

The Migration Issues in Korea: Korean-Chinese, Migrant Workers, Marriage Immigrant Women, and the Refugee Act

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Abstract

From the 1970's construction boom in the Middle East up to the early 1980's, Korea was an aggressive exporter of labor. However, after a high-growth period in the late 1980's, Korea transformed from a source country to a destination country for labor and marriage immigrants. Since then, the percentage of foreign migrants and their stays in Korea increased, so that by the mid-2000's, Korea attained the status of an "immigration state" as designated by the United Nations (UN).

This paper discusses the human rights issues concerning the immigrant status of three growing immigrant groups in Korea: (1) overseas Korean nationals, (2) unregistered migrant workers, and (3) marriage immigrant women. In addition, the paper evaluates the recently enacted Refugee Act.

First, the paper analyzes the Act on the Immigration and Legal Status of Overseas Koreans ("Overseas Koreans Act") and concludes that it ultimately results in the *de facto* exclusion of Korean-Chinese (*Chosunjok*) from their immigration process, thereby resulting in a violation of equal rights and undermining the original purpose of the Act.

Second, the paper analyzes the Act on the Employment, etc. of Foreign Workers ("Employment Permit Systems Act") and the subsequent Employment Permit System (EPS), as well as the Immigration Control Act, in relation to unregistered migrant workers in Korea. International human rights bodies have repeatedly expressed concern with the poor human rights situation of these workers. The current system affords insufficient protection for these workers, enables human rights violations by law enforcement, and has internment facilities that do not meet international human rights standards. This paper makes a number of recommendations.

Third, the paper looks at various human rights issues concerning the guarantee of residence permits for marriage immigrant women and the recognition of dual nationality under the Immigration Control Act and Nationality Act. The status of marriage immigrant women is largely dependent on their Korean husbands due to residency requirements under current immigration law. This paper analyzes the social and cultural factors underlying the difficulties faced by marriage immigrants and makes recommendations to secure further protection for these women.

Finally, the paper evaluates the significance, limitations, as well as problems of the recently enacted Refugee Act. The paper concludes that refugee rec-

ognition in Korea remains in reality a deficient process, and it remains to be seen how the Ministry of Justice will conform to the objectives of this new legislation.

Key Words: Immigration, Immigrants, Migrant worker, Employment permit system, Overseas Korean nationals, Unregistered migrant workers, Chosunjok, Marriage immigrant women, Refugee, Judicial Activism

I. Introduction

“[T]he concept of globalization implies, first and foremost, a *stretching* of social, political and economic activities across frontiers such that events, decisions and activities in one region of the world can come to have significance for individuals and communities in distant regions of the globe (emphasis in the original).”¹ In particular, there is a transnational expansion of economic activities that not only push capital beyond its borders but also “cheap” labor from third world countries, especially women, resulting in the feminization of immigration and thus an increase in the migration of human resources. From the 1970’s construction boom in the Middle East up to the early 1980’s, Korea was an aggressive exporter of labor. However, passing through a high-growth period in the late 1980’s, it went from a source country to a destination country for labor and marriage immigrants. Since then, the percentage of foreign migrants and their stays in Korea increased, so that by the mid-2000’s, Korea attained the status of an “immigration state” as designated by the United Nations (UN). According to the statistics released by the Immigration Services of the Ministry of Justice in 2011, the number of foreign nationals residing in Korea reached its peak at 1.4 million (1,395,077). Among them, the number of long-term residents, excluding temporary stays and tourist visas, exceeded one million, reaching 2.2 percent of Korea’s total population.² In spite of this, in its 2004 World Economic Outlook, the International Monetary Fund (IMF) stated that Korea would need to accommodate immigrants up to 35 percent of its population for it to be able to retain the current labor force until 2050. Along these lines, the continued administrative and legal systems and culture towards “others/outsideers” that the Korean society holds fast to should be transformed in a variety of different ways. However, the issue of “immigration” and “immigrants” in Korea bears a unique context that is distinct from western states. The historical experience of forced transfer and such during the Japanese colonization era, exclusive nationalism based on the Confucian traditions of East Asia, and gender bias grounded in the patriarchal system, etc. are affecting the immi-

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1. David Held *et al.*, *Global Transformations: Politics, Economics, and Culture* 15 (Stan. Univ. Press 1999).
 2. Korea Immigration Serv., Non-Korean Nationals Classified by Residence Status (4th quarter, 2011), http://www.immigration.go.kr/HP/TIMM/imm_06/imm_2011_12.jsp.

gration policies and immigrant issues in the Korean society.

Below, this paper will discuss human rights issues of overseas nationals, migrant workers, marriage immigrant women with regard to their immigrant status. More specifically, the issues to be dealt with are: first, violation of equal rights of the Korean-Chinese (*Chosunjok*) in their immigration process pursuant to the Act on the Immigration and Legal Status of Overseas Koreans (hereinafter “Overseas Koreans Act”); second, human rights violations in relation to immigration of unregistered migrant workers pursuant to the Act on the Employment, etc. of Foreign Workers (hereinafter “Employment Permit System Act”) and Immigration Control Act; third, issues concerning the guarantee of residence permits for marriage immigrant women and recognition of dual nationality pursuant to the Immigration Control Act and Nationality Act; and lastly, review of the significance and limitations, as well as problems, of the recently enacted Refugee Act.

II. Issues Concerning the Immigration Status of Korean-Chinese (*Chosunjok*)

A. Significance of the Act on the Immigration and Legal Status of Overseas Koreans

Korea’s immigration policies concerning foreign nationals are regulated by the Immigration Control Act. However, Korean nationals overseas are separately regulated by the Overseas Koreans Act. The Overseas Koreans Act implemented by the Kim Daejung administration in December 1999 provides preferential treatment for overseas nationals satisfying the criteria laid out by law by granting them similar legal status as that of nationals within Korea.

The concept of overseas Koreans is an exceptional term not generally used by other countries. Other countries rather utilize the term “overseas nationals,” which indicate those who, with voluntary intent, leave their original state and emigrate to another in order to reside there, while retaining the nationality of their originating state. Though they have left their state of nationality to their resident state, it is natural that they are granted immigration privileges equivalent to that of other nationals because they have retained their nationalities.

However, the Overseas Koreans Act defines overseas Koreans more broadly

than the definition generally used. Overseas Koreans Act Article 2(2) defines “foreign nationality Koreans” as those who have held the nationality of the Republic of Korea in the past, or even if they have not, include those who are lineal descendants of Korean nationals, thereby granting them extensive immigration and legal privileges pursuant to the Act.³

B. The Scope of “Foreign Nationality Koreans” pursuant to the Overseas Koreans Act

Then, just how far does the scope of “Koreans” extend? In the proposed draft of the Overseas Koreans Act of September 29, 1998, the definition of foreign nationality Koreans was “Among persons of Korean lineal descent and having acquired the nationality of a foreign country, those prescribed by Presidential Decree.”⁴ However, with the submission of the Ministry of Foreign Affairs stating that such legislation of *jus sanguinis* violates principles of international law, that the international custom relating to such legislation follows the principle of past nationality, and that it may create diplomatic friction with China as it conflicts in part with China’s integration policy towards its minorities, “foreign nationality Koreans” were defined in the final proposal as Koreans having emigrated abroad after the establishment of the Government of the Republic of Korea.⁵

3. Jaeoe dongpo eui churipguk gwa beopjeok jiwi e qwanhan beobyul [Act on the Immigration and Legal Status of Overseas Koreans], Act. No. 10543, Apr. 5, 2011, art. 2(1)-(2) (S. Kor.).

4. Official Gazette of the Republic of Korea, <http://gwanbo.korea.go.kr/main.gz> (last visited Aug. 6, 2013).

5. Jaeoe dongpo eui churipguk gwa beopjeok jiwi e qwanhan beobyul [Act on the Immigration and Legal Status of Overseas Koreans], Act. No. 6014, Sept. 2, 1999, *amended by* Act. No. 10543, Apr. 5, 2011 (S. Kor.).

Article 2 (Definitions) The term “overseas Korean” in this Act means a person who falls under any of the following subparagraphs:

1. (Omitted)

2. A person, prescribed by Presidential Decree, of those who, having held the nationality of the Republic of Korea or as their lineal descendants, have acquired the nationality of a foreign country (hereinafter referred to as a “foreign nationality Korean”).

[Enforcement Decree of the Act on the Immigration and Legal Status of Overseas Koreans], Presidential Decree No. 16602, Nov. 27, 1999, *amended by* Presidential Decree No. 23488, Jan. 6, 2012 (S. Kor.).

Article 3 (Definition of foreign nationality Korean) “A person, prescribed by Presidential Decree, of those who, having held the nationality of the Republic of Korea or as their lin-

Arguments were made against this definition as having been created without a rational basis because, although Koreans having emigrated *before* the establishment of the Government of the Republic of Korea or Koreans having emigrated *after* the establishment were fundamentally the same “Koreans,” the Overseas Koreans Act created an arbitrary standard of the holding of Korean nationality to grant immigration and legal status privileges only to those *after* the establishment of the government and excluding the same for those *before* its establishment.⁶ Further arguments were made that such an interpretation was a denial of the legitimacy of the Provisional Government of the Republic of Korea.⁷ Pursuant to these arguments, a constitutional petition was filed by Koreans forcefully transferred to Sakhalin prior to the establishment of the Government of the Republic of Korea as well as the Korean-Chinese. The Constitutional Court held in 2001 concerning the scope of Overseas Koreans limited to “those having emigrated abroad after the establishment of the Government,” that “the establishment of the Government cannot be a rational basis for differentiating Overseas Koreans.”⁸ Declaring the provision unconstitutional, it ordered the amendment of the provision by December 31, 2003.

Thus, the Ministry of Justice amended the scope of the Overseas Koreans Act from the previous “persons or their lineal descendants having emigrated abroad after the establishment of the Government of the Republic of Korea and, having lost the nationality of the Republic of Korea, have acquired the nationality of a foreign country” to persons, “prescribed by Presidential Decree, of those who, having held the nationality of the Republic of Korea or as their lineal descendants, have acquired the nationality of a foreign coun-

real descendants, have acquired the nationality of a foreign country” in Article 2(2) of the Act means a person who falls under any of the following subparagraphs:

1. A person who had emigrated abroad after the Government of the Republic of Korea was established and have lost the nationality of the Republic of Korea or their lineal descendants.
 2. Those who had emigrated abroad before the Government of the Republic of Korea was established or their lineal descendants had their nationality of Korea confirmed prior to acquiring the nationality of a foreign country.
6. Sunjoo Lee, *Jaeoedongpobeope wiheonmunjewa kaejeong bangan* [Unconstitutionality of the Overseas Koreans Act and Amendment Proposals], 105 *Kyopo Jeongchek Jaryo Tongkwon* [105 Overseas Koreans Policy Materials] 11-13 (2002).
 7. *Jaeoedongpobeop Heonso Kim Haesung Moksa Jungguk-Russia Dongpo Jaewae Bipan* [Constitutional Appeal by Rev. Kim, Haesung of the Overseas Korean Act for Excluding Chinese & Russians] *The Hankyoreh*, Aug. 27, 1999.
 8. Constitutional Court [Const. Ct.], 99Hun-ma494, Nov. 29, 2001 (en banc) (S. Kor.).

try,” so that the discrimination no longer existed among emigrants depending upon their point of emigration.⁹ At the same time, the Enforcement Decree was also amended to define foreign nationality Koreans as “those who, having held the nationality of the Republic of Korea (including those who had emigrated abroad before the Government of the Republic of Korea was established), have acquired the nationality of a foreign country” and “those whose parent or grandparent of either side, having held the nationality of the Republic of Korea, have acquired the nationality of a foreign country.”¹⁰

On the one hand, during the amendment process of the Overseas Koreans Act after being found unconstitutional by the Constitutional Court, arguments were raised that granting immigration and legal status privileges to foreign nationals of Korean descent conflicted with the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “ICERD”),¹¹ which Korea was a party to.¹²

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9. Jaeoe dongpo eui churipguk gwa beopjeok jiwi e qwanhan beobyul [Immigration and Legal Status of Overseas Koreans], Act. No. 11690, Mar. 23, 2013 (S. Kor.).
Article 2 (Definitions) The term “overseas Korean” in this Act means a person who falls under any of the following subparagraphs:
 1. (Omitted)
 2. A person, prescribed by Presidential Decree, of those who, having held the nationality of the Republic of Korea (including those who had emigrated abroad before the Government of the Republic of Korea was established) or as their lineal descendants, have acquired the nationality of a foreign country (hereinafter referred to as a “foreign nationality Korean”).
 10. Jaeoe dongpo eui churipguk gwa beopjeok jiwi e qwanhan beobyul sihaengryung [Enforcement Decree of the Act on the Immigration and Legal Status of Overseas Koreans], Presidential Decree No. 23488, Jan. 6, 2012 (S. Kor.).
Article 3 (Definition of foreign nationality Korean) “A person, prescribed by Presidential Decree, of those who, having held the nationality of the Republic of Korea or as their lineal descendants, have acquired the nationality of a foreign country” in Article 2(2) of the Act means a person who falls under any of the following subparagraphs:
 1. A person who, having held the nationality of the Republic of Korea (including those who had emigrated abroad before the Government of the Republic of Korea was established), have acquired the nationality of a foreign country.
 2. A person who, whose either parent or grandparent with the nationality of the Republic of Korea, have acquired the nationality of a foreign country.
 11. International Convention on the Elimination of All Forms of Racial Discrimination, Nov. 14, 1978, 660 U.N.T.S. 195 [hereinafter ICERD], available at http://likms.assembly.go.kr/bms_svc/img_attach2/09/doc_10/090853_10.PDF.
 12. Comments of the National Human Rights Commission of Korea concerning the Proposed Amendment of the Act on the Immigration and Legal Status of Overseas Koreans 13, Dec. 21, 2001.

Having been ratified by the National Assembly and thus having the same effect as that of domestic law, ICERD article 5 provides for the “guarantee [of] the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law...” including rights to leave and return to a country, right of residence, right to own property, the right to free choice of employment, etc. The argument raised was that granting privileges to foreign nationals of Korean descent was equivalent to “preference based on race” in article 1(1) of ICERD; and the various privileges enjoyed by the Overseas Koreans under the Act ultimately fall under the scope of human rights, the discrimination of which is prohibited by article 6 of ICERD.¹³

In the case of Korea, however, the formation of the concept of overseas Koreans has a historical context different from that of other states. This is because the migration of overseas Koreans was more often involuntary, unlike the voluntary emigration of most other countries. According to statistics, forced transfer during the forced Japanese occupation of Korea numbered between 1.2-1.6 million,¹⁴ while some scholars estimate the number to exceed 2 million.¹⁵ Japanese colonization of the Korean Peninsula had resulted in forced transfer policies and involuntary emigration by the Japanese government, resulting in countless numbers of involuntary emigrants. To consider as “preference based on race” the “deserving treatment” of persons of Korean descent inevitably residing abroad due to forced transfer against their humanity by the colonizing state is an imperialistic conception that seeks to present Japanese colonization and the subsequent forced migration as being “natural.” Within this context and in relation to the historically unique circumstances of Korean-Chinese, the Constitutional Court held, “Rather than helping fel-

13. ICERD, *supra* note 11, at 17.

14. Kyeongsik Park, *Ilbonjegukjuie Chosunjibae [The Rule of Japanese Imperialism over Chosun]* 356-47 (Chunga Book 1986).

15. The number of those forcefully transferred is increasing with further progress of research in the field. It is estimated that the number of laborers forcefully transferred to regions in Japan numbers 730,000; civilian components of the military, though greatly varying in different records, at 150,000; soldiers numbering 244,000. Considering that the number of Koreans forcefully transferred from Southeast Asia numbers 100,000, in addition to those massively transferred from China, 200,000 cannot be seen as being exaggerated. (Seokhong Chang, *History of Koreans Abroad: How Do We Understand the History of Independence Movement against Japan?* [Hewaedongposa, Hangildoknipundongsa Eoteoke Jeongrihal Geoshinga?], presented at the Third Seminar of the Truth and Reconciliation Commission, Feb. 16, 2006.)

low Koreans who could not but leave the country due to its dismal historical situation, adopting lawfully discriminatory policies is a situation without precedent even in foreign countries. Thus, it is very difficult to recognize the legitimacy of the discrimination in this case from a humanitarian perspective, even apart from an ethnic perspective. The benefit that the government seeks to gather from the discrimination in this case is significantly smaller than the resulting pain and division among fellow Koreans.”¹⁶ Within this historical context, granting special immigration status to Koreans that have been forcefully transferred and their descendents to allow their return to the homeland¹⁷ is based on the rationale of the abnormal circumstances of the colonization era during which the status of the sovereign state was deprived, while simultaneously restoring the rights of its citizens prior to colonization. In spite of this, the *de facto* status of Korean-Chinese and Korean-Russians (*Chosunjok* and *Koryeoin*) has not improved due to the gap between the law and its implementation.¹⁸

C. Immigration and Legal Status of Overseas Koreans

When a person is recognized as an overseas Korean under the Act, they may acquire an overseas Koreans visa (F-4).¹⁹ When a person receives the F-4 visa, he/she in principle is not restricted to activities generally limited based on residence categorization;²⁰ they are also free to find employment or engage in any other economic activities as long as they do not harm the social order or economic stability.²¹

16. Constitutional Court [Const. Ct.], 99Hun-ma494Nov. 29, 2001 (en banc) (S. Kor.).

17. Jonghoon Lee, *Terminology Issues in the Overseas Koreans Act*, presented at the Overseas Koreans Act and the Legal Status of Japanese-Koreans Symposium (Apr. 2003), hosted by The Association of Korean-Japanese National Studies.

18. Jinyoung Lee *et al.*, *Bangmunchiupje-e dehan shiltaejosa mit dongpomanjokdo josa* [Survey of the Current Status of the Employment Permit System and Satisfaction of Overseas Koreans] (Korea Immigration Serv. 2008) http://immigration.go.kr/HP/COM/bbs_003/ListShowData.do?strNbodCd=noti0093&strWrtNo=31&strAnsNo=A&strOrgGbnCd=104000&strRtnURL=IMM_6020&strAllOrgYn=N&strThisPage=2&strFilePath.

19. Churipguk qwalibeop sihaengryung [Enforcement Decree of the Immigration Control Act], Presidential Decree No. 24628, June 21, 2013, art. 12, Table 1 (S. Kor.).

20. *Id.* art. 23(3).

21. Act on the Immigration and Legal Status of Overseas Koreans, *supra* note 5, art. 10(5) (S. Kor.).

When recognized as an overseas Korean, they may report to the Immigration Office²² and receive their Report Card of Domestic Place of Residence.²³ Though the duration of residence based on sojourn status is initially set at no more than three years,²⁴ when continuing residence beyond the three years, they may extend their visas indefinitely as long as they are not at fault.²⁵ Further, they may engage in property²⁶ and financial²⁷ transactions equal to that of the Korean nationals; and persons residing over 90 days may take advantage of medical insurance privileges.²⁸

However, as an overseas Korean, he/she is still subject to the application of the provisions of the Immigration Control Act in principle; thus, they may be restricted from engaging in simple labor²⁹ or acts contrary to good morals and social order, or in cases where the employment activities are deemed necessary to prohibit in order to maintain public interest or domestic employment order.³⁰ In spite of these restrictions, because many overseas Koreans may still enter the country pursuant to the Overseas Koreans Act and affect the domestic labor market, the Ministry of Justice requires additional documentation from overseas Koreans who come from countries from which over 50 percent illegally overstay their visas before their F-4 visas are issued.³¹

22. *Id.* art. 6 (Report of Place of Residence in Korea).

23. *Id.* art. 7 (Issuance of Report Card of Domestic Place of Residence, etc.).

24. *Id.* art. 10(10) (Immigration and Sojourn).

25. *Id.* art. 10(2); Jaeoe dongpo eui churipguk gwa beopjeok jiwi e qwanhan beobyul sihaengryung [Enforcement Decree of the Act on the Immigration and Legal Status of Overseas Koreans], Presidential Decree No. 23488, Jan. 6, 2012, art. 16 (S. Kor.).

26. Act on the Immigration and Legal Status of Overseas Koreans, *supra* note 5, art. 11. (Real Estate Transactions, etc.).

27. *Id.* art. 12 (Financial Transactions).

28. *Id.* art. 16 (Health Insurance).

29. Churipguk qwalibeop sihaeng gyuchik [Enforcement Regulations of the Immigration Control Act], Ministry Decree No. 795, June 28, 2013, art. 27-2 (Emp't Limitations for Overseas Koreans), art. 23(3)(1) (S.Kor.); Simple Labor refers to tasks requiring simple, mundane physical labor as announced by the Korea Standard Occupation Categories, Statistics Korea, (Notice of the Ministry of Justice no. 2010-297, Apr. 8, 2010).

30. *Id.* art. 23(3).

31. *Id.* art. 76(1) Table 5. Overseas Koreans (F-4): Document such as Annual Tax Payment Certificate, Income Certificate, etc., proving non-engagement in employment activities as provided in article 23(3) such as simple labor during the stay (This includes overseas Koreans from states from which illegal immigrants result as announced by the Minister of Justice).

Thus, the Minister of Justice determines “nations from which most illegal overstays result” from which over 50 percent illegally stay in Korea;³² and overseas Koreans coming from such a country must satisfy strict conditions such as “persons working in businesses with annual import/export performance of over \$100,000 or make annual domestic investment of over \$500,000” in order to receive an F-4 visa. For those who are not able to meet such requirements, they are issued Family visitation visas (F-1) or employment permit (F-9) visas. Currently, one can stay up to five years in Korea with an F-1 visa.

D. Violation of Equal Rights in the Immigration Process for the Koreans in China (*Chosunjok*)

During Japanese colonization, there were many Koreans who migrated to Gando and Yanbian in China with its borders adjacent to Chosun. These emigrants to China became what the Chinese call the minority group of *Chosunjok* and continue to reside there. With the amendment of the Overseas Koreans Act in 2008, a majority of the Korean-Chinese came within the scope of application of the Act. Thus in principle, even Korean-Chinese (*Chosunjok*) may enjoy the immigration status guaranteed by the Act when the conditions are met.

However, with the Foreign Minister’s designation of China as a nation with a high percentage of illegal immigrants,³³ they must submit additional documents mentioned above in their visa process in order to receive an F-4 visa pursuant to article 2(2) of the overseas Korean Act, even if they are categorized as overseas Koreans. Thus, the instances when Korean-Chinese (*Chosunjok*) actually receive F-4 visas are very limited. According to 2008 statistics, F-4 visas were issued to 37,191 United States (US) citizens, 5,507 Canadian citizens, and 2,881 Australian citizens. For Chinese citizens, however, only four people were granted F-4 visas in 2002, with none to follow from 2003 to 2007.³⁴

32. States from which most illegal overstays resulted as of 2010 (22 countries)/Notice of the Ministry of Justice no. 2007-150: China, Philippines, Indonesia, Vietnam, Mongolia, Thailand, Pakistan, Sri Lanka, India, Myanmar, Nepal, Iran, Russia, Uzbekistan, Kazakhstan, Kirgizstan, Ukraine, Nigeria, Ghana, Egypt, Peru.

33. Enforcement Decree of the Immigration Control Act, *supra* note 19, art. 76(1) Table 5 and Notice concerning the Issuance of Visas etc., and Required Documents (Notice of the Ministry of Justice no. 2003-619, Dec. 12, 2003).

34. National Human Rights Commission, 07Jin-in4397 [hereinafter NHRC Decision], July 15, 2008.

Argument was raised concerning these regulations that differentiating or discriminating the immigration process among different Koreans was unconstitutional.³⁵ The Korean-Chinese filed a constitutional petition claiming that Enforcement Regulations of the Immigration Control Act article 76(1) table 5 and Enforcement Regulations of the Immigration Control Act annex 5 “Notice concerning Issuance of Visas etc., and Required Documents” (Notice of the Ministry of Justice no. 2003-619, Feb. 12, 2003) violated their equal rights and freedom to choose employment of their choice by requiring submission of “Document such as Annual Tax Payment Certificate, Income Certificate, etc. proving non-engagement in employment activities as provided in article 23(3) such as simple labor during the stay” when applying to enter with an F-4 visa. The trial began on September 20, 2011, and the case is still in progress.³⁶ The Constitutional Court had earlier rejected a similar case;³⁷ but as the earlier case was rejected for a lapse of the statute of limitations and not based on the merits, the decision of this case is receiving much attention.

The freedom of occupation³⁸ guaranteed by the Constitution is a fundamental right granted to the national of a state, and such rights are restrictively granted to non-nationals based on the discretion of foreign nationals. Along these lines, the Enforcement Decree of Immigration Control Act article 23(3) limits overseas Koreans, including Korean-Chinese, from engaging in domestic, simple labor. Thus, the government is of the position that guaranteeing freedom of employment to only the citizens in article 15 of the Constitution cannot be deemed discriminatory to Korean-Chinese alone. In particular, nations designated as “nations from which most illegal overstays result” have not been arbitrarily determined by the Minister of Justice but were determined pursuant to precise statistics on factors that can affect the domestic labor market; therefore, requiring submission of additional documents from nationals of these designated states is a measure taken pursuant to rational reasons.³⁹

35. Chosunjok Chabyeolcheolpye Heonbeopsowon [Constitutional Petition to Abolish Discrimination against Chosunjok] [hereinafter Chosunjok Petition], Yonhap News, Aug. 23, 2011, <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=001&aid=0005225697>.

36. Constitutional Court [Const. Ct.], 2011Hun-ma474 (Pending) (S. Kor.).

37. Constitutional Court [Const. Ct.], 2011Hun-ma477, Oct. 18, 2011 (S. Kor.).

38. Daehanminkuk Hunbeob [Hunbeob] [Constitution] art. 15. (S. Kor.). “All citizens shall enjoy freedom of occupation.”

39. Interview with Prosecutor Hyun Kim (Korea Immigration Services, Ministry of Justice), on May 7, 2012 at Inha University Law School [hereinafter Hyun Kim Interview].

On the other hand, civic groups and Korean-Chinese argue that while overseas Koreans coming from states not designated as “nations from which most illegal overstays result” are automatically granted F-4 status by the Ministry of Justice upon meeting the “foreign nationality Korean” criteria laid out in the overseas Korean Act, for Korean-Chinese, it is clear that additional documents are required before visas are issued. Therefore, this poses a disadvantage only to Korean-Chinese, who must pass through an additional stage, and thus violates the right to equal treatment guaranteed by the Constitution. It is further argued that imposing such measures that violate their rights pursuant to the designation of the Minister of Justice without basing it on legislation of the National Assembly is beyond the scope of delegated legislation and is thus unlawful.⁴⁰

E. Conclusion

1. Whether the Freedom of Occupation Was Violated

Article 3 of the Overseas Koreans Act limits the scope of application of the Act to overseas nationals and foreign nationality Koreans with F-4 status among those provided for in article 10 of the Immigration Control Act. Article 5(4) provides that the status criteria are determined by Presidential Decree. The Enforcement Decree of Overseas Koreans Act article 4(4) provides that such determination is made by applying articles 12 and 23. Thus, even if a “foreign nationality Korean” has foreign nationality, one must acquire an F-4 visa pursuant to the Enforcement Decree in order to be subject to the application of the Act. Enforcement Decree article 23(3) provides that those with F-4 status are not restricted in their activities according to resident categories unless it has been determined necessary to limit the employment for maintenance of public interest or domestic employment order and in cases of simple labor.

Even in cases where one has been granted legal status equal to that of a national as “foreign nationality” Korean pursuant to the Overseas Koreans Act, restricting the scope of employment of certain resident categories in consideration of the domestic labor market can be seen as being part of legislative discretion from an immigration administration perspective, and the relevant

40. *Chosunjok* Petition, *supra* note 35.

regulations in themselves cannot be deemed contradictory to the Constitution and thus unlawful.

However, considering that the freedom of employment bears the characteristics of civil liberty necessary for the survival of sojourners, and that the Human Rights Commission had recommended the revision of the discriminatory Guidelines for Issuing F-4 Status that had granted immigrant status only to overseas Koreans in professional employment,⁴¹ if the legal procedure restricts the freedom of occupation of “foreign nationality” Koreans to the point of completely disregarding the purpose of the Overseas Koreans Act, then it would be difficult to recognize such a restriction under the rationale of legislative discretion. More fundamentally, restricting resident status in cases causing harm to public interest or domestic employment order can be seen as an arbitrary provision that will differ greatly depending upon how the concepts of “public interest” and “domestic employment order” are interpreted. In fact, considering their contribution to society, such as “cheap” labor of the Korean-Chinese that raises the competitiveness pricing of Korean products both domestically and abroad, or their participation in reproductive labor such as childcare and housework helping Korean middle-class women to advance into the public sphere, their domestic employment in themselves cannot be interpreted as threatening public interest or employment order.

2. Whether Their Equal Rights Have Been Violated

The Korean Constitution provides for equal rights.⁴² The language provides for “all citizens,” but pursuant to the mutuality principle, it is a right granted not only to citizens but also to foreigners. However, there are opposing views arguing that foreigners cannot but be discriminated in their right to vote, etc. and there is a need to discriminate for other public interests so that foreigners cannot be the grantee of rights here.⁴³

The violation of equal rights occurs in cases where fundamentally the same objects should be treated the same while different objects are treated differ-

41. NHRC Decision, *supra* note 34.

42. Daehanminkuk Hunbeob [Hunbeob] [Constitution] art. 11(1) (S. Kor.). “All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status.”

43. Kyeongjoo Lee, Hunbeob1 [Constitutional Law 1], at 203 (Chongmok Publishers 2012).

ently, but this is not to be done arbitrarily. Concerning this, the Constitutional Court has held that the existence of objective and rational reasoning justifying the discrimination is the standard for determining whether equal rights have been violated.⁴⁴

The Korean government is of the position that requiring additional documents from Korean-Chinese in their issuance of visas based on the “objective” statistics of “nations from which most illegal overstays result” as designated by the Minister of Justice is not a violation of equal rights.⁴⁵ However, while partially recognizing the discretion of legislators in their discriminatory legislation based on nationality, the legislative purpose of such discriminatory legislation must minimally have not only a rational basis but also practical relevance. This theory of mid-term review⁴⁶ argues that in the case of overseas Koreans from “nations from which most illegal overstays result,” unlike overseas Koreans from other countries, they must personally prove that they will not engage in employment prohibited by law. Thus, the burden of proof has been transferred to them, under which they are unable to *de facto* enjoy the privileges granted by the system; and such immigration procedures are understood to be unfair discrimination to Korean-Chinese. Furthermore, in determining the scope of foreign nationality Koreans pursuant to the Overseas Koreans Act, conditional issuance of visas is a measure contradictory to the intent of the Korean Government wanting to restore the rights of citizens of a sovereign state prior to the colonization era in consideration of the historical uniqueness of the Korean-Chinese. More fundamentally, by not differentiating the Korean-Chinese from the Han-Chinese of “nations from which most illegal overstays result,” they are being deprived of their “proper” status as “foreign nationality Koreans” determined by Korean law itself.

3. Deviation from the Limits of Delegated Legislation

Delegated order is permitted only when there is independent delegation

44. Constitutional Court [Const. Ct.], 2002Hun-ma45, Feb. 5, 2002 (S. Kor.).

45. Hyun Kim Interview, *supra* note 39.

46. Moonhyun Kim, *Pyeongdunge Kwanhan Heonbeopjepanso Pallye-e Dadangye Wiheon-simsakijune Dehan Pyeongka* [Evaluation of the Multi-Level Standards of Constitutional Review in Constitutional Court Decisions concerning Equality], 17(2) Miguk Heonbeop Yeongu [17(2) US Const. Rev.] (2006).

pursuant to the specific scope determined by legislation or higher law.⁴⁷ This is a basic principle that can limit the fundamental rights of citizens. It functions together with Korean Constitution,⁴⁸ and sets the limits of restricting fundamental rights based on the arbitrary regulations of administrative institutions. However, the relevant provisions of annexes to the enforcement decree of the Immigration Control Act take the form of excessively delegating regulations concerning the fundamentals of the Overseas Koreans Act, namely the scope of application, conditions for acquiring resident status, and scope of activities to administrative legislation. Furthermore, allowing the Minister of Justice to determine whether a state is *de facto* “nations from which most illegal overstays result” and to allow limitation of conditions for acquiring resident status and their scope of activities without providing for them by law, can certainly be considered to have exceeded limits of delegated legislation.

4. Conclusion

Although it is possible to limit the freedom of employment for foreigners in principle, regulations transferring the legal “burden of proof” only to overseas Koreans from “nations from which most illegal overstays result” unlike persons from states not designated as such, thereby *de facto* excluding them from the regime, not only violates equal rights but also treats overseas Koreans from “nations from which most illegal overstays result” equal to the citizens of that state. This apparently violates the “proper” status granted based on historically unique circumstances of the “foreign nationality Koreans” pursuant to the Overseas Koreans Act. Such arbitrary measures ultimately discriminate between the relatively “poor” Korean-Chinese and Korean-Americans or Korean-Japanese. This not only aggravates the “grave hurt and division” among fellow Koreans but also is an act showing that the overseas Korean Act is based not on Korea’s historically unique circumstances but on the economic status of their resident states. This contravenes the original purpose of the Overseas Koreans Act,

47. Supreme Court [S. Ct.], 2001Du5651, Aug. 23, 2002 (S. Kor.).

48. Daehanminkuk Hunbeob [Hunbeob] [Constitution] art. 37(2) (S. Kor.). “Freedoms and rights of citizens may be restricted by Act only when necessary for national security, maintenance of law and order or for public welfare. Even when such restriction is imposed, essential aspects of the freedom or right shall not be violated.”

which seeks to prove by circumstantial evidence that Korea has always maintained its sovereign statehood. Further, it casts doubts on the decision-making process of the Korean judicial system as an organ realizing “justice,” in considering the economic power of the resident state of the overseas Koreans to reach their decisions.

III. Issue of Immigration Status of Unregistered Migrant Workers⁴⁹

A. Current Status

1. Relevant Statistics

According to the “Current Status of Foreigners with Employment Permit” from the Ministry of Justice, there are a total of 595,098 migrant workers with employment permits in Korea as of December 31, 2011. Among them, persons with lawful status number 540,259, while persons without permits and thus considered illegal aliens number 54,839.⁵⁰ Over 80 percent of these persons (45,105) are workers having entered the country with unprofessional employment visas (E-9) under the Employment Permit System (EPS) Act. This shows that the issue of unregistered immigrants in Korea lying at the heart of immigration problems is not unrelated to the EPS Act.

The total number of unregistered migrant workers discovered in 2011 numbered 92,970, among which 18,034 were forcefully removed, and 5,112 ordered or advised to depart. Every year, approximately 23,000 migrant work-

49. The Ministry of Justice refers to migrant workers without immigration status as illegal aliens. However, they have not actually committed unlawful acts but are merely persons without status pursuant to immigration procedures. In that sense, it is more proper to use the term unregistered migrant worker. In the relevant international human rights documents of the UN or ILO, they often use the terms irregular migration or (Undocumented migrant worker); Jeonghoon Jeong, *Wegukin Inkwon Gichoyeongu* [*Basic Study of the Human Rights of Foreigners*] [hereinafter Basic Study], 1 (Migration Research and Training Ctr. 2010).

50. Korea Immigration Serv., *Foreigners of Employment Status* (4th quarter, 2011), http://www.immigration.go.kr/HP/TIMM/imm_06/imm_2011_12.jsp.

ers are being deported out of the country.⁵¹

Similarly, the migrant workers that have legally lost their resident status are in a dead zone of human rights in labor and daily life. The fact that among the 80 concerns and recommendations put forth by international human rights bodies since 1990's concerning the human rights situation of immigrants in Korea, 25 concerned the human rights of migrant workers, showing that the improvement of their human rights is an important task for our society.⁵²

2. Uniqueness of Migrant Worker Issue to Korea

For a long time, the Korean society has shared the myth of a single ethnicity and thus a strong sense of identity of blood relations, resulting in an exclusive attitude towards different matters. This ethnic identity was only emphasized by the eras of violent change under Japanese colonization and the contemporary US military government regime. As a result, the basic understanding of immigrants was that they were harmful to the purity of blood and social oneness, which lead to a widespread attitude of discrimination.⁵³ At the same time, the Koreans' exclusive attitude towards others was dependent upon the economic status of the country from which the foreigner comes from, and this ultimately was not irrelevant to their "skin color." Koreans have an attitude towards others that is more exclusive towards those that are economically inferior or have darker skin. "Migrant workers" is a term referring not to whites from the US, Canada or Europe coming to teach English but is biased towards northeast, southeast and central Asians engaged in difficult, dangerous, and dirty (so-called "3D") labor. The concepts of upper circuit and survival circuit⁵⁴ generally refer to the global migration route of multinational corporation (MNC) workers in fields such as finance for the former and unskilled workers in manufacturing for the latter; but in Korea, these have much relevance to skin color.

51. Korea Immigration Serv., Handling of Immigration Violations (4th quarter, 2011), http://www.immigration.go.kr/HP/TIMM/imm_06/imm_2011_12.jsp.

52. Guidelines for Immigration and Human Rights [hereinafter Guidelines] 6 (Nat'l Human Rights Comm'n. 2012).

53. Donghoon Seol, Hanguksahwe-e Waegukin Ijunodongja: Saeroun Sosujipdane dehan Sahwehakjeok Seolmyeong [Foreign Migrant Workers in Korean Society: Explanation of the New Minority Group from Sociological Perspective] (Sarim 2009).

54. Saskia Sassen, *Cities in a World Economy* (Pine Forge Press, 2006).

Such an understanding was also reflected in the immigration policies of the Korean government. The Ministry of Justice has been planning and carrying out operation plans since 1962, through which the ideologies behind such policies are evident.⁵⁵ According to these plans, immigration control administration bears an international character as it is concerned with foreign nationals; and as the population concentration of Korea ranks fourth in the world, the government strongly promotes population and immigration control policies. Thus, the arrival of foreigners must come under strict regulations, and immigration policies should be set in consideration of “the effect of lawbreaking foreigners or unethical foreigners on the lives of the citizens.” However, for a large population to survive in a limited area with limited resources, technologies of the advanced states must be brought in and the arrival of such skilled persons welcomed. It thus reveals the need to carry out immigration control by balancing the two conflicting interests of attracting foreigners and restraining their arrival.⁵⁶

Such an immigration policy became the root of the present-day regime, which grants immigrant status by categorizing the immigrants into a hierarchy of those to welcome or to exclude based on the subject of their applicative policies. In other words, professional skills are actively embraced from the perspective of national interest and economy, while simple labor and illegal aliens were excluded as object of aggressive control/management.⁵⁷ However, within this “rational” appearing decision lies a racist attitude as evident in the difference of skin color between professionals arriving through the upper circuit and the simple labor force arriving through the survival circuit. Thus, at the root of the government exclusion policies toward migrant workers and the unregistered workers that are subject to control are the combination of deeply rooted exclusive pureblood and racist attitude of Korean society.

Based on these problems, issues that arise from the Act on the Employment, etc. of Foreign Workers and the subsequent Employment Permit Sys-

55. Wonsook Kim, *Woorinara Wegukin-jeongcheke Yeoksajeok Jeonge-e Kwanhan Sogo* [Overview of the Historical Development of Foreigner Policies in Korea], 7, Inst. of Foreign Affairs and Nat'l Sec., (2010).

56. Ministry of Justice, Data on 40 Years of Immigration Control 419-20.

57. Jeonghoon Jeong, *Lee Myungbak Jeongbue Ijumin Jeongchekgwa Ingwon Undong* [Immigrant Policies and Human Rights Movements of Myungbak Lee Administration], presented at the 2008 Korean Social Forum.

tem Act, which have become the channel for the largest number of unregistered migrant workers in Korean society, will be discussed in the next section, as well as recommendations for the improvement of their human rights situations.

B. Issues concerning the Employment Permit System pursuant to the Act on the Employment, etc. of Foreign Workers

1. Limitation of Employment

The discussion regarding the implementation of the EPS began in 1995 and continued for 8 years until 2003, when the legislation was finally passed under the condition that it would be carried out in parallel with the Industrial Trainee System. The EPS was implemented in order to resolve issues with the Industrial Trainee System, such as overstaying after the training period, and overdue wages and violence of the employers committed due to the vulnerability of those who overstay. By broadly categorizing the foreign labor force as professional skilled labor and simple labor, the system began to change in order to ease the accommodation of the latter. This system permitted employers seeking to hire foreign laborers to permit such employment, while issuing employment visas to foreigners seeking to be employed by such permitted employer for set periods. However, the resulting irregular status of foreigners having entered with these visas is a task yet to be tackled by the system.

The Act on the Employment, etc. of Foreign Workers article 18 provides, "Any foreign worker may work as an employee for not more than three years from the date on which he/she enters the Republic of Korea." According to article 18(3), "Foreigners having been employed in Korea and have departed from the country, (except for foreign workers under article 12(1)) may not be re-employed under this Act within 6 months of the date of departure." This provision is understood to have been included in order to avoid the general side-effects of foreign workers such as long-term employment and stays, and to grant employment opportunities to numerous other foreigners seeking employment in Korea, by placing procedural restrictions such as limiting the permitted duration of employment activities to three years in principle and

requiring passage of six months after departure before seeking reemployment.⁵⁸

It has long been argued and criticized that this three-year limitation is too short from the perspective of the actual parties involved.⁵⁹ Thus, the Act on the Employment, etc. of Foreign Workers was amended several times to allow stays longer than three years in exceptional circumstances; but as recognition of such exceptions still is rather limited, the fundamental issue has not been addressed.

Further, article 25(4) limits the change of workplace of foreign workers to three times in three years, which makes the status of migrant workers unstable. Though various reasons exist in specific and individual cases that make such change inevitable, collectively limiting the number of possible changes of workplace violates the freedom of employment of migrant workers. In particular, leaving the final, third workplace ultimately means involuntary departure pursuant to the termination of resident status for the migrant worker, which entails the danger of being forced to work for low wages. In December 2011, the Act was amended to allow migrant workers to change workplaces without including it in the three permissible changes if there was no fault with the change;⁶⁰ but in cases where the migrant workers are no longer able to work due to a workplace accident, this is still included within the three permissible changes.

This was also pointed out in the recommendations of the commissions of international human rights conventions, ratified by Korea. The ICERD commission, in its recommendation pursuant to the 13th and 14th periodic reviews submitted by Korea, expressed its concern for the widespread discrimination and abuse at the workplaces such as the non-renewable three-year employment contracts, severe limitations in job changes, long working hours, low wages, and dangerous working conditions.⁶¹ The Standards Committee of

58. Jongryul Lim, *Nodongbeop* [Labor Law] 640-41 (Bakyongsa, 7th ed. 2008).

59. Hyeongbae Cheon, *Goyongheogaje Shiheng 5 nyeon, Ijunidongja-e Gibonkwonun Bojangdwego itnunga?* [5 years of EPS, Are the Migrant Worker Rights Being Protected?] (Nat'l Human Rights Comm'n 2009).

60. Seongcheon Kang, Proposed Partial Amendment of Act on the Employment, etc., of Foreign Workers, Proposal No. 13525 (2011).

61. CERD/C/KOR/CO/ (cited from Survey for the Construction of Guidelines for Immigration and Human Rights 92 [hereinafter Guidelines Survey] (Nat'l Human Rights Comm'n 2011)).

the ILO at the 98th session of June 2009 called for the relief/flexibility of the excessive restriction of freedom to change workplaces, as such appropriate level of flexibility and the subsequent reduction in the excessive dependence of migrant workers on their employers would help reduce their vulnerability.⁶²

Furthermore, as is evident in the title of this system (EPS), this law is focused on the employers and thus can be seen as already being premised on discrimination of foreign workers. In this context, there are experts that argue for a labor permit system focused on laborers rather than the employment permit system.⁶³ These experts point out that under the currently active EPS, strict observance of contract term is applied regardless of the satisfaction of the workers with their workplaces so that their freedom of changing jobs is not guaranteed. With insufficient enforcement/binding force concerning nonperformance of the employer such as the withholding of wages, foreign workers must withstand various disadvantages as such under the Industrial Trainee System, which results in unregistered aliens.

2. Resolving the Issue of the Dead Zone Hidden from the Protection of Labor Law

Act on the Employment, etc. of Foreign Workers article 22 provides, “No employer shall give unfair, discriminatory treatment to any person on the ground that he/she is a foreign worker.” Further, both the Supreme Court and the Constitutional Court held that migrant workers also in principle were subject to the application of employment relations including labor standards.⁶⁴ In actuality, however, it is more common that the migrant workers are not sufficiently guaranteed of their labor rights in their workplaces or that they are discriminated in comparison to domestic laborers.

According to the surveys of the Human Rights Commission,⁶⁵ more than

62. ILO Committee on the Application of Standards at the Conference, 92th Session, Geneva, 2009.

63. Hyewon Koh & Cheolsoo Lee, *Waegukin Goyongheogaje Doip Gwajeong [The Process of Implementing the Foreigner Employment Permit System]*, 13(5) *The Korean Ass'n for Pol'y Stud. J.*, 17-43 (2004).

64. Supreme Court [S. Ct.], 2005Da50034, Nov. 10, 2005 (S. Kor.); Constitutional Court [Const. Ct.], 2007Hun-ma1083, Sept. 29, 2011 (S. Kor.).

65. Guidelines Survey, *supra* note 61, at 134.

half of the migrant workers answered that their working conditions after their arrival in Korea differed from what was described in their contracts; specifically, their work hours, salaries, room and board, and actual labor. Migrant workers should be able to receive information concerning immigration policies, labor contract and ways to exercise their rights in their native language; and the government has the duty to provide the government of the labor source country with relevant information.⁶⁶ However, the issue is not that precise information alone needs to be delivered to the foreign workers; the key point is that where one immigrates to a state with a higher economic status than its own, the general form of labor is downgraded to simple, non-skilled simple labor at the immigrating states regardless of the education, work experience or skills obtained in the workers' native states.⁶⁷ Similarly, the EPS system, unscrupulously reflecting the difference of economic status between Korea and the source country, mostly places foreign workers in non-skilled simple labor, ultimately inducing them to escape from the contracted workplaces. Many of them are placed outside the protection of the law even when their human rights such as labor rights are violated due to their irregular status.

In the final recommendation, adopted after evaluation of Korea's second Universal Periodic Review, the UN Human Rights Committee expressed their concern for the continued discrimination and abuse experienced by the migrant workers in their workplaces and the lack of sufficient protection and relief for such violations.⁶⁸ The social rights committee advised, in its final recommendation following the third UPR evaluation, of expansion of inspections for those violating the minimum rights law.⁶⁹

C. Human Rights Issues for Unregistered Migrant Workers

1. Need for the Protection of Unregistered Migrant Workers under the Law

The International Convention on the Protection of the Rights of All Mi-

66. Guidelines, *supra* note 52, at 8.

67. Hyunmi Kim, *Experience and Livelihood of Chinese-Koreans on Working Visits*, 42(5) Korean Soc'y for Cultural Anthropology J., 35-75.

68. CCPR/C/KOR/CO/3; Guidelines Survey, *supra* note 61.

69. E/C.12/KOR/CO/3; *Id.*

grant Workers and Members of Their Families (1990)⁷⁰ widely protects the rights of unregistered migrant workers and their families, but Korea has not yet ratified this treaty.⁷¹ As a result, unregistered immigrants are excluded from legal and systemic protection of Korean society and thus placed in the dead zone of human rights protection. As observed in the statistics above, the field in which mass unregistered immigrants occur is through the Non-professional Employment (E-9) visa of the EPS system. The strengthening of the legal protection of unregistered migrant workers is ultimately the core of legal protection for all unregistered immigrants.

Prior to a discussion of this issue, it needs to be understood that the issue of unregistered migrant workers in Korea is a structural result of Korea's immigration policy and the needs in the labor market. Most of the foreigners seeking work in Korea through the EPS system must pay enormous costs to brokers in Korea for their immigration processing, due to which they bear huge debts when entering the country. Such debts become a direct cause for their escape from their contracted workplaces. The Working Visit system,⁷² which targets Korean-Chinese and Koreans of the former Soviet Union, is a system that allows their lawful entry into Korea without the intervention of brokers. When we consider that globalization is where social, political, and economic decisions and activities in one region of the world can come to have significance for individuals and communities in distant regions of the globe, it is undoubtedly clear that this system triggered changes especially in the economy of Korean-Chinese frequently traveling to and from Korea and for those in their livelihood including the freedom to immigrate. Of course, the increased number of overseas Koreans worsened their rights as laborers; which means that the Korean government does not pay for the social costs connected with the increasing number of foreign workers.⁷³

The inflow of migrant workers through the EPS takes place according to state policy adopted pursuant to agreements individually made between the

70. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families unanimously adopted at the UN General Assembly on December 18, 1990 and entering into effect in July 2003. As of September 2011, 45 states had ratified and 31 signed the convention.

71. Status, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en.

72. Hyunmi Kim, *supra* note 67.

73. *Id.*

Korean government and other states. The Foreign Workforce Policy Committee under the Prime Minister reviews and adopts most of the policy regime such as Basic Plan for Foreign Workers,⁷⁴ Work Type and Scale for Bringing in Foreign Workers,⁷⁵ Designation and Cancellation of Foreign Worker Sending States,⁷⁶ Businesses, Workplaces and Employment Scale that can Hire Foreign Workers,⁷⁷ and Protection of Rights and Interests of Foreign Workers, etc.⁷⁸ In spite of this, the fact that migrant workers brought in under such a regime planned by the state constitutes over 80 percent of the irregulars/unregistered within the country shows that there is a serious problem with the construct of the regime itself. Further, unconditionally categorizing these unregistered migrant workers as illegal aliens, subjecting them to forced deportation, and other enforcement measures only places their already destitute lives in greater fear/suspense.

Thus the argument that resident status and legal protection should be distinguished and the latter provided to unregistered migrant workers is gaining support.⁷⁹ Migrant workers have already lowered production costs with their low wages, and their services in the 3D labor play an important role in the industrial structure of Korean society. It is self-contradictory to label the unregistered as “illegal” and exclude them from protection of the law without acknowledging this reality.

When we observe other countries such as Spain, those countries utilize the term “irregulars” instead of unregistered or illegal immigrants in implementing policies to “regularize” them. Though irregular, once “registered” at the city hall where they reside, they are granted the privilege of free education and medical services, so that they have relatively more opportunities than other countries to enjoy rights of education and health. As we can observe in Spain and Italy, regularization rescues the irregular migrant workers from

74. Waegukin geunroja ui goyong deung e qwanhan beobyul [Act on the Employment, etc., of Foreign Workers], Act. No. 11690, Mar. 23, 2013, art. 4(2)(1) (S. Kor.).

75. *Id.* art. 4(2)(2).

76. *Id.* art. 4(2)(3).

77. Waegukin geunroja ui goyong deung e qwanhan beobyul sihaengryung [Enforcement Decree of the Act on the Employment, etc., of Foreign Workers], Presidential Decree No. 24447, Mar. 23, 2013, art. 3(1) (S. Kor.).

78. *Id.* art. 3(4)

79. Interview of Kyeongseo Park, Representative of the Joint Committee for Migrant Workers in Korea, Apr. 21, 2012, at Inha University Law School.

their destitute labor situations and reduces tax evasion occurring from illegal employment, so that overall, the central and regional governments increase their tax income, allowing an equal realization of a higher quality welfare system.⁸⁰ Others argue that the immigration control regimes of western states in this regard protect the internal market through priority measures for nationals and strict restrictions in the process of employment, so that the guarantee of rights to education and health for irregular immigrants is an independent regime.⁸¹ However, the current EPS allows the hiring of migrant workers only when domestic workers cannot be hired,⁸² so that the protection of the domestic labor market and protection of unregistered immigrants under the law actually conflict. Thus, expanding the legal protection of unregistered migrant workers is most urgent.

2. Human Rights Violations in the Process of Law Enforcement of Unregistered Immigrants

A survey revealed that most of the periodic law enforcement operations conducted jointly by the Ministry of Justice and the police force against unregistered immigrants were conducted without identification (37.4 percent), forcing entry without consent or permission (71.5 percent), by enforcement officers in civilian clothing (47.9 percent), at workplaces (43.0 percent) or place of residence (17.9 percent) en masse.⁸³ From these, 79.5 percent of the enforcement officers used handcuffs, while there were cases where police equipment, electric shock devices, and net guns were used.⁸⁴ Those arrested upon their visit to public offices numbered 4.9 percent. Among those arrested in public offices, 15.3 percent had visited the offices in order to report their injuries/harm/damages, while 14.5 percent were testifying or giving witness statements when their unregistered status were revealed.⁸⁵ In particular, it

80. Guidelines, *supra* note 52, at 63.

81. Interview of the Former Director of Korea Immigration Services, Choonbok Lee, Apr. 21, 2012 at Inha University Law School [hereinafter Choonbok Lee Interview].

82. Employment, etc., of Foreign Workers Act, *supra* note 77, art. 6 (Efforts to Employ Nationals).

83. Guidelines Survey, *supra* note 61, at 256.

84. *Id.*

85. Byeongryul Lee *et al.*, *Wegukin Bohoso Bangmoonjosa Gyulgwabogoseo- Wegukin Dansokgwajeong Joongshim* [Report of the Visitation to Foreigner Custody Center: Focus on the Arrest Process] Nat'l Human Rights Comm'n (2009).

was further revealed that some 100 migrant workers perished in the process of law enforcement after 2003, showing the urgent need for human rights friendly mechanisms.⁸⁶

Another big issue in the current Immigration Control Act of arrest - internment (confinement) - forced removal is that there is no control exercised by the courts over the process of physical confinement (“internment” under the Immigration Control Act). Internment under the Immigration Control Act refers to the immigration control official administering activities taking into custody or impounding a person having reasonable grounds to be suspected of falling under persons subject to deportation at a foreigner internment room, foreigner internment camp or other places designated by the Minister of Justice.⁸⁷ Although such internment measures are administrative measures equivalent to *de facto* confinement in nature restricting “personal liberty” under article 12 of the Constitution, the current laws do not include review by the court in the process prior to and after arrest and internment.⁸⁸ Concerning the lack of court review with respect to “internment” measures taken after arrest, in particular, arguments have been raised that this violates article 12(6)⁸⁹ of the Constitution.⁹⁰ On the contrary, there are opposing arguments stating that the internment under the Immigration Control Act is an administrative act rather than one of criminal punishment and thus does not require a warrant.⁹¹

However, the ‘Habeas Corpus Act’ (enacted on Dec. 21, 2007, law no. 8724) was enacted recently in order to regulate physical confinement according to administrative measures, thereby clarifying that judicial relief

86. Guidelines, *supra* note 52, at 64.

87. Churipguk qwalibeop [Immigration Control Act], Act. No. 11298, Feb. 10, 2012, art. 2(11) (S.Kor.).

88. Decision of the National Human Rights Commission concerning the Human Rights Violation of Unregistered Foreigners in the Arrest Process, May 23, 2005; Supreme Court [S. Ct.], 99Da68829, Oct. 26, 2001 (S. Kor.).

89. *Daehanminkuk Hunbeob* [Hunbeob] [Constitution] art. 12(6) (S. Kor.) “Any person who is arrested or detained, shall have the right to request the court to review the legality of the arrest or detention.”

90. Myeongho Hah, *Consideration of Foreigner Custody, Forced Removal Process and their Relief from Public Law Perspective*, 52 Korea L. Rev. 167-212 (2009).

91. Choonbok Lee Interview, *supra* note 81.

procedures were still applicable to such confinement.⁹² However, the current Habeas Corpus Act excludes persons “in custody pursuant to the Immigration Control Act” from its scope of application.⁹³ However, because the Constitution provides that anyone can petition review on the legality of custody to the court and because this is closely related to personal freedom, it is not a basic right under the Constitution guaranteed only to the citizens but a fundamental right guaranteed for all people.⁹⁴ Thus, migrant workers subject to forced removal also fall within the scope of article 12(6) of the Constitution, and the provisions of the current Immigration Control Act and Habeas Corpus Act are highly likely to be unconstitutional.

3. Human Rights Violation of Foreigner Custody Facilities

Internment facilities for foreigners are not, in principle, correctional facilities.⁹⁵ Rather, it is a waiting area for custodial purposes and execution of forced removal in the context of administrative procedures. Thus, restricting freedom of persons within these facilities must remain at the bare minimum necessary for the execution of removal procedures. However, an observation of the current operation of the facilities show that living within the custody

92. *Insin bohobeop* [Habeas Corpus Act], Act. No. 8724, Dec. 21, 2007, art. 3 (S. Kor.) (Habeas Corpus Petition) - Where the confinement of an inmate is illegally initiated or an inmate remains confined even after the cause that gave rise to such confinement ceases to exist, such inmate or his/her legal representative, guardian, spouse, lineal blood relative, brother, sister, cohabitant, employer or an employee at the relevant confinement facility (referred to as “habeas corpus petitioner” hereinafter) may file a petition for habeas corpus with a court, as prescribed by this Act: Provided, That if any other procedure for habeas corpus relief is included in any other Act, this is applicable where it is obviously impossible to seek habeas corpus relief under such other Act within a reasonable period.

93. Habeas Corpus Act art. 2 (Definitions): 1) The term “inmate” in this Act means any person held, protected or confined against his/her free will in any medical facility, welfare facility, confinement facility or custody facility [hereinafter referred to as “confinement facility”] managed by the State, a local government, a public corporation, an individual, a private organization, etc.: Provided, That this shall not include any person arrested and detained according to criminal procedure, any convict, nor any person who is protected in accordance with the Immigration Control Act.

94. Constitutional Court [Const. Ct.], 2001Hun-ba96, Jan. 30, 2003 (S. Kor.).

95. *Waegukin boho gyuchik* [Foreigner Custody Regulations], Ministry of Justice Decree No. 774, June 13, 2012, art. 3 (S. Kor.) (Prohibition of Use as Detention Facility) “No persons may utilize the custody center as a detention facility for detaining persons under the Criminal Administration Act.”

facilities is limited to the “main hall” (prison), and free movement within the facilities is impossible, so that it is very similar to general detention facilities in operation.⁹⁶ Such operation also signifies that the custody facilities can be abused as one forcing quick removal by its punitive nature. This directly contravenes the UN recommendations stating that foreigners who are in custody and are not criminals should not be treated as such, and custody pursuant to reasons such as illegal stay should in no instance bear a punitive character.⁹⁷

Cases of human rights violation have also been discovered in the basic operation of internment facilities. According to the results of a status survey conducted following a fire incident at the foreigner custody facility in Yeosu in 2007, grave violations of human rights were being committed, such as accommodation of persons exceeding the proper number; issues of custody period, form and environment; issues of physical examination and storage of possessions during the process of custody; meeting with legal counsel and restriction of visitations; restriction of correspondence and telecommunication; poor facilities, hygiene, meals and health; use of equipment and weapons; lack of safety measures, and human rights violations committed by immigration and public officers.⁹⁸

It has been consistently pointed out that such elongated custodial measures toward unregistered immigrants and operation of custody facilities do not satisfy the standards set in the UN Standard Minimum Rules for the Treatment of Prisoners⁹⁹ (1955).¹⁰⁰ Thus, policies should be reexamined in order to establish the internal zones of the facilities for minimal control as suitable for the purpose and nature of such facilities, while minimizing the restrictions placed on liberty within.

4. Conclusion

It is urgent that the government recognizes the need for increased protec-

96. Survey of the Foreigner Custody Centers Nat'l Human Rights Comm'n (2008).

97. U.N. Doc. E/CN.4/2003. 85. III. B. ¶ 51.

98. Seoul Bar Association, Report on the Foreigner Custody Facilities: Hwaseong Foreigner Custody Center (2004); Donghoon Seol *et al.*, *Report on the Arrest of Unregistered Foreigners and the Foreigner Custody Centers* Nat'l Human Rights Comm'n, (2006).

99. U.N. standard Minimum Rules for Treatment of Prisoner, approved by the U.N. Economic and Social Council on July 31, 1957.

100. Guidelines, *supra* note 52, at 67.

tion under the law for the unregistered migrant workers. More specifically, it is not helpful at all that the government simply considers such unregistered immigrants, resulting from the system planned and operated by the government, “illegal” and thus subject to exclusion.

As a specific method, transformation of the work migration/immigration policy from the current system based on the EPS to the work permit system has been suggested. Representative of the proposed draft for the work permit system is the Proposed Act concerning the Foreign Labor Employment and Guarantee of Basic Rights jointly petitioned by the Korean Confederation of Trade Unions, Lawyers for a Democratic Society, and the Democratic Labor Party in the process of discussing the introduction of the foreign human resource policy in 2002.¹⁰¹ Also when considering the context of globalization where social, political, and economic decisions and activities in one region of the world can come to have significance for individuals and communities in distant regions of the globe, it should be noted that Korea’s work permit system would grant more opportunities and resources to brokers in the labor source country. This ultimately will turn into debts for the immigrating workers, a factor causing them to remain in Korea as unregistered aliens.

Further, the arrest and custody of the unregistered immigrants are related to grave restrictions of real personal liberties, so that its substance is similar to arrest and detention pursuant to criminal procedures. Then the basis and procedure must be equivalent to that of criminal procedure and judicial review of such tasks strengthened. The current Immigration Control Act and Habeas Corpus Act provisions, without regard to such, appear highly unconstitutional in violating the fundamental rights protected by the Constitution.

Also, due process should be observed in the process of law enforcement pursuant to the Immigration Control Act so that human rights are not violated. In order to prevent such violations in the process, periodic human rights education of immigration control officers should be conducted. Efforts should be made by related institutions to reduce factors leading to human rights violations in the foreigner custody facilities and to aid its human rights friendly operations according to its original purpose.

101. Basic Study, *supra* note 49, at 13.

IV. Issue of the Immigration Status of Marriage Immigrant Women

A. Current Status of Marriage Immigrant Women

1. General Statistics

As of March 2012, marriage immigrants numbered 145,604, having increased 1.8 percent from the year before; and by nationality, Chinese numbered 63,720 (43.8 percent), Vietnamese 38,101 (26.2 percent), Japanese 11,276 (7.7 percent), and Filipino 8,724 (6.0 percent).¹⁰² With such an increase of marriage immigrant women settling in as a new social phenomenon, new social issues with respect to their human rights also began to surface in relation to domestic violence, matchmaking system which comes close to human trafficking, and unstable immigration status.

2. Uniqueness of Korea regarding Marriage Immigrant Women

Marriage immigrants to Korea are closely related to the issues of a decreasing Korean population in relation to low birth rates, the aging of society and the migration of farming and fishing villages.¹⁰³ The fact that policies related to marriage immigration from nations of low economic status was promoted by the government in order to resolve such issues is what sets Korea apart from marriage immigration in nations such as the US and Europe where individuals have opted to do so. In other words, marriage immigrants to Korea are the result of policies adopted to overcome the failure of population control, such as the inability of males in economic peripheries like farming and fishing villages to get married, the resulting migration from the regional areas, the continued low birth rate that is one of the lowest in the world, and the resulting crisis of labor reproduction. For these reasons, the number of women entering Korea, together with Japan, constitutes a high percentage

102. Korea Immigration Serv. Info., Monthly Bulletin of Foreigner Arrival and Departure (Ministry of Justice 2012).

103. Kyeonghee Moon, *Multiculturalism and the Multicultural Phenomenon in Korea Observed as a Result of International Marriage Migrant Women*, 16(3) 21st Century Pol. Sci. Ass'n J. Rep. 67-93 (2006).

compared to other Asian nations.¹⁰⁴ In this context, these women have very much become a tool for the Korean government. From the early stages of the policy, these women were consistently expected to fulfill their “duties” of normalizing the farming population and economy through childbirth, but their human rights were not considered important. This also explains why the multicultural policies of the Korean government are focused on their children and family support rather than their human rights.¹⁰⁵

This “tool” of marriage migration, encouraged and pursued by the national government as part of its population control policy, not only evades the original framework of love or contract between two individuals but also eliminates arrival procedures that should be based on “justice.” Numerous small matchmakers can conduct their businesses merely by reporting to the tax office when they receive up to 10 million won from the prospective husband or local governments for each successful case. Thus, their only objective is to succeed in the matchmaking. In order to achieve this goal, the process will involve false, exaggerated or too little information regarding the involved persons, explicit commercialization of the women’s body and sexuality, coercive atmosphere, etc.¹⁰⁶ In addition, gender inequality arising from the patriarchal traditions of the Confucian culture in East Asia and the economic superiority that Korea has over its surrounding Asian states caused the farming communities to impose upon these women from “poor” Asian nations the role of a “submissive” woman and daughter-in-law, which had already been long criticized and undone in Korean society. Within this context, the violence of Korean husbands¹⁰⁷ and cruel treatment of the in-laws towards them were frequent, but the Korean government did not intervene. Many studies have emphasized the human rights of immigrant women and the Korean government also raised issues concerning the assimilation forced upon these

104. Sunjoo Lee *et al.*, *Study on Globalization and the Migration of Asian Women* (Korea Women’s Dev. Inst. 2005).

105. Kyeonghee Moon, *supra* note 103.

106. Rami So, *Examination of the Legal System for the Stable Status Guarantee of International Marriage Migrant Women (Summary of Debate)*, 96 Just. 43-53 (2007).

107. Human Rights Lawyer Rami So (2007) reported based on the statistics of Ministry of Health and Welfare that one out of every ten marriage migrant women were assaulted/beaten or forced to have sex by their husbands; *Id.*

women;¹⁰⁸ but as we can observe in the terminology of “marriage” immigrant women rather than just “immigrant” women used by Korean society, they are expected to play the role of traditional wife, daughter-in-law, and mother acceptable to the patriarchal marriage system of Korean society. Furthermore, the legal provision allowing them to acquire citizenship only when they give birth within two years of their marriage clearly shows the extremely patriarchal nature of Korea’s Nationality Act.

The 1948 Nationality Act, enacted based on the paternal *jus sanguinis* at the point of legislation, was the foundation for Korea’s patriarchal Nationality Act. Although amended in 1997 to *jus sanguinis* following either parent, amendment of the law alone did not aggressively transform the gender-biased practical affairs concerning nationality.¹⁰⁹ The image of female immigrants as the “bride of the farming village bachelor” is still deeply rooted in the paternal *jus sanguinis*. Most representative efforts of the government for resolution of the two-year residence requirement of the Nationality Act for Simple Naturalization was to allow confirmation of fault by authorized women-related organizations in 2006.¹¹⁰ However, the issue of dependency of marriage immigrant women to their Korean husbands due to their residence requirement is continuously being raised. The exclusive immigration policies of the Korean government such as the current Support for Multicultural Families Act limiting its scope of application to “foreigners or naturalized persons having married and formed families with Korean nationals of lawful resident status” so that permanent residence is only permitted to marriage immigrants,

108. Kyeonghee Moon, *supra* note 103; Hyekyung Lee, *Honinijuwa Honiniju Gajeonge Munjewa Deung [Problems and Solutions to Marriage Migration and their Families]*, 28(1) Korea Population Ass’n J. 73-106 (2005); Geonsoo Han, *Nongchonjiyeok Gyeolhon Iminja Yeoseonge Gajok Senghwalgwa Galdung mit Jeogung [Life, Conflict and Adaptation of Marriage Migrant Women in Farming Areas]*, 39(1) Korean Soc’y for Cultural Anthropology J. 195-243 (2006).

109. Basic Study, *supra* note 49, at 28.

110. Nationality Duty Guidelines art. 11 (Naturalization Application of Persons Whose Marriage with Korean Spouse Has Been Dissolved) Pursuant to the Act article 6 (2)(3), persons seeking naturalization for having been unable to continue normal marriage life without being at fault must prove their innocence through documents such as decisions e.g. court decision, decision of non-indictment, certificate, bankruptcy; runaway report, immigration Certificate of Fact, statement issued by the *tongjang* (*banjang*) of the place of residence of the first cousins of the Korean spouse or at the time of dissolution of marriage, or certificate (of form 4) issued by publicly approved women groups.

ultimately exclude a majority of foreign immigrants.¹¹¹

These issues can also be observed in the recommendations of international human rights organizations. The Committee on Economic, Social and Cultural Rights (CESCR), in its final comments upon evaluation of the third government report in 2009, expressed concern for the dependency of foreign spouses married to Korean citizens with regard to their resident status, and recommended additional support on the part of the Korean government to help these women married to Korean husbands to be able to acquire residence permits without depending upon their husbands or grant them the right to naturalize and thus overcome the discrimination they face.¹¹² If they must depend upon their husbands for a basic right such as resident permits, the marriage immigrants cannot negotiate, compromise or resolve disputes at an equal level as that of their husbands. Thus, this provision reflects the male-centered marriage philosophy of Korea, which becomes the reason why marriage immigrant women “endure” the violence or unfair treatment they experience within marriage.¹¹³

3. Direction for Discussion

The issue of human rights violation of marriage migrant women from whom childbirth was expected as part of Korea’s population policy was perhaps foreseeable from the beginning. Their marriage process can be divided into pre-marital matchmaking and post-marital resident status acquisition. First, an issue in the process of marriage matchmaking is that commercial international matchmaking bears the characteristics of human trafficking, which has been confirmed numerous times through fact-finding reports.¹¹⁴ These international marriage systems were pointed out as being equivalent to human trafficking in the Protocol to prevent suppress and punish trafficking in persons, especially women and children, supplementing the United Nations

111. *Damunwha gajung jiwon beob* [Support for Multicultural Families Act], Act. No. 12079, Aug. 13, 2013, arts. 1 & 2 (S. Kor.).

112. Concluding observations of the committee on Economic, Social and Cultural Rights: Republic of Korea, E/C.12/KOR/CO/3. Sep. 20, 2009.

113. Rami So, *supra* note 106.

114. Hyunwoong Koh *et al.*, *Gukjegyeolhon Joongge System: Vietnam, Philippines Hyunji Shiltaejosa* [Survey of the International Matchmaking System: Vietnam and the Philippines Focus] (Presidential Comm. on Soc. Inclusion *et al.* 2005).

Convention against Transnational Organized Crimes¹¹⁵ adopted by the UN General Assembly in 2000.¹¹⁶

In order to resolve this issue, the Korean government enacted in 2007 the Act concerning the Regulation of Marriage Matchmaking Business (Law no. 8688, Dec. 14, 2007) effective from May 2008; but its effectiveness has been questioned as it follows the market principle of freedom of contract rather than protecting the human rights of the parties entering into marriage.¹¹⁷

In the recent fourth amendment of the National Assembly (amended Dec. 15, 2011), some of the existing issues in the matchmaking process were addressed, such as prohibiting mass meetings and mass boarding, increasing the amount of information being provided to marriage immigrant women, newly including a requirement of capital for matchmaking businesses in order to regulate the entry of small businesses, and reinforcing relevant punishments.¹¹⁸ However, in such an international matchmaking process, unlike typical domestic matchmaking, there is an extreme unbalance of power between the parties involved as the husband or his family pays an enormous amount of commission beyond his economic ability to the broker in order to “purchase” his bride. The brokers abuse this power imbalance to maintain the practice of forcing women into participating in “beauty contest-like” selection processes or demanding sexual intercourse with men they have only met for a couple of days or hours. From this perspective, broker intervention under the market principle of freedom of contract, which is based upon equal rights of both parties, cannot be the solution for the fundamental problems of international marriage.¹¹⁹ Not only the control of the Korean central and local governments is necessary but also a system that notifies the brokers of the

115. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United National Convention against Transnational Organized Crime.

116. Mijoo Kwon, Inshinmemejeok Gukjegyeolhoni Gajinun Munjewa Ku Hegyeorul Wihan Beopryuljeok Kwaje [Problems in Trafficking-like International Marriages and Legal Challenges for their Resolution] presented at the Policy Debate for Lawmaking regarding Sexual Exploitation and Human Trafficking 2010.

117. Jeongsun Kim & Jaewon Kim, *Act concerning the Regulation of Marriage Matchmaking Business, Insignificant Yet Valid Law: Focus on Cambodia*, 86 *Econ. & Soc'y.* 305-44 (2010).

118. Fourth amendment of the Act concerning the Regulation of Marriage Matchmaking Business Law, no. 11283, Feb. 1, 2012.

119. Basic Study, *supra* note 49, at 27.

strict regulations applicable with continuous evaluation and management of them based on these standards. Also, not only the realization of marriage but also post-marital process should help these women adapt to Korean society while there also should be educational planning to help them meet the spouse and his family as equals within the family. It should not only be the women adjusting to Korean society but also her new Korean family surrounding her; and furthermore, Korean society should help prepare for changes that will result from their existence.¹²⁰ To this end, government management of the brokers intervening with the arrival of the marriage immigrant women, as well as educational opportunities to help these women and their Korean families to mutually respect culture and practices are what the central and local governments need to implement. If policies concerning marriage immigrant women were created as part of Korea's population policy, the government naturally must provide educational opportunities to the newly incorporated members of the population and their families.

Below, we will review the factors that contribute to the violation of human rights regarding immigration status occurring in the process of acquiring citizenship and resident status after marriage and discuss points of improvement.

B. Improvement Measures for the Immigration Status of Marriage Immigrant Women

1. Continued Stay with F-6¹²¹ after Divorce

Until she obtains permanent residence or Korean citizenship, an immigrant woman resides with an F-6 visa with which she can engage in any kind of economic activity.¹²² However, if the marriage fails and she faces divorce prior to acquiring citizenship or permanent residence, the immigration office

120. Yoonkyeong Nah *et al.*, Gyeolhon Ijuyeoseonge Hengwijaseonggwa Pyeongsenggyoyooke Jihyangjeom Mosek [Agency of Marriage Migrant Women and Life-long Education], 14(4) Life-long Educ. Stud. 185-213 (2008).

121. As of December 23, 2011, the amendment of Enforcement Decree of the Immigration Control Act Table 1 changed the status of marriage migrants from the previous F-2 to an independent classification of F-6 marriage migrant visa.

122. Chu lib kuk kwan li beob sihaengryung [Enforcement Decree of the Immigration Control Act], Presidential Decree No.24628, June 21, 2013, Table 1, 28-4 (S. Kor.) (Marriage Migrant visa F-6).

currently extends the F-6 visa on a very limited scope for divorced immigrant women, while the rest are often altered to the F-1 visa¹²³ and essentially forced to voluntarily depart.

If divorce had resulted from the fault of the Korean spouse, the court verdict clearly mentions such fault of the Korean spouse, and she is to receive adequate settlement/alimony, then the previous status is extended.¹²⁴ But if such information cannot be sufficiently proven, the visa is altered to F-1, the point at which her lawful economic activity is put to an end and she must either return to her country or become an illegal immigrant.

The victim mentality that the Korean spouse of the marriage immigrant and his family has is the belief that the foreign women fraudulently married for the purpose of entering the country. This is at the root of their suspicion towards the genuineness of their marriages.¹²⁵ However, this suspicion does not appear to be an issue at an individual level. If the marriage immigrant cannot prove that the cause for divorce is with the husband, the Korean law depriving the woman of the resident status likewise casts doubt on the genuineness of her marriage immigration. This “social” suspicion gives rise to the law provision granting them nationality only when giving birth within two years of marriage. While it should first generally accept the genuineness of the parties and apply to exceptional cases that are not, instead, initially there are doubts about the genuineness of the parties and the setting aside of this doubt upon childbirth is very narrow-minded in that it “exposes” rather than protects the constituents, thereby losing its status as a law of “justice.” The issue of not granting resident status in Korea to women of fraudulent marriage, and the issue of not granting resident status to those in genuine marriage relationships that failed and resulted in divorce should clearly be distinguished.

CERD in 2007 recommended that even if the marriage did not fail entirely due to the fault of the Korean husband, measures should be adopted to legally guarantee residence to the women of international marriage in cases of di-

123. Family Visitation visa (F-1) is granted to “Those seeking stay for the purpose of visiting relatives, living with family, getting support, household maintenance or other similar purposes,” or “Those that are acknowledged to have acceptable reason(s) to stay in Korea for a long time without being employed.” With these visas, economic activities are not permitted.

124. Nationality Duty Guidelines art. 11.

125. Rami So, *supra* note 106.

voiced or separation.¹²⁶ Considering that the marriage immigrants to Korea are placed in circumstances similar to human trafficking or through the “import” to Korea by brokers, their relationship to their Korean husbands cannot but be unequal as mentioned above. Further, during the two year period required for Simple Naturalization under the Nationality Act, the unequal power relationship due to the unstable status resulting from unilateral dependence of the marriage immigrant woman on the husband continues. This makes negotiation and compromise impossible between the couple, so that independent resolution of conflicts within the family is impossible. This thus requires an amendment of the relevant law provisions.¹²⁷

2. Permitting Dual Nationality for Immigrant Women

Though dual nationality is not permitted in principle pursuant to the amendment of the Nationality Act,¹²⁸ it is permitted for marriage immigrants having received Simple Naturalization Permission.¹²⁹ However, the situations recognized as exceptions in article 10(2) of the amended Nationality Act are limited to article 6(1)-(2) marriage immigrants whose marital status is maintained. Thus, exceptions are not recognized for those whose marital status has been dissolved.¹³⁰

Permitting dual nationality for marriage immigrants was because it is difficult for them to visit their naturalized country without their nationality, and their abandonment of nationality cannot be forced. Thus, it follows that the current Nationality Act permitting marriage immigrants whose marriage has been dissolved without fault on her part to acquire Korean nationality only upon abandoning the nationality of her original state is discrimination, the rationale for which cannot be found within the marriage immigrants themselves and thus violate equal rights.

126. CERD, Concluding observation of the committee on the Elimination of Racial Discrimination, U.N. doc, CERD/C/KOR/CO/1. Aug. 17, 2007.

127. Rami So, *Review of the Multicultural Family Support Act from the Perspective of Gender and Human Rights*, 2(1) Gender and L. (2010).

128. Kuk jeok beob [Nationality Act], Act. No. 10275, Jan. 1, 2011 (S. Kor.).

129. Nationality Act, *supra* note 128, art. 10 ¶ 2 (1) (Obligation of Persons who Retain Nationality of the Republic of Korea to Renounce Foreign Nationality).

130. *Id.* art. 6 (2)(3).

C. Conclusion

In order for unions through marriage immigration to be settled equally and peacefully, the guarantee of stable legal status of the immigrant women should take precedence. Recognizing their right of residence and marriage and thus accepting them as equal constituents of Korean society will be the most basic starting point in preparing for a multicultural society.

V. Significance of the Refugee Act and its Limitations

A. Current Status

Refugee refers to any person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”¹³¹ Korea became a party to the Convention and Protocol Relating to the Status of Refugees in December 1992. Following the signing of the convention, it added the provision on recognition of refugees in the Immigration Control Act in December 1993,¹³² and beginning in 1994, petitions for the recognition of refugee status were received.

Following the signing of the Refugee Convention, however, Korea did not recognize any refugees until 2000 when it became a member of the executive board of the UNHCR. With the recognition of one Ethiopian in 2001, the total number of foreigners having applied for refugee status numbers 4,011 as of January 2012, of whom 268 have been granted refugee status and 146 the humanitarian residence permit, while 1,923 have been denied and 659 withdrawn. The remaining 1,015 are waiting the results of their evaluation.¹³³ This

131. Convention Relating to the Status of Refugees art. 1, July 29, 1951, 19 U.S.T. 6260, 189 U.N.T.S. 137.

132. Immigration Control Act, *supra* note 122, art. 8-2 (Recognition of Refugees).

133. Bokhee Chang, *Issues and Practices concerning the Convention Relating to the Status of Refugees: Study of the Refugee and North Korean Defector Issues from International Legal Perspective* Korean Soc’y of Int’l L. J. (2012).

has brought about criticism that the refugee recognition standards were too strict.

In order to resolve this issue, the Refugee Act was submitted by floor leader Hwang Wooyeo and passed by the National Assembly in December 30, 2011.¹³⁴ According to the purpose of the Refugee Act, it states that “After having signed the Convention and Protocol Relating to the Status of Refugees in December 1992, the Republic of Korea has been controlling the refugee recognition process by the Immigration Control Act. For the past 15 years, however, the petitioners have remained at about 2,000 persons, while those having been recognized as refugees numbered less than 100; so that compared to other developed countries, it has not received sufficient number of refugees and thus fulfilling its responsibilities within the international community.” Further, while refugee applicants waiting the first level determination numbers 1,000, the process of which has been criticized internally and abroad for its lack of efficiency, transparency, and fairness. Issues have also been raised because methods of sustaining livelihood for the applicants are blocked, while even those having been recognized as refugees have not been able to enjoy the rights guaranteed by the Refugee Convention. Thus, by enacting the Act concerning the status and treatment of refugees, we seek to harmonize domestic law with international law such as the Convention Relating to the Status of Refugees, while seeking to advance as a developed human rights nation by specifically providing for the recognition procedures and treatment of refugees.¹³⁵

B. Significance of the Refugee Act and its Limitations

1. Significance of a Separate Refugee Act

In the Immigration Control Act legislated from an immigration control perspective rather than Refugee Act from a refugee protection perspective, provisions concerning refugees are not a suitable legal regime for guaranteeing the human rights of refugees. Though the process of recognition and their treatment cannot be separated from the other, the problem with the Immigra-

134. Congressman Wooyeo Hwang, Proposed Act regarding the Status of Refugees etc., and their Treatment, Proposal no. 4927.

135. *Id.*

tion Control Act is that it precisely does that in providing only for recognition procedures and not their treatment.¹³⁶ The UNHCR recommended to the Korean government in August 2006 that the legislation of independent refugee protection law which would guarantee procedural rights in the refugee evaluation process limit the methods and duration of confinement, and determine not only the recognition procedures for refugee status but also the rights and duties of the refugees and asylum petitioners.¹³⁷ The enacted Refugee Act is significant in that it reflected such discussions to establish the minimum standard of refugee protection towards meeting the international standards of a refugee regime and the guarantee of refugee rights.

2. Specific Provisions of the Refugee Act

The recently passed Refugee Act provisions include General Provisions, Refugee Status Application and Determination, the Refugee Committee, and Treatment of Recognised Refugees and Others. The significance of the regulation can be summarized as follows.

First of all, the Refugee Act defines refugees as “an alien who is unable or unwilling to avail him/herself of the protection of his/her country of nationality owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or who, not having a nationality, is unable or, owing to such fear, unwilling to return to the country of his/her former residence (hereinafter “the country of habitual residence”).”¹³⁸ This definition is clearer and more specific than the definition provided in the Immigration Control Act¹³⁹ and also satisfies the objective of refugee recognition in international law. The Refugee Act also specifically provides for the prohibition of refoulement,¹⁴⁰ a core principle of the Refugee Convention. In particular, the Act is significant in that it includes not only persons recognized as refugees but also humanitarian status holders and refugee status applicants in the scope of the application of the prohibition.

136. Basic Study, *supra* note 49.

137. Recommendation regarding proposed legislative Revisions in Korea, UNHCR Seoul, Republic of Korea, Aug. 2006.

138. Nanmin beob [Refugee Act], Act. No. 11298, Feb. 10, 2012, art. 2(1) (S. Kor.).

139. Immigration Control Act, *supra* note 87, art. 76-2(1) (S. Kor.).

140. Refugee Act, *supra* note 138, art. 3.

Due process was also reinforced in the refugee recognition procedure. The Refugee Act grants applicants the right to receive the assistance of an attorney,¹⁴¹ interpretation in filling out interview reports,¹⁴² and the presence of trusted individuals during the interview.¹⁴³ The applicant may request access to, or a copy of the interview record, or relevant materials such as documentary evidence submitted by herself.¹⁴⁴ This would be important court evidence if the applicant were to be denied refugee status, after which she appeals through an administrative appeal. The applicant can also prohibit the disclosure of personal information in order to protect privacy and safety.¹⁴⁵

Provisions for the treatment of recognized refugees, humanitarian status holders, and refugee status applicants are also significant. An alien who is recognized as a refugee and stays in the country is provided social security at the same level as that of Korean nationals,¹⁴⁶ and if her child is a minor as defined by the Civil Act, she can receive primary and secondary education as that provided to Korean nationals.¹⁴⁷ Treatment of humanitarian status holders and refugee status applicants is also provided for. The Minister of Justice may permit a humanitarian status holder to engage in wage earning employment;¹⁴⁸ the Minister of Justice may provide living and other expenses to refugee status applicants until the Minister can permit the applicant to engage in wage-earning employment six months after the date on which the refugee application was received.¹⁴⁹ The refugee status applicant can receive medical services support, as well as primary and secondary education at the same level as that of Korean nationals for family members who are minor aliens.¹⁵⁰

What the Ministry of Justice is most concerned with following the legislation of the Refugee Act is the practical difficulties in immigration control due

141. *Id.* art. 12.

142. *Id.* art. 14.

143. *Id.* art. 13.

144. *Id.* art. 16(1).

145. *Id.* art. 17.

146. *Id.* art. 32.

147. *Id.* art. 33.

148. *Id.* art. 39.

149. *Id.* art. 40.

150. *Id.* art. 42.

to the abuse of the refugee system. If illegal aliens refuse to return to their own countries and apply for refugee status, the realistic issue will be how far that status can be recognized. With respect to this, the Refugee Act provides that the Minister of Justice may omit part of the determination procedure if “the refugee status applicant concealed facts in the application through means that include, but are not limited to, the submission of false documents or false statements,” “the refugee status applicant re-applied for refugee status without material change in circumstances after a previous application was denied or previous refugee status recognition was cancelled,” or “the refugee status applicant is an alien who has stayed in the Republic of Korea for one year or longer and who applied for refugee status when the expiration of the sojourn period was imminent, or is an alien subject to forcible removal who applied for refugee status for the purpose of delaying the enforcement of the removal order.”¹⁵¹

3. Issues with the Simplified Procedures

In spite of the positive significance of the passage of the Refugee Act, there is great potential for the original objectives to be abused pursuant to the simplified procedures. Because the simplified procedures do not specify what part of the process may be eliminated, if the core procedures such as “interview” or “fact-finding” were to be omitted, it would be difficult to judge whether the refugee application was one of an abuse of the system.

According to the current Refugee Act provisions, omission is permitted where the refugee status applicant concealed facts in the application through means that include, but are not limited to, the submission of false documents or false statements. In general, however, refugees having fled their countries due to persecution may not be able to clearly testify the facts during the first investigation. Thus, testimony before and after may contradict each other, or that objective facts may not be uniform. There may be cases where they inevitably change their statements in order to protect persons that have helped them. Under these circumstances, omitting part of the process upon determining that the applicant had concealed certain facts may be problematic.¹⁵²

151. *Id.* art. 8(5).

152. Seungjin Oh, *Significance and Issues of the Enactment of Refugee Act, presented at Issues of Refugees and North Korean Defectors* Korean Soc’y of Int’l L. (2012).

Paragraph 199 of the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees states, “Untrue statements by themselves are not a reason for refusal of refugee status and it is the examiner’s responsibility to evaluate such statements in the light of all the circumstances of the case.” This shows that interview and fact-finding is minimal to such an evaluation. This should similarly be applied to cases where a statement differs from the facts that are given in reapplications without a significant change of circumstances. In order to find out whether there has been a significant change of circumstances, there needs to be fact-finding regarding the state of affairs in the nationality state after at least an interview with the applicant.¹⁵³

From the applicant’s perspective in particular, application for refugee status is often the last resort. Yet if they were to uniformly apply for refugee status “over one year of stay” without consideration for their actual circumstances, they uniformly become subject to the simplified procedures which conflicts with the objective of the law. Further, the problem is serious where, though the scope of those subject to forced removal is comprehensive and ambiguous, if subject to these provisions, they are deemed to have abused the refugee law and thus subject to simplified procedures.¹⁵⁴

4. Recognition of Refugee Status for Immigrants Entering for Economic Purposes

The timing of a refugee application in the host state cannot be a dispositive factor for determining refugee status. It is very rare for refugees to apply as soon as they arrive in the state. However, the current Refugee Act subjects the refugees applying for status as a “foreigner having stayed over one year of stay” for the simplified procedures that permits omission of certain criteria. The case in which this can be most problematic is in the recognition of an “immigrant having entered for economic purposes.”

Even if the primary or first purpose for entering Korea was economic such as an industrial internship, for those applying for refugee status after having

153. Jongcheol Kim, Nanminbeopsang Ganijeolchawa Chooripgukhangeseoi Nanminshincheonge Deheseo [Simplified Procedures of the Refugee Act and the Refugee Application at the Port of Entry], presented at the National Human Rights Commission Discussion of the Enactment of Refugee Act, 2012.

154. Seungjin Oh, *supra* note 152.

engaged in “political activities” within the country, the recognition of genuineness is very strict even up to the present time. For example, in the case of migrant workers from Burma, although they had first entered Korea for economic purposes as industrial interns, they engaged in activities such as a migrant worker labor union, as well as anti-government activities against the military government of Burma and human rights activities for the Burmese people. Once their visas expired and they had to return to their country, the percentage of recognition of their visa applications was very low.

Even if following the newly enacted Refugee Act, such migrant workers will be subject to simplified procedures, pursuant to which the recognition of their refugee applications would not be very easy. With the recent Supreme Court decision, however, the high court decision overturning the trial court was upheld in recognizing their refugee status. The court held, “Although it is difficult to conclude that there were concerns for persecution by the Burmese government since they entered Korea not while fleeing from the persecution of the Burmese government but for economic reasons such as the industrial trainee system, because they actively engaged in high-level anti-government activities and other human rights activities after entry, it is possible that they will be persecuted by the Burmese government.”¹⁵⁵

5. Conclusion

Refugee recognition procedures are not for a state to grant rights to its citizens as a dispensation of justice but a realization of the rights protected by international law for refugees. Refugee recognition in Korea up to the present is regulated by portions of the Immigration Control Act and thus there remains a deficient process in reality. The newly legislated Refugee Act is a single, unitary law enacted to improve the issues raised by academia, civic groups and international human rights bodies. Its significance is great in that it sets the direction in which the legal regime can meet international standards with respect to the refugee system and the protection of human rights.

However, the issue still remains as to whether the Ministry of Justice, in its concern for the abuse of the refugee system, will conform to the objectives

155. Namil Kim, Burma Hengdong Hwewondul Nanmin Hwakjeong [Burmese Action' Members Recognized as Refugees], *The Hankyoreh*, Mar. 3, 2011, available at http://www.hani.co.kr/arti/society/society_general/466398.html.

of the legislation in the immigration process. In particular, by omitting important procedures in the refugee determination process through the so-called simplified procedures, and performing evaluations as a formality, the purpose of the legislation that was passed with difficulty can fade. In this regard, the decision of the Supreme Court is significant.

VI. Conclusion

A. Uniqueness of the Immigration Issue to Korea

The issues of immigration and immigrants are a social phenomena occurring around the globe. With the deepening of bipolarization of the world economy and the subsequent increase of economic dependency of poor nations on richer nations, as well as the development of transportation and logistics, they give rise to not only a difference in capital but also the status and human rights of immigrants migrating with the financial resources. As the title reveals in *Servants of Globalization*,¹⁵⁶ written by Parrenas, a social scholar from the Philippines, as a result of globalization, migrant workers from developing countries become servants in the countries they immigrate to and form a new social class. Such a relationship raises the likelihood of eliminating the proper payment for the labor provided by the immigrants and the human rights that ought to be granted them as laborers. In addition to this international context, the immigration issue in Korean society also bears problems such as immigration of overseas Koreans as laborers from the historical backdrop of colonization, marriage immigrant women policies implemented as part of population control policies, gender discrimination towards them resulting from the patriarchal traditions of Confucianism unique to East Asia, exclusive and disparaging attitude towards immigrants from poor nations coming from the ethnic focused community and economic centered way of thinking. These issues, in conjunction with the traditional immigration policies of “selective acceptance” and “general exclusion” increase the severity of human rights violations, which in turn makes it more difficult to solve the issues through the existing, conservative legislature and administrative branches.

156. Rhacel Salazar Parrenas, *Servants of Globalization* (Stan. Univ. Press 2001).

B. Judicial Activism of the Judiciary¹⁵⁷

The backwardness of the Korean government concerning the issue of immigration has long remained veiled in spite of its discordance with international human rights norms. As reviewed earlier, many international human rights organizations have continuously made recommendations and requested changes to the Korean government concerning its immigration system. However, up to present, legislative and administrative institutionalization by the Korean government has been rare, aside from the recent Refugee Act.

The fact that recommendations and advice of the international community, rather than a self-examination by Korean civil society, brought about legislation and improvements to the disparaging and exclusive attitude of the Korean people towards those who are from a different culture, especially those from poor countries, is far from the “national dignity” repeatedly emphasized by the current government. This national dignity mentioned by the administrative head of Korea has remained at an economic centered way of thinking with only minor degree of variance. Amidst the efforts to enhance the role and status of Korea in the international community based on its rapid economic growth in the 21st century, the fact that its experiences as a “marginal state” subject to disparagement and discrimination up to the late 20th century are not reflected, indicates the high possibility that Korea will only repeat the same to the people from developing countries. Up to the early 1980’s, Korean laborers entered economically rich countries in the Middle East and North America, where they labored as laborers from developing countries do today in Korea. Korean women similarly emigrated to the US and Europe in the form of mail-order brides – like the marriage immigrant women in Korea today – following the Korean War. Thus, foreign workers and marriage immigrant women who remain “outsiders” of Korean society are equivalent to the “Koreans of the past.” Disparagement and discrimination of Koreans toward these people are ultimately an insult to the image of the past Koreans, and a repetition of the arrogance of imperialists toward their colonies. If the Korean people themselves do not reflect upon this context, the *Servants*

157. While the definition of Judicial Activism varies among different scholars, this writing opted for the definition: “The progressive attitude of the judiciary which, by interpreting and applying the law while actively seeking the realization of justice, does not simply stop at interpreting and applying the provisions of the law but further affects the policy formation through creative interpretation of the law.”

of Globalization of Parrenas is a phenomenon that will recur in Korea. Globalization is only a revival of imperialism, not within the borders of another nation, but within its own state by the people who refuse to change their imperialist attitude towards Koreans and people from the developing world. The active role of the judiciary, in this regard (where self-reflection of the society does not take place), is very important. Though the decision of the Constitutional Court regarding immigrants is not entirely satisfactory, it has provided important standards for the various issues explored earlier. When considering the stages of development of Constitutional Court decisions, we can hope for more progressive decisions in the future concerning the fundamental rights and labor rights of immigrants. Such decisions of the judiciary will also ultimately help change the understanding and sensitivity of the people towards immigrants.

The Constitutional Court and the Supreme Court have their specific objectives as the highest courts of the nation. In particular, the Korean Constitution provides for the prohibition of political activities and guarantee of position for the justices of the Constitutional Court, thereby guaranteeing their independence and the neutrality of their judgments.¹⁵⁸ When considering the essence of the Constitution and the purposes of the Constitutional Court, the important role of the Constitutional Court is in actively protecting the rights of the minority that are not sufficiently protected by or reflected in the legislature constituted by the election of those with voting rights or the executive run by an elected president.¹⁵⁹

The progressive and active decisions of the federal supreme court of the US concerning racial discrimination brought about a change of understanding of the American people concerning their racial prejudice. Recalling its bridging role to policy legislation, progressive perspective of the Korean Constitutional Court towards the immigration issue is very important. In order to make possible the progressive perspective of the judiciary, we must reconsider the Korean experiences as foreign workers that had occurred only one generation ago, as well as the experiences of mail-order brides, and endeavor to provide a forum for discussion as to how such experiences should be interpreted for Korean society at this point in time when multicultural families

158. Daehanminkuk Hunbeob [Constitution] art. 111 (2)-(3) (S. Kor.).

159. Jibong Lim, Sabeopjeokgukjuwa Sabeopkwon Doknip [Judicial Activism and the Independence of the Judiciary] 20-25 (Cheolhagwa Hyeonshilsa 2004).

are being formed. When such efforts are made, the Korean judiciary will acquire a more progressive and human rights oriented legal system towards foreigners than any other society. This is why it is important for the judiciary of a state to endeavor to understand the history and culture of that society.

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