of EOPs as well as applicable reforms or changes. Therefore, it is essential for policy-making in these cases to establish a clear target in order to attain the desired policy or to sustain its essence and stability. Still, if the target is not sufficiently persuasive, disadvantages and burdens in one field will be shifted to another (shifting strategy).³⁵ In the case of “atomized” individuals, by contrast, the situation is different. These individuals are isolated, “thrown” individually into the policy-making process.³⁶ Policy makers are then not as sensitive to their addressees. The resulting bundles of policies are heterogeneous and they vary depending upon the respective circumstances. This may, in turn, render it difficult to analyze and evaluate the policies and their interactions. It may also be difficult to reform them.³⁷

35) See Fritz W. Scharpf, *The Viability of Advanced Welfare States in the International Economy: Vulnerabilities and Options*, in WELFARE STATE FUTURES 123, 130 (Stephan Leibfried ed., 2001).

36) See generally FRANZ-XAVER KAUFMANN, VARIANTEN DES WOHLFAHRTSSTAATES: DER DEUTSCHE SOZIALSTAAT IM INTERNATIONALEN VERGLEICH [VARIANTS OF THE WELFARE STATES: THE GERMAN WELFARE STATE IN INTERNATIONAL COMPARISON] 82 (2003) (Ger.); POLITIK DER ARMUT UND DIE SPALTUNG DES SOZIALSTAATS [POLITICS OF POVERTY AND THE SPLITTING OF THE WELFARE STATE] (Stephan Leibfried & Florian Tennstedt eds., 1985) (Ger.).

37) See Alexander Graser, *Zur Fragmentierung der Mindestsicherung – Eine Hypothese zum Zusammenhang zwischen dem Geltungsbereich eines sozialrechtlichen Regelwerks und seinem materiellen Schutzgebiet*, *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* [On Fragmentation of the Minimum Income – A Hypothesis on the Relationship Between the Scope of a Social Legislation and its Material Protective Content], 17 J. FOREIGN & INT’L LAB. & SOC. L. 319, 319 (2003) (Ger.), for the hypothesis resulting from this circumstances.

IV. Systematization

A. Overview of EOP

1. Regulatory Policy

This category includes general equality clauses, anti-discrimination laws, and affirmative action that are all mentioned in the Korean Constitution and partly regulated in statutory law. As discussed above, it is not productive to compare general equality clauses without further specification.³⁸ Rather, it is more instructive to look at the criteria that may not be relied upon in legal distinctions. These criteria are listed in the Constitution in relation to gender, religion, and social status (Article 11 I). However, this prescription cannot alone prevent discrimination and it is difficult to extract any social meaning from it. In addition, not all prohibited criteria are framed in concrete terms, which are illustrated by the ambiguity surrounding the concept of “social status.”³⁹ The effect of this prohibition of discrimination is that judicial review will be stricter when a distinction refers to one of the listed criteria. Treating people differently because of these criteria will only be constitutional if the justification meets the requirement of proportionality as compared with the standard of mere non-arbitrariness that is otherwise applicable.⁴⁰

We find a set of more specific rules against discrimination on grounds for gender within the context of the fundamental social rights on labor. Here, special protection applies to working women. They are not to be subjected to unjust discrimination with regard to hiring, wages, and working conditions (Article 32 IV). Anti-discrimination is understood here to comprise two dimensions: On the one hand, nobody should be discriminated against on the basis of the prohibited criteria. For example, the EFEA requires an equal wage for work of equal quality and quantity (§8). On the other hand, it commands

38) See SEN, *supra* note 12.

39) The Korean Constitutional Court interprets this concept broadly. Namely, it defines the status that a person has had for a long period, which is determined by a social assessment. This interpretation includes both inherited and acquired characteristics. See Constitutional Court [Const. Ct.], 93Hun-Ba43, Feb. 23, 1995, (7-1 DKCC, 222) (S. Kor.). See also Chong Soo Lee, *Constitutional Meaning of the Provision against Discrimination Because of Social Status*, 31 PUB. L. 351 (2002).

40) See Constitutional Court [Const. Ct.], 98Hun-Ma363, Dec. 23, 1999, (11-2 DKCC, 770) (S. Kor.).

more positively that favorable conditions should be afforded to those who are socially or historically disadvantaged so as to ensure that they have equal opportunities in the related sectors. For this latter type of anti-discrimination measures, intensity and implementation largely depends on the weight of countervailing interests. Accordingly, these prescriptions do not have to be followed if this would entail a disproportionate burden on employers or facility owners, or if a legitimate reason for non-adherence is presented (§ 2 no. 1 HRCA, § 4 III no. 1 DDA, § 4-4, 4-5 ADEA). The unintended or even reverse effects, in which these arguments could result, will be described later in this article. Under present circumstances, active judicial intervention could hardly be expected for the implementation of equality unless the contents of the prohibited discriminatory measures were clearly specified by law.⁴¹

With regard to the enforcement of the anti-discrimination rules, both the Human Rights Commission Act and the Disability Discrimination Act in Korea opt for an intermediate approach.⁴² Recognizing the structure of implementation analyzed above, these anti-discrimination statutes prescribe the issuance of recommendations that are not legally binding as a way of resolving disputes (§ 44 HRCA, § 42 DDA). To date, however, attention has rarely been paid to these recommendations.⁴³

There is a significant overlap between anti-discrimination measures as understood above and affirmative action that intends to compensate for historically rooted social disadvantages. However, the latter differs from the former in that it involves a confined special group of individuals and a special sector.⁴⁴ In this sense, measures of affirmative action have more regulatory characteristics, which renders their justification in terms of reverse discrimination debatable. In Korea, affirmative action was introduced in the form of a quota system for the disabled and a “bonus-point” system in employment decisions for the veterans and discharged soldiers.⁴⁵ In the

41) See Ockert Dupper, *Affirmative Action in South Africa*, VERFASSUNG UND RECHT IN ÜBERSEE, 2006, at 138.

42) The Americans With Disabilities Act (ADA) is a good example. See Robert Gervy, *The Americans With Disabilities Act: Lesson for South Korea*, (2008), for this experience in the USA.

43) See– Disability Discrimination Act ch.IV .A.4, for further discussion of these measures.

44) See Ji Young Kim, *Judicial Review on Measurements for Affirmative Action in USA*, KOREA CONST. RES. INST. (2017).

45) For the reason mentioned above, some constitutional cases were brought against these clauses. See Constitutional Court [Const. Ct.], 2001 Hun-Ba96, July 24, 2003, (15-2 DKCC, 91) (S. Kor.) (quota system for the disabled); Constitutional Court [Const. Ct.], 2000Hun-

political sector, there is a quota for female candidates where 50 % of candidates on the list for proportional representative elections must be female (§ 47 III Public Officials Election Act).

2. Redistributive Policy

As explained above, equality is based upon freedom. It does not just entail the freedom for individual achievement, but also the provision of social protection. This latter kind of equality inevitably relies on redistributive policies. The main instruments for this are tax and social policy. How tax policy relates to EOPs has already been explained.⁴⁶ An eminent redistributive effect should further be expected in the field of guaranteeing the minimum standard of living and social services. Inter-temporal distribution, by contrast, can be expected in the field of social insurances. These types provide examples of state-centered redistributive policies. Redistribution between private persons is mostly to be observed in the industrial relations between employers and employees.⁴⁷

3. Discretionary Spending

Many social services belong comprehensively to this category, including education, public health, and vocational training. From an equality perspective, discretionary spending is, however, ambivalent. On the one hand, it serves to promote equality of gender, religion, social status, and etc. For example, free compulsory education contributes towards equality by enabling and providing individuals with the same opportunities to realize their own personal, economic, and social potentials.⁴⁸ It was also reported that this approach enhances

Ma25, Feb. 22, 2001, (13-1 DKCC, 405) (S. Kor.); Constitutional Court [Const. Ct.], 2004Hun-Ma675, Feb. 23, 2006, (18-1 DKCC, 269) (S. Kor.) (quota system for veterans); Constitutional Court [Const. Ct.], 98Hun-Ma363, Dec. 23, 1999, (11-2 DKCC, 787) (S. Kor.) (quota system for discharged soldiers).

46) See Disability Discrimination Act ch. III.B.

47) See Hans F. Zacher, *Zur Rechtsdogmatik sozialer Umverteilung [The Legal Doctrine of Social Redistribution]*, ZEITSCHRIFT FÜR VERWALTUNGSRECHT UND VERWALTUNGSPOLITIK DÖV [J. ADMIN. & ADMIN. POL'Y] 3 (1970); HANS F. ZACHER, ABHANDLUNGEN ZUM SOZIALRECHT [TREATISES ON SOCIAL LAW] 279 (1993), for the various types of redistribution.

48) See Constitutional Court [Const. Ct.], 2003Hun-Ga20, Mar. 31, 2005, (17-1 DKCC, 302) (S. Kor.), for a constitutional approach to this problem.

effectiveness, for instance, in the sphere of public health.⁴⁹ On the other hand, it may contradict the idea of equality because it is given to everyone regardless of his or her economic capabilities. This has been a crucial point in recent debates in Korea with regard to a policy of free-meals at school. This ambivalence should also be considered in the aforementioned sector of social services.

Another question is how equality could be pursued beyond this level of minimal or adequate provision. In Korea, equality is not yet a dominant idea in the policy field of social services. Rather, the focus is on concrete welfare measures, which are mostly related to minimum standard of living that more selective in character.

4. “Soft” Policies

This type of EOPs is useful and needed for the disabled who have struggled to become aware of, claim, and receive the benefits or services, which the law provides for them. If they are not supported by soft policies, which provides information related to the offered services, legal counseling, and assistance in the specific situations, the intended effects of the respective laws and regulations will be undermined.

B. Dimension One: Regulatory versus Non-Regulatory

The general clause of equality is implicitly included in most policies in that it retrospectively functions as the standard for their constitutional review. Equality is positively pursued in the form of anti-discrimination laws or affirmative action. These regulatory policies provide the preconditions for enabling individuals to acquire their rights. As these policies are meant to achieve certain favorable conditions or even outcomes for the individuals and groups concerned, the respective regulation should be framed accurately with regard to their addressees, targets, conditions, and contents. It should also specify the obligations of third parties involved and the support from the state or local government. Without such intensive regulations, this kind of EOPs cannot be conducive to the purpose of equality.

49) See Stefan Huster, *Gesundheitsgerechtigkeit: Public Health im Sozialstaat [Health Justice: Public Health in the Welfare State]*, JURISTEN ZEITUNG, Sept. 2008, at 859 (Ger.).

The Korean Constitution prescribes rules against discrimination on the ground of gender in the employment sector (Article 32 IV). This mandate motivated the pioneer legislation on equality between men and women in the form of the Employment Act of 1987. Equality between men and women has traditionally been neglected in Korean society, and the voice of women had concurrently grown rapidly and strongly at the same time. Employment was undeniably the central sector in which these demands were addressed. There has been a considerable interplay between these norms and reality, and the Act of 1987 significantly contributed to gender equality. Since then, a certain tendency toward anti-discrimination policies can be observed in Korea, as was described above.⁵⁰ It has not yet been assessed in how far these legislative acts have been and can be conducive to equality. As was mentioned above, such an assessment would depend on various factors.⁵¹

Affirmative action needs to be more intensively discussed at a legislative stage than in its implementation. This is because it directly aims to give the addressees the favorable position in the form of quotas or bonus-point systems. Both have a detrimental effect on (real or potential) competitors (“reverse discrimination”). In order to benefit the individuals, such regulation should accurately define its addressees and targets. The Constitution supports affirmative action for both veterans and women in the employment sector.⁵² Moreover, this kind of EOPs is now effective also for the disabled in employment, although there is no explicit constitutional ground for this.⁵³

Discretionary spending, by contrast, is mostly non-regulatory because concrete rights and duties are not derived from it. Discretionary spending policies apply universally and give every citizen the opportunity to access the provided institutions. However, there may be a discrepancy between such policies’ ambition and their real effect.⁵⁴ In particular, this is the case when these policies lack the infrastructure for providing services of the required quantity and quality. Soft policies may be regulatory, at least in part. This is true, for example, when we deal with counseling services for concrete and

50) See Disability Discrimination Act ch.III.A.4.

51) See *id.* ch. I V.A.1.

52) The range of favored persons has recurrently been the subject of constitutional review. See Constitutional Court [Const. Ct.], 2000Hun-Ma25, Feb. 22, 2001, (13-1 DKCC, 405) (S. Kor.); See Constitutional Court [Const. Ct.], 2004Hun-Ma675, Feb. 23, 2006, (18-1 DKCC, 269).

53) See Constitutional Court [Const. Ct.], 2001Hun-Ba96, July 24, 2003, (15-2 DKCC, 86) (S. Kor.), for a constitutional review of this clause.

54) See Pieters, *supra* note 10, for this problem in comparative social security law.

individual cases. Whether measures of soft policy are granted generally or restricted to the exercise of a certain right may change the legal character and contents of that policy. It may also determine the remedies available against wrong or declined services. However, soft policies are mostly non-regulatory. This may explain why they are underestimated in spite of their importance for the implementation of legal targets by a continued use of the available procedures.

C. Dimension Two: Distributive versus Non-Distributive

Distributive policies seek to achieve effects that are direct and visible. It is their financial effects that characterize this policy type. These effects are bilateral in the form of taking and giving (in social insurances) or unilateral in the form of taking (in tax policy) or giving (in social assistances). By contrast, the other types of EOPs, such as regulatory, discretionary, and soft policies, pursue various ways of reaching their goals. These EOPs also have a distributive effect. However, this is mostly indirect and invisible. It is indirect because it may lead to the envisaged circumstances, but it does not guarantee the specific circumstances themselves. It is invisible in that these EOPs chiefly distribute non-calculable opportunities or services. Analyzing both characteristics proves to be complicated.

D. Dimension Three: Substantive, Procedural, and Organizational

EOPs can also be categorized as substantive, procedural and organizational types. These types of EOPs could be regulatory or redistributive policies and discretionary spending or “soft” policies.

Affirmative action and the policies classified as distributive fall under the category of substantive EOPs. Quota systems and bonus-point systems, however, may be further distinguished by the intensity of their implementation. Quotas guarantee an intended outcome (strong substantive), but this does not mean that all applicants will benefit. Rather, the target is typically defined as a fixed proportion. For instance, according to the Occupational Promotion of the Disabled Act (OPDA) in Korea, covered enterprises should give 2.9% of the anew available jobs to the disabled in 2017.⁵⁵ Under a bonus-point system, by

55) This quota will be raised to 3.1% in 2019.

contrast, it is only acceptable to increase the beneficiaries' chances of access (weak substantive).⁵⁶ Apart from the quota or the bonus-point regulation, affirmative action may even be shaped as a monopoly of a special group in a certain occupation. For instance, the occupation of masseuses is accessible exclusively to the visually disabled in Korea (Medical Service Act §82). As mentioned earlier, such rules require strict constitutional scrutiny because they function at the expense of others' rights.⁵⁷ Anti-discrimination laws as described above⁵⁸ are, in part, procedural in that they seek to exclude discriminatory considerations from the decision-making process. But, in part, they are also substantive in that they prescribe more positively that favorable conditions be afforded to disadvantaged groups in order to enable the socially weak to have equal opportunities. However, the impact of these provisions is limited because their implementation depends upon various factual as well as normative elements, such as administrative and financial support from the state or local government on the one hand and the willingness or capability of third parties to provide such facilities on the other hand.⁵⁹ The latter element potentially interferes with the interests and rights of the concerned to be balanced with them.

Soft policies are predominantly procedural in character. They serve an auxiliary function in helping to achieve the intended outcomes of other EOPs. With regard to these EOPs, we may further distinguish between general and specific measures. This distinction is relevant for the possible formation of subjective rights and duties. General soft policies are non-regulatory, so they cannot entail subjective rights. Specific soft policies, by contrast, are directly related to the implementation of a particular right. They should, therefore, take the shape of a subjective right, a violation of which directly influences the intended outcomes. Discretionary EOPs make it possible for individuals to access the related institutions where services are provided. Soft policies serve individuals to enjoy the services provided in these institutions. In this sense, both discretionary and soft policies achieve equality indirectly in the majority of cases.

56) See Gervey, *supra* note 42, for the relevant cases of constitutional review.

57) This measure was complained about in the constitutional court on multiple occasions, but ultimately declared constitutional. See Constitutional Court [Const. Ct.], 2002Hun-Ga16, June 26, 2003, (15-1 DKCC, 672) (S. Kor.); Constitutional Court [Const. Ct.], 2003Hun-Ma715, May 25, 2006, (18-1 DKCC, 112) (S. Kor.); Constitutional Court [Const. Ct.], 2006Hun-Ma1098, Oct. 30, 2008, (20-2 DKCC, 1089) (S. Kor.).

58) See *supra* note 51.

59) See Dupper, *supra* note 41, for an American example.

V. Potential Applications

A perspective that includes all conceivable types of EOPs and systematizes them may serve to form, understand, evaluate, and develop relevant policies. One can start from the commonalities between the functions of different policies. As mentioned in the beginning of this article, inherently and especially in Korea, equality and its anticipation have been understood as a burden. The following description should hopefully contribute to a refined understanding of equality.

A. Functional Equivalence

1. General Remarks

Each category of EOPs differs in its way of reaching equality. One can substitute the other. However, the goal of a particular policy is rarely pursued using just one method. Instead, some or all of them interact in the pursuit of their goal. Such interdependence shall be dealt with later.⁶⁰

Functional equivalence can be found between categories as well as within one particular category. This allows for policy choice in both dimensions. The first one is between tax policy and social benefits. Tax policies can have similar effects to social benefits in that they can reduce the burden on individual expenses where it is necessary to protect against social risks. The second example is between affirmative action and anti-discrimination measures. They are similar in the sense that they require that favorable conditions be given to a certain group of individuals in order to reach an envisaged goal. The variable differentiating both is related to these questions: To what degree does discrimination or disadvantages prevail in a society? Why does one encounter more difficulties in reaching equal opportunity than others? Does this originate from a social and historical context?

Anti-discrimination policy and social policy also appear to be interchangeable. It is generally observed that in a country where social policy has traditionally remained underdeveloped, anti-discrimination policies are expected to play a dominant role. In contrast, anti-discrimination policies are regarded as incidental in a country with advanced social policy. The USA belongs in the

60) See Disability Discrimination Act ch. V.A.2.

former type, and Germany belongs in the latter.⁶¹ This comparison is helpful when answering the question that was raised in the beginning of this article, viz., in which way and to what degree the new anti-discrimination policies supplement existing welfare legislation in Korea.

An example of policy choice between categories can be seen also in health policy. As almost the entire population is insured under the public medical insurance scheme and as medical insurance largely relies on subsidies from the state budget, the system has come close to a national health service. As the models appear to be interchangeable, a dialogue between both is required. More generally, public and private policy instruments are often interchangeable. As mentioned above, this can be observed in advanced welfare states when they turn to privatization and in other welfare states when they cut back their expenditure in the face of the neo-liberal retrenchment.

2. Policy Choice or Preference

The said shifts should, however, be compensated by EOPs in industrial relations or, additionally, by favorable tax policies. Hence, the interchangeability between policies will often affect the relationship between the state and the individuals and between individuals. The implementation of affirmative action is faced with normative objections, for in this policy, the selection of a particular group unavoidably excludes the rest. Therefore, this kind of policy must be justified against strict constitutional standards.⁶²

Anti-discrimination laws, by contrast, do not guarantee the intended outcomes, but rather provide the group or individual concerned with the opportunity to be treated as equal. On the one hand, reasonable consideration

61) See Christian Auktor, *Deutschland*, in BEHINDERUNG IN ASIEN UND EUROPA IM POLITIK- UND RECHTSVERGLEICH [DISABILITY IN ASIA AND EUROPE IN POLITICAL AND COMPARATIVE LAW: WITH A CONTRIBUTION TO THE US] 27 (Bernd von Maydell et al. eds., 2003); Alexander Graser, *USA*, in BEHINDERUNG IN ASIEN UND EUROPA IM POLITIK- UND RECHTSVERGLEICH [DISABILITY IN ASIA AND EUROPE IN POLITICAL AND COMPARATIVE LAW: WITH A CONTRIBUTION TO THE US] 233 (Bernd von Maydell et al. eds., 2003); Rainer Pitschas, *Integration behinderter Menschen in verschiedenen Lebensphasen als Politikauftrag: 'Potentiale wecken statt Menschen entmündigen'; ein kategorialer Rahmen (Integration of Disabled People in Different Phases of Life as a Policy Task: 'Awakening Potential Instead of Incapacitating People'; A Categorical Framework)*, in BEHINDERUNG IN ASIEN UND EUROPA IM POLITIK- UND RECHTSVERGLEICH [DISABILITY IN ASIA AND EUROPE IN POLITICAL AND COMPARATIVE LAW: WITH A CONTRIBUTION TO THE US] 389 (Bernd von Maydell et al. eds., 2003), for an example of each.

62) See Kim, *supra* note 44, for relevant cases in the Korean Constitutional Court.

(such as disabled-friendly facilities or working conditions) should be given to the specific circumstances of addressees of the EOPs so they are able to enjoy equal opportunities. On the other hand, this obligation to consider the circumstances should be administratively and financially supported by the state. However, the owners of the facilities or the employers are exempted from the obligations if these considerations would impose an unbearable expense on them. When assessing on the one hand what is deemed reasonable and what is bearable on the other, the countervailing interests have to be balanced in light of the intentions behind the EOPs.

Disability policies in Korea provide a good example. The Korean Constitution makes no explicit reference to disabled persons.⁶³ Despite this, there is no serious objection against the aim to afford favorable treatment to the disabled. Affirmative action and anti-discrimination policy seem to have the same effects. In fact, both are used to support the disabled in the employment sector. However, in the last 20 years, a problem has risen and has been recognized. Affirmative action in the form of a quota system has, in fact, been applied mainly to the lightly disabled and the severely disabled were neglected.⁶⁴ This unintended effect has led to discussions on whether these strong substantive EOPs should instead be confined to the severely disabled because even reasonable considerations are insufficient means of providing them with equal opportunity. Anti-discrimination, by contrast, is adequate to be applied to the lightly disabled when used in conjunction with corresponding measurements for occupational promotion. This is an example that illustrates the difference in effects between both types of EOPs.

B. Interdependence between EOPs

The last point of this article is concerned with the idea that seemingly interchangeable policies with similar functions can have different effects. Ideally, these effects should be coordinated with each other, but they can also contradict each other when combined in a certain way.

63) In the Korean Constitution there is no special equality clause for the disabled. In fact, the Korean Constitutional Court refused to include disability in the list of explicitly prohibited criteria of discrimination. *See* Constitutional Court [Const. Ct.], 2002Hun-Ma328, Oct. 28, 2004, (16-2 DKCC, 210) (S. Kor.). Notably, in 1994, a provision for the special treatment of the disabled was inserted in Article III of the German Constitution.

64) *See* JONG JIN KIM ET AL., REDESIGN OF THE QUOTA SYSTEM FOR THE EMPLOYMENT OF THE DISABLED 28 (2008).

1. Complementarity

Substantive EOPs, including regulatory and distributive ones, rely on the procedural services provided by soft policies to reach their intended goals. Discretionary spending should also complement substantive EOPs. For instance, without the possibility to access job training centers and to participate in job training, the addressees of anti-discrimination law may not even come under its protection. This can be seen in the field of disability policy in Korea where employers deplore the lack of sufficient human resources with adequate knowledge or skills. As with the example mentioned above, in order to avoid policy distortion, affirmative action in the form of a quota system should concentrate on the severely disabled. Such a shift could be justified if an occupational promotions system for the lightly disabled were to be put in place so as to enable them to compete in the labor market with the non-disabled. So, in this case, notice should be taken of the interdependence between anti-discrimination and the discretionary spending.⁶⁵ Otherwise, the disabled would be thrown into a labor market in which they would hardly survive. Coordination is necessary also in the field of distributive EOPs. For what tax policy takes, social policy gives. Therefore, governments need to avoid any benefits given by social policy, which are then taken away by tax policy. They have to ensure that social policy is complemented by tax policy without such contradictions.⁶⁶ This complementarity is required *inter alia* in the implementation of the National Minimum Standard of Living Act.⁶⁷

2. Incompatibility

Notwithstanding the potential of such complementarity, it can also prove counterproductive if the interdependence between EOPs and between policies in a same category goes unnoticed or if they are combined in the wrong way. The following paragraph provides an example of this effect that occurred as a result of a new policy in Korea. With the Reform Act of 1998 and 2007, the benefits of the national pension service in Korea have gradually decreased. In

65) See Kwang Seok Cheon, *Constitution and Policy for the Disabled – Interaction Between Welfare and Equality*, 20 J. CONST. L. 407 (2009), for a reflection of the interaction between EOPs and social policies.

66) See Cheon, *supra* note 20, on this issue and related text.

67) See Constitutional Court [Const. Ct.], 92Hun-Ba49, July 29, 1994, (6-2 DKCC, 95).

2007, the Basic Pension Act for the elderly was enacted, which intended to fill the payment gap left by the revised National Pension Service Act. Politically, the new Act intended to compensate for the reductions of the national pension. The aims of both Acts, however, are contradictory as they follow different approaches. The former is concerned with relative equality based upon the contributions of the insured, whereas the latter seeks to achieve absolute equality for all in need. Recognizing this difference of the policy goal, the latter must be discussed in connection with the Basic Minimum Standard of Living Act.

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