

## **A Study on the protection of the Migrant Worker's Rights in Korea**

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**Abstract:** *The importance of Migrant workers in the recent globalized world cannot be overemphasized. There are about 150 million people living outside their country of birth. Out of these, 12 million are refugees and 97 million migrant workers. But it is unfortunate that Migrant workers have fallen victims of different levels of degrading and inhuman treatments in their countries in recent time. The United Nations adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) in December 1990. On July, 1 2003; the twenty first states ratified the Convention. By the end of 2007, however, only 37 countries had ratified the Convention. It has been estimated that in 2005, 94 million of the world's approximately 191 million migrants were economically active. Two more recent estimates suggest that the number of international migrants has reached 200 million. Almost half of those migrants are women, who are increasingly migrating for purposes of work. It is great concern that the most developed countries of the world have refused to ratify this convention like the United States, France, Canada, and the United Kingdom. Without ratification of this convention it will not get effectiveness. Despite the adoption of this treaty in 1990, global events continue to show that the inhuman treatment of the past has continued to make life unbearable for Migrant workers in different countries of the world. In this presentation we will take an in-depth look into the rights sanctuary in the convention which will engage in an article by article analysis of the ICRMW with the aim of appraising the level of rights and protection offered to migrant workers under this convention. It examines the rights of migrant workers as aliens' in general international human rights law as well as the specific efforts and measures of the International Labour Organization and the United Nations. Republic of Korea is the first Asian nation recognizes migrant worker rights. This paper will draw out the weaknesses of the ICRMW while offering suggestions on how these weaknesses can be overcome. Most developed countries have indicated these weaknesses as their reasons for refusing to ratify this convention. This presentation will examine these claims while analyzing the appropriate steps to be taken if the UN intends to confer some effectiveness and acceptance on this important treaty.*

**Keyword:** *Migrant worker, ICRMW, Republic of Korea, Labour Migration, Human rights. EPS system*

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### **I. Introduction**

The Steering Committee of the Global Campaign was first convened ICRMW for protection of migrant worker's rights in 1998.<sup>4</sup> It is an exceptional coalition involving the United Nations Secretariat, diplomatic agencies and leading international human rights organization, church, labour, migrant and women's organizations.<sup>5</sup> Only forty-two countries have ratified the treaty as of December 2009. Furthermore, none of the primary receiving states have ratified this convention. To achieve success, hundreds of organization and the people at same level took part of the activity.<sup>6</sup> Over past 50 years there were a rapid growth of migration among the states for achieving better life and quiet environment. During this time, a large number of migrant worker are living outside their country of origin has almost tripled, around 75 million to 214 million from 1960 to 2010 in dramatic way.<sup>7</sup> The Commission for Social Development, the International Labour Organization, Scientific and Cultural Organization and World Health Organization was involve completing this important task. In many countries, politicians seized upon the divisive potential of immigration to bolster political support for revolutionary agendas. In more than a few such situations, more mainstream political parties have sought to

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<sup>4</sup>The International Convention on Migrant Worker and its Committee, fact sheet no. 24 Rev 1, pp. 2-3. See. <http://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf>.

<sup>5</sup> Ibid.

<sup>6</sup> International Convention on the Protection of the Rights of All Migrant Worker's and Members of their Families, opened for signature Dec. 18, 1990, entered into force July 1, 2003.

<sup>7</sup> International Labour Migration – A Rights-based Approach; ILO; 2010; p. 115.

accommodate the minority appeal of nationalistic impulses with restrictions policies.<sup>8</sup> Republic of Korea is one of the dream countries for migrant worker. Although there is different kind violation of human rights has been committed by the authority. In this paper I shall try to find out specific reason of violation and the path of avoiding these burning issues. I have interviewed a lot of migrant workers living in the Republic of Korea both legal and illegal. To import skilled labour, many Korean firm as well as affiliate asked to bring trainee in to the Republic of Korea since 1991. Korean firms with a foreign affiliate have been allowed to bring trainees into Korea since 1991.<sup>9</sup> As a labour exporting country Korea sent their first batch in West Germany for nursing. Middle East was the dream country for Korean worker as well. Specially, construction work. Republic of Korea has developed its economics in sharply within the decade and changed the labour situation like other developed country. JVTP<sup>10</sup> was the first scheme for importing migrant worker introduced in 1991.

The Convention on the migrant worker's rights is the first foremost rights of all who are living outside of the country of origin.<sup>11</sup>

I discovered there are several problems that the worker facing during their stay period in Korea. Among all problems some are silly in accordance with their agreement under employment permitting system (EPS)<sup>12</sup>. Unfortunately, I come to know after interviewing them; they have victimized different level in their work place. The major problem I discuss in this article as follows:

- The scarcity of exercise the international law that Korea has already been signed.
- Shortage of monitoring system in workplace.
- Recent situation of Migrant worker in the Republic of Korea.
- Problem under international as well as domestic law.

For this article, I interviewed more than 50 regular and irregular migrant workers as well as staff from shelters, migrant centers and other nongovernmental organizations, trade unionists, factory owners, managers, and the National Human Rights Commission of Korea (NHRCK).

During crackdowns, seven cases has documented where immigration officers, sometimes accompanied by the police, have used unnecessary or excessive force and subjected irregular migrant workers to ill-treatment. These include a crackdown in Pocheon in September 2008 where a Myanmar man died in custody thirteen hours after his arrest. Immigration officials had failed to provide him with interpretation during a medical exam and afterwards refused his request for further medical treatment. In Maseok in November 2008, immigration officials forced a Filipino woman to urinate in public, dragged two Filipino women by their hair while they were still in their underclothes, and denied prompt medical treatment to a Bangladeshi man suffering from a broken leg and other injuries. In Daejeon in April 2009, an immigration officer was captured on video beating a detained Chinese woman.

My purpose is writing to this article to find out the major problem of migrant worker in Korea. Republic of Korea is now a dream country for Asian worker. A huge amount of worker complain regarding their workplace, pay, salary, work condition, rude behavior of owner, rest days, harassment, sexual discrimination, illegal crackdown, medical care and so on.

To discuss regarding this issue, I divided my article in to three parts. Chapter II belongs to the actual situation in Republic in Korea. I added some example concerning the violation of migrant worker's rights adopted by the international treaty and convention. Demerit of existing EPS acts as to analyze the obligation of the Korean government.

In Chapter III, I tried to mentioned convention and international treaty that has already been signed by the Korean government. In accordance with this convention and international treaty, which rights they can enjoy inside in Korea during their service time. Later on I mention some constitutional rights ensured by Korean government.

To fulfill my desire to write this article I recommend some suggestion in Chapter IV. This research also depended on research method. All information are collected from National and international legal text, Judgment of Korean supreme court, Report of international Non-Government Organization, Article concerning migrant worker in Korea, Ministry of Justice in Republic of Korea and academic literature and so on.

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<sup>8</sup> Amnesty International, Republic of Korea (South Korea): 'Migrant workers are also human beings'. August 2006, pp. 19-20.

<sup>9</sup> Bangladesh, Cambodia, China, Indonesia, Kyrgyzstan, Mongolia, Myanmar, Nepal, Pakistan, Philippines, Sri Lanka, Thailand, Timor-Leste, Uzbekistan and Vietnam.

<sup>10</sup> JVTP stands for Industrial Training for Joint Ventures.

<sup>11</sup> Guide on Ratification ICRMW the international steering committee for the campaign for ratification of the migrant's rights conventions, p3.

<sup>12</sup> EPS stands on "Employee Permit System."

## **II. Situation Of The Migrant Worker's Rights In Korea**

The EPS system allowshiring migrant worker for those employers who has failed to engage native worker in their workplace. In that case,government usually takesinitiative to import migrant workers from EPS countries.<sup>13</sup>The developing Korea began import the migrant workers from the early of 1990 decade.

Now we will take depth look in the problem on the migrant worker in Korea. Though, the past government has taken severalinitiatives for the wellbeing of migrant workers living inside the Korea.

### **Kim young-sam (1993-1998)**

Kim Young-Sam took two measures for illegal migrant worker and import new labour from exporting countries at the same time. In 1993, ITTP<sup>14</sup> has announcedan altered form of JVTP. In this program, the trainees are allowed to stay in Korea for one year, though the extended period of two years. Fifteen Nepalese migrant workers first draw the attention of Korean nations in front of the cathedral in central Seoul Myeongagainst the ITTP. This event is distressing situation of migrant workers to provide the legal rights in accordance with the international law. For the first time, civil society and jurist also get alarm regarding migrant rights.

### **Kim dae- jung (1998-2003)**

Kim dae-Jung government has changed into education programs conducted in 1998 work after training period (WATP). The main difference between above mentioned policy is 'Period of stay'. Under this policy foreigners can stay in Korea one year as trainee and rest of two years as an employee. According to the changing provision migrant worker were permitted to change their job location after consideration of workplace condition, working condition. WATP reduce human rights violation.

### **Roh moo-hyun (2003 –2008)**

Employment permit system (EPS) came into force on August 17,2004. It's contains bonus pay, severance pay, and unionizing, collective bargaining and collective action in the labour sector of foreign workers. In addition, workers joined by their families to limit. EPS employer in Korea work specified sector where the Korean national not interested to work. Specially in SME designated sector. Under this provision many illegal migrant worker get back their legal status. Within 2010 EPS has amended several times in favor to the migrant worker. A revision to EPS, made in April 2010, stipulates that the right to rehire migrant workers rests solely with the employer. This element of immobility is one of the most criticized features within the EPS.

### **Lee myung-bak (2008 – 2013)**

Lee myung-bak has changed EPS when he came in to power in 2009 and was promulgated in 2010. It was the 'First Basic Plan for Immigration Policy 2008–2012'. Under the Ministry of Justice (MoJ), laid the foundation for implementation a long-term and consistent immigration policy. The FBPI explicitly states that national-level protection against discrimination will be ensured and human rights will be respected (FBPI: 12). It also offers specific provisions on the improvement of detention facilities. However, there are a few factors that need urgent attention, including a one-step employment application procedure at the employment support center; improved methods of re-employment; a loosening in some of the conditions stipulated in employment contracts; and employer surveillance. The FBPI clearly articulates a strategy for controlling illegal workers through crackdowns twice a year for a period of four months for the next five years. Within the EPS, stronger punishments for employers have been proposed FBPI (First Basic Plan for Immigration Policy).<sup>15</sup>

### **Park geun-hye (2013- present ):**

Amnesty International issued an open letter to President Park geun-hye on February 24, 2014, on the occasion of her one-year anniversary. It is interesting that Amnesty International officially issued this open letter raising concerns about Korea's human rights, including the areas of death penalty, freedom of association, migrant workers, National Security Law, conscientious objectors. Amnesty International's research has found that restrictions on changing jobs severely hinder migrant workers from raising abuses at work, such as late or non-payment of wages or benefits, inadequate safety measures, and physical or sexual violence.<sup>16</sup>

Besides these policy and laws there is massive human rights violation I found on my research.

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<sup>13</sup>Julia Jiwon Shin, *The gendered and Racialised Division in the Korean Labour Market: The case of Migrant Workers in the catering sector*. East Asia 2009, Springer science business media B.V 2009. p97.

<sup>14</sup>Industrial & Technical Training Programme.

<sup>15</sup>Sarah Hasan, *Labour Migration to South Korea: Policies and problems related to illegal workers*, The academy of Korean Studies. pp 4-5.

<sup>16</sup><http://zoominkorea.org/amnesty-internationals-open-letter-to-park-geun-hye/>. Last visited 2015-05-09

### **Legal status of Illegal aliens' children and workers**

A Bangladeshi girl Mahia 8, left for her country. Actually, she is not a Bangladeshi, nor a Korean. She was born and living with her illegal parents in Korea without health care benefit and decent education. As a result, she was bound to go to his parent's country and in Bangladesh she will not be treated as citizen. According to the Principle of territorial nationality she is not Bangladeshi. Principle of personal Jurisdiction has followed by the Republic of Korea in tem of naturalization. So they leave this country for their parents' homeland, which may not identify her as citizens if she has to be treated by the principle of territorial nationality, unlike Korea which adheres to the principle of personal jurisdiction. Many children like Mahia have known as illegal status to born in Korea. This is silly inhumane. According to scholar, Korea is now 15 largest economies in the world to show more tolerance to punish this youngster. Although, Mahia is not liable for this problem. Bangladesh is country of third world. To get better and bright future her parent came from third world country like Bangladesh. The USA exercises territorial principles for nationality of a new born baby. If any baby born in the USA he or she will be considered as a citizen. A baby who comes to the USA with their parents, after five years he or she can apply for citizenship even he or she is illegal. Their parent also able to seeks citizenship if they never committed any offense. U.S for 10 years deprived of committing any crimes. If we look at the nationalization process in Germany, they have provided home care allowance and educational subsidies for illegal aliens. The National Assembly must make law regarding this acid test issues. Surprisingly more, Australia and United States have provided mercy for illegal aliens through occasional pardons though they are criticized for racism. As a nation of first world countries, Korea did not provide a single opportunity for illegal child to become a national of the Republic. Can Korea still say it is determined to become a multicultural society? <sup>17</sup> Two basic principles are followed by the whole world. Acquisition of nationality by birth is known to 'Jus soli'. Anglo American countries follow this principle. <sup>18</sup> Due to complex law one cannot get citizenship even he or she born in Korea. Many of them become stateless person.

### **Discriminating Release and crackdown**

Article 23(1) of the Labour Standards Act states that 'No employer shall dismiss layoff, suspend, or transfer a worker, or reduce wages, or take other punitive measures against a worker without justifiable reasons.' <sup>19</sup> EPS workers can file a complaint against their unfair dismissal at the Labour Relations Commission, which is a quasi-judicial governmental body affiliated to the Ministry of Labour and composed of tripartite representatives: workers, employers and public interests. MTU has also stated that the complaints procedures are difficult for migrant workers to access without assistance because they may not know that these procedures exist and cannot communicate their concerns verbally or in writing due to language barrier. In the case of the labour office and job Centre, the situation is exacerbated by inadequate interpretation and unhelpful or impatient staff who are often understaffed. As the EPS is a government-run work scheme, the Korean authorities have a duty and obligation to ensure that an effective complaints mechanism is in place for all migrant workers to access.

### **Violations of immigration and arrest procedures**

There are several international regulations on arrest procedure for illegal worker or alien. 'Immigration and police officials may use force only when strictly necessary and only to the extent required for the performance of their duty, Under the UN Code of Conduct for Law Enforcement Officials (UN Code of Conduct)' <sup>20</sup> There is a basic Principles to use of force and firearms by Law Implementation Officials (Basic Principles) <sup>21</sup> provided that the police 'shall, as far as possible, apply non-violent means before resorting to the use of force' (principle 4). If force cannot be avoided then police officials must 'exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved' (principle 5a). Although not legally binding, these strategies signify global standards on how to best implement international human rights treaties, in particular the provisions of the International Covenant on Civil and Political Rights (ICCPR), through legislation, regulation and during actual law enforcement operations. <sup>22</sup> On the other hand, Labour Standard act in Republic of Korea enclose penal provision in chapter XII. Some special grounds we observed several violation regarding arrest procedure.

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<sup>17</sup> Source: Korea Times (2013.05.10) ([http://koreatimes.co.kr/www/news/opinon/2013/05/137\\_135492.html](http://koreatimes.co.kr/www/news/opinon/2013/05/137_135492.html)).

<sup>18</sup> Thomas Alexander Aleinikoff, David A. Martin, Hiroshi Motomura, Immigration and citizenship process and policy fifth edition American casebook series, p15.

<sup>19</sup> Labour Standards Act No. 8561, 27 July 2007, last amended on 21 May 2009, available at: <http://www.moleg.go.kr/FileDownload.mo?flSeq=25699>, accessed 1 October 2009.

<sup>20</sup> Article 3 of United Nation code of conduct.

<sup>21</sup> UN Economic and Social Council, Basic Principles, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August – 7 September 1990.

<sup>22</sup> Amnesty International, Guns and Policing: Standards to prevent misuse, February 2004, p7 (AI Index: ACT 30/001/2004).

**Discrimination in pay and withholding of pay**

Under the EPS the Korean government responsible for monitoring workplace through ministry of Justice to ensure the labour standard about benefit, rest days as well as pays. Moreover, they are responsible to monitor and follow up all work place where violations took place. However, both legal and illegal workers have interviewed and they stated there is huge scarcity of monitoring system. Discrimination despite legal requirements for employers on the same working migrant workers, female is getting less than male migrant workers. In 2002, a survey conducted by the Republic of Korea's National Human Rights Commission (NHRC) 'facts about the human rights of migrant workers living in Korea' report 'Women migrant workers salary less than their male colleague an average of 10 per cent, respectively'.

Pay withholding is the biggest problem inKorea. I want to display a table.

Occurrence			Resolved				Legally Settled		
Year	No. of Companies	No. of Worker	Amount (million KRW)	No. of Companies	No. of Workers	Amount (million KRW)	No. of Companies	No. of workers	Amount (million KRW)
2006	1,154	1,832	4,043	745	1,056	2,098	371	686	1,768
2007	1,097	2,249	6,280	654	1,049	2,467	418	1,142	3,673
2008	3,269	6,849	17,037	2,092	4,017	9,129	1,085	2,526	7,102
2009	765	1,738	4,380	378	915	2,329	210	463	1,125

Withheld or unpaid salary of migrant worker from 2006 to 2009.<sup>23</sup>

**Sexual violence and harassment against women in the workplace**

Under the Korean law, sexual harassment is completely prohibited in work place in the Act on Equal Employment and support for work family Reconciliation(Equal Employment act).<sup>24</sup> General Recommendation no 19(1992) 'Committee on the Elimination of Discrimination against Women' stated that, 'equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace' and that 'such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.' A survey in 2002 has shown the information that near about more than 12 percent of woman has victimized for sexual violence in their work place. To conserve their legal migrant status many women worker did not reported about abuses. According that survey 54 percent of irregular worker has experience regarding sexual violence by their employer. They didn't report because of fair from losing job, legal status and return to the native country.<sup>25</sup> In interviewed with Amnesty International a female Nepalese migrant worker in Korea told that, she suffer sexual nuisance atwork place by her male administrators. She also mentioned to the amnesty international that many time even at middle night, the drunken administrator beat her dormitory door and shouted to open her room's door. Six Sri Lankan women also complain before the Amnesty International that how they harass and sexual discriminated by the administrator. How they tolerated the unethical and inappropriate touching and other sexual harassment. Due to fare of sacked they never complaint against the factory owner or president by whom they are being harassed. It is well-known that without work and salary they cannot survive here in Korea. President of the factory took this privilege to fulfill their bad intention. During their shower time company president knock their door and request to open. They complained to the recruitment agency in January 2005.<sup>26</sup> After visiting the workplace by the concern official they suggested to compromise with the president and agree to solution with the accused person.<sup>27</sup> Female migrant worker are more vulnerable situation compared with their national counterpart.<sup>28</sup> This woman comes from Thailand, Uzbekistan, Indonesia and China.

<sup>23</sup> Source: Ministry of Labour.

<sup>24</sup> Act On Equal Employment And Support For Work-family Reconciliation, Act no. 3989, 4 December 1987, last amended on 22 December 2007, available at: <http://www.moleg.go.kr/FileDownload.mo?flSeq=27330>, accessed 1 October 2009.

<sup>25</sup> CEDAW General Recommendation No.19 on Violence against Women (11th Session), paras 17 and 18, 1992.

<sup>26</sup> "Illegal Foreign Worker Wins Compensation Case", The Korea Times, 23 June 2008, Available at: [http://www.koreatimes.co.kr/www/news/nation/2008/06/117\\_26362.html](http://www.koreatimes.co.kr/www/news/nation/2008/06/117_26362.html), accessed 23 June 2008.

<sup>27</sup> Amnesty International interviews with SN, JK, HB, Kwon, "Lee" and "Park" in Incheon, Hwaseong and Maseok, South Korea on 14, 15 and 22 November 2008.

<sup>28</sup> <http://www.lexisnexis.com/ap/academic/?lang=kr>

“States must promote and protect the human rights of women and exercise due diligence:

- a) To prevent, investigate and punish acts of all forms of VAW whether in the home, the workplace, the community or society, in custody or in situations of armed conflict.
- b) To intensify efforts to develop and/or utilize legislative, educational, and social and other measures aimed at the prevention of violence, including the dissemination of information, legal literacy campaigns and the training of legal, judicial and health personnel.<sup>29</sup>

**Health and safety in work conditions and discrimination against pregnant women.**

Korean Maternity Protection Act does not bring satisfactory explanation to the pregnant woman. It is totally prohibited to do any dangerous and hazardous work under the Maternity Protection Act. They are also not eligible for night work as well as overtime work. The woman who is pregnant has to rights for easy and light work. Even after twelve month of given birth a woman is completely prohibited for any hazardous work, night work and doing overtime as well.<sup>30</sup> Pregnant migrant women have been endangered with discharge or with having their documents seized when they have informed their employer of their situation. <sup>31</sup>There are particular concerns about the lack of mandatory health insurance for women migrant workers. Migrant women who become pregnant may struggle to afford treatment or undergo regular check-ups. It is more pathetic that the survey conducted in 2002 have found that 66.7 per cent woman conceive during their working time but unfortunately are not brave enough to inform to their owner for the fear of dismissal, 56 percent on the other hand, female migrant workers become pregnant had abortion or miscarriages.<sup>32</sup> This report shows that after miscarriage many women continue their previous heavy workload. Some of them doing more dangerous and unethical work compared their Korean colleagues without proper adequate training and protection.

As the case below shows, even when they fall in disease, they may be denied basic rights including access to appropriate health care.

	Number	Percentage
Wages/ Salary	135	22.5
Working hours	98	16.4
Rules of food and accommodation	95	15.9
Rest days and time	91	15.2
Industry types	89	14.9
Work types	81	13.5
Others	10	1.7

Complaint against employer<sup>33</sup>

**Deaths and injuries while fleeing and in custody**

The UN code of conduct has introduced some significant rules related behavior towards the custodian. ‘Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.’ <sup>34</sup> Commentary states that medical attention must be secured ‘when needed or requested.’ Moreover, article 21(1) and (2) of Korea’s Regulation on the Protective Custody of Foreigners states that: ‘When a detained foreigner is ill or suffers a head injury, he or she must be taken to a doctor for medical treatment.’ When an imprisoned foreigner has an illness, which cannot be treated with the available medical supplies, equipment or staff at the detention centre, the official in charge may accept the detainee’s request to be treated at a hospital outside the detention centre at his or her own cost, taking into consideration the condition of the detainee and his or her flight risk. However in the case of an emergency, the detainee must be taken to the hospital immediately.

**Industrial coincidence reimbursement**

Under Korea’s Industrial Accident Compensation Insurance (IACI) Act, all migrant workers regardless of their legal status are eligible for compensation when injured in the workplace. Employers are required to contribute to IACI scheme, although certain sectors are exempted, including agriculture, forestry, fishery,

<sup>29</sup> Committee on the Elimination of Discrimination against Women, General Recommendation 19 on Violence against women (Eleventh session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 84, para9.

<sup>30</sup> Amnesty International interview with EM in Seoul, South Korea on 16 November 2008.

<sup>31</sup> Amnesty International meeting with the Korea Immigration Service and Ministry of Justice in Gwacheon, South Korea on 27 July 2009.

<sup>32</sup> Amnesty International, Republic of Korea (South Korea): ‘Migrant workers are also human beings’, August 2006, p4 (AI Index: ASA 25/007/2006).

<sup>33</sup> Ibid.

<sup>34</sup> Article 6 of the UN Code of Conduct.

hunting, small construction companies and domestic service industry (e.g. restaurants) employing fewer than five workers.<sup>35</sup> Under this Act, a worker including regular and irregular migrant workers 'who is unable to work due to medical care shall be paid 70 per cent of the average wages' for the period of time that they cannot work due to medical treatment.<sup>36</sup> In the event that an injury results in a disability, 'the worker shall be paid compensation according to the level of disability.'<sup>37</sup> For injured workers exempted from the IACI, employers must pay 60 per cent of their average wages as compensation during the period of medical treatment.<sup>38</sup>

### **Incapability to right of entry justice**

Ministry of Justice of Republic of Korea stated that the E6 visa holder can go to labour office for any kind of help and they can complain against someone who has violated their rights. I interviewed many E6 workers, a lion share of them didn't have any idea regarding the legal process and they are not aware about this. Furthermore, it is not easily accessible for E6 visa holder. On the other hand labour and police official stated without specific complaint one cannot file case to the concern authority.

### **MTU's legal status**

Constitution of the Korea granted the collective action to all workers who may eligible to exercise the right to engage in collective action.<sup>39</sup> The Seoul-Gyeonggi-Incheon Migrants' Trade Union (MTU) was formed on 24 April 2005 for all migrant workers regardless of their legal status. Its membership consists of both regular and irregular migrant workers. On 3 June 2005, Korean Ministry has declared that the illegal worker will not be subject to exercises legally protected rights like right to freedom of association and also other guaranteed rights with other worker. Even though, High Court of Korea has declared the rights of association for the migrant worker including irregular migrants approved by the Korean constitution.<sup>40</sup> On 25 March 2009, the ILO Committee on Freedom of Association issued its concluding remarks on allegations that the Korean government refused to register the MTU and carried out a targeted crackdown on the union, recalling that: '- in this regard the general principle according to which all workers, without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing when examining legislation that denies the right to organize to migrant workers in an irregular situation a situation maintained de facto in this case it has emphasized that all workers, with the sole exception of the armed forces and the police, are covered by Convention No. 87, and it therefore requests the Government to take the terms of article 2 of Convention No. 87 into account in the legislation in question.' 'The resolution concerning a fair deal for migrant workers in a global economy adopted by the ILO Conference at its 92nd Session (2004) according to which migrant workers also benefit from the protection offered by the ILO Declaration on the Fundamental Principles and Rights at Work and its follow-up (1998). In addition, the eight core ILO Conventions regarding freedom of association and the right to bargain collectively, non-discrimination in employment and occupation, the prohibition of forced labour and the elimination of child labour, cover all migrant workers, regardless of status.' Article 5(e)(ii) of ICERD, article 21(1) of the ICCPR and article 8 of the ICESCR all protect the right of workers to freedom of association, and in particular to form and join trade unions, irrespective of their immigration status. Although, there is some reservation of ICCPR like article 22 (Rights to association) in Republic of Korea. 'All citizens are equal before the law. No one shall be discriminated against in any area of political, economic, social or cultural life based on gender, religion or social status' stated the constitution of Republic of Korea. Despite the use of the term 'citizen', the Constitutional Court ruled that the basic rights of foreigners and citizens are equally protected under the Constitution with limitations only in the area of political participation.<sup>41</sup> According to the Convention on the Rights of the Child, Korea must 'respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without any kind of discrimination, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.<sup>42</sup>

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<sup>35</sup> Information provided by the Ministry of Labour on 11 May 2009.

<sup>36</sup> Information provided by the Ministry of Labour on 30 June 2009.

<sup>37</sup> Korea Labour Education Institute, *Easy Korean Labour Law, 2007*, pp87-91.

<sup>38</sup> Information provided by the Ministry of Labour on 30 June 2009.

<sup>39</sup> Republic of Korea Labour rights report September 2011.

<sup>40</sup> Seoul High Court decision 2006 NU 6774.

<sup>41</sup> Constitutional Court Decision 93 Ma 120, 29 December 1994 and 99 Ma 494, 29 November 2001.

<sup>42</sup> Article 2(1) of CRC.

### III. Protection Of Migrant Worker Rights Under The Law

#### 3.1 Protection of the migrant worker rights under the Korean law

Constitution of Republic of Korea has adopted on Jul 17, 1948<sup>43</sup> declared some specific fundamental rights of its citizen. For labour, Republic of Korea adopted Law no. 5309, Mar.13, 1997. Labour standard Act in wide range. Chapter I of this act provided, ‘The purpose of this Act is to set the standards for the conditions of employment in conformity with the constitution, thereby securing and improving the living standards of workers and achieving a well-balanced development of the national economy’<sup>44</sup> that is very similar to the ICRMW convention. The policy approach on migrant workers follows a policy of selectively announcing low-skilled workers, giving attention to their effect on the labour market. Since 2003, Migrant worker enjoy their rights as same as their local counterpart according to the new policies of Korean government though the nature of those rights and status are not same. Regarding foreigner, some of the legal instruments include the Immigration Control Act, Act No.7006, Mar.24, 2005<sup>45</sup> (ICA); Act on the Treatment of Foreigners in Korea, Act No. 21214, Dec.31, 2008<sup>46</sup> (ATFWK); Act on Foreign Workers’ Employment, ETC., Act No. 9798, Oct.9, 2009<sup>47</sup> (AFWE); Labour Standard Act, Act No. 10366, Jun. 10, 2010<sup>48</sup> (LSA); The Minimum Wage Act, Act No. 8964, Mar.21, 2008<sup>49</sup>; Industrial Accident Compensation Insurance Act, Act No. 9988, Jan.27, 2010<sup>50</sup>.

#### 3.2 Protection of the migrant worker rights under the International law

This is the first International Instrument to protect migrant worker rights with the civil and political rights as well as economic, social and cultural rights for all migrant workers and the members of their families. Regardless of status, religion, race, all migrant worker have rights under international law. Membership status of international convention of Republic of Korea<sup>51</sup>

The International Covenant on Civil and Political Rights (ICCPR); <sup>52</sup>
The International Covenant on Economic, Social and Cultural Rights (ICESCR); <sup>53</sup>
The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
The Convention on the Rights of the Child (CRC);

Various conventions of the International Labour Organization

These treaties provide for the rights of migrant workers to:

Right to life <sup>54</sup>
Right to freedom from torture, cruel, inhuman or degrading treatment or punishment <sup>55</sup>
Right to freedom from slavery and servitude <sup>56</sup>
Right to freedom from imprisonment for inability to fulfill a contractual obligation <sup>57</sup>
Right to freedom from discrimination <sup>58</sup>
Right to recognition as a person before the law <sup>59</sup>
Right to freedom of thought, conscience and religion <sup>60</sup>
Right to health <sup>61</sup>

<sup>43</sup>Chongko Choi, “Law and Justice in Korea South and North” Seoul National university Press, p 439.

<sup>44</sup>Article 1 of labour standard Act.

<sup>45</sup> First promulgated in 1964 and was wholly amended in Dec. 1992, since then has been amended 9 times until March, 2005.

<sup>46</sup> First promulgated in May 17, 2007 and has been amended 1 times on December, 2008.

<sup>47</sup> First promulgated in Aug.16, 2003 and has been amended 7 times until October, 2009.

<sup>48</sup> First promulgated in Mar.13, 1997 and has been amended 22 times until June, 2010.

<sup>49</sup> First promulgated in Dec.31, 1986 and has been amended 11 times until March, 2008.

<sup>50</sup> First promulgated in Dec.22, 1994 and has been amended 20 times until January, 2010.

<sup>51</sup> Jung-Eun Oh, Dong Kwan Kang , Julia Jiwon Shin, Shin Sang Lim Lee, Seung Bok Lee, Kiseon Chung, Migration Profile of the Republic of Korea International Organization for Migration. 2011-01.

<sup>52</sup>Signed in 10, April 1990.

<sup>53</sup> Ratified in 1990, on 20<sup>th</sup> November, the ICESCR Committee finished its 43<sup>rd</sup> Session after three weeks of meetings in Geneva. It reviewed State party reports from Republic of Korea, Poland, Chad, Madagascar, and Democratic Republic of Congo.

<sup>54</sup> Art 6 of the ICCPR.

<sup>55</sup> Article 6 of the ICCPR, article 9 of the ICRMW.

<sup>56</sup> Article 7 of the ICCPR, article 10 of the ICRMW.

<sup>57</sup> Article 8(1) and (2) of the ICCPR, and article 11(1) of the ICRMW.

<sup>58</sup> Article 11 of the ICCPR, article 20(1) of the ICRMW.

<sup>59</sup> For instance article 2(1) of the ICCPR, article 2(2) of the ICESCR and article 7 of the ICRMW. ICERD and CEDAW are wholly devoted to the elimination of specific types of discrimination.

<sup>60</sup> Article 16 of the ICCPR and article 24 of the ICRMW.

Education <sup>62</sup>
Adequate housing <sup>63</sup>
All migrant workers should be benefited on basis the principle of ILO declaration 1998. It should be reflected in the eight fundamental conventions what already identified as core standard of labour protection <sup>64</sup>
Adequate food and water <sup>65</sup>

### 3.2.IILO convention

There are huge insufficiencies of the protection of migrant worker's rights in the International instrument. Moreover, International labour Organization has adopted many principles of all international labour standard for the migrant workers and their families. These Standard include,

Fundamental Rights Convention of the ILO <sup>66</sup>
ILO declaration of fundamental Principles and rights at works for protection of wages health and safety and inspection as well.
Employment policy
Private employment Agencies Convention, 1997 (No. 181) as a specific provision and as social security instrument ILO adopted Domestic Worker Convention, 2001 (No 189).

Specific Instrument of International Labour Organization is as follows:

Migrant of employment convention <sup>67</sup>
Migration for Employment recommendation <sup>68</sup>
Migrant worker (Supplementary Provisions) Convention. 1975 ( No 143)
Migrant workers Recommendation 1975 (No 151).

An expert group of ILO concluded a general survey on these instruments in 1999 for 87<sup>th</sup> International Labour conference. In broad sense, Migrant worker are fully protected by the nine UNcores of Human rights Instruments. State party will be responsible to fulfill the objectives of this convention. There is also several mechanism of United Nations to protect migrant worker's' rights all over the world is given bellow:

#### Fundamental rights conventions

Forced labour Convention 1930 ( No 29)
Minimum age Convention 1973 ( No 138)
Equality of Treatment ( Accident compensation ) convention, 1925 ( No 19)
Rights to organize and collective bargaining convention 1949 ( No 98)
Private Employment Agencies Convention 1997 ( No 181)
Abolition of Forced labour Convention 1957 ( No 105)
Domestic Worker Recommendation 20110 ( No 201)
Equal remuneration Convention 1951 ( No 100)
Labour inspection Agriculture Convention 1969 ( No 129)
Discrimination Employment and occupation convention 1958 ( No 11)
Nursing Personal Convention 1977 (No 149)
Worst forms of Child labour convention 199 ( No 182)
Freedom of Association and protection of the rights to organize convention 1948 ( No 87)
Lobour Inspection Convention 1947 ( No 81)
Minimum Wage fixing Convention 1979 (No 131)
Tripartite Consultation (International Labour Standard) Convention 1976 ( No 144)
Safety and health in Construction Convention 1988 ( No 167)
Maternity Protection Convention 200 ( No 183)
HIV and AIDS recommendation 2010 ( No200)
Domestic Workers Convention 2011 ( No 189)

Republic of Korea has ratified the following ILO convention

<sup>61</sup> Article 12 of the ICESCR; article 5(e) (IV) of the ICERD; articles 12 and 14(b) of the CEDAW; articles 24 and 25 of the CRC; and article 28 of the ICRMW.

<sup>62</sup>Articles 13 and 14 of the ICESCR; articles 28 and 29 of the CRC; article 5(e) (v) of the ICERD; and article 30 of the ICRMW.

<sup>63</sup> Article 11 of the ICESCR; article 14(2) of the CEDAW; articles 16(1) and 27(3) of the CRC; and article 5(e) (iii) of the ICERD.

<sup>64</sup> ILO, "Draft ILO Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a right-based approach to labour migration," (ILO, TMMFLM/2005/1), p.11.

<sup>65</sup> Article 11 of the ICESCR; article 24(2) (c) of the CRC, article 14(2) of the CEDAW.

<sup>66</sup> Identified in the 1998

<sup>67</sup> Revised 1949 (No 97)

<sup>68</sup> Revised 1949 (No 86)

ILO Convention No.100: Equal Remuneration Convention, 1951 <sup>69</sup>
ILO Convention No.111: Discrimination (Employment and Occupation) Convention, 1958 <sup>70</sup>
ILO Convention No.138: Minimum Age Convention, 1973 <sup>71</sup> and ILO Convention No.182: Worst Forms of Child Labour Convention, 1999. <sup>72</sup>
International labour organization is a specialized agency of United Nations Organization to protection migrant workers' rights. <sup>73</sup>

Surprisingly, still now Korea is not the state party of some international Convention like ILO convention, which would improve this defenseless situation of migrant worker in Korea. Korea also not ratified eight fundamental ILO conventions which is core standard of labour protection. Korea also not ratified the following international conventions and treaties

ILO convention no 87, where the freedom of association was mention for migrant workers.
ILO convention No 98 Right to organize and collective Bargaining convention, 1949
ILO convention No 29 Forced Labour Convention 1930
ILO convention No 105 Abolition of forced Labour Convention 1957
ILO convention No 97 Migration for Employment Convention (Revised) 1949.
ILO convention No 143 on Migrant Worker Rights Convention (Supplementary provisions) 1975. <sup>74</sup>

### **3.2.2 International Convention on the protection of the rights of all migrant workers and members of Their Families (ICRMW)**

ICRMW provides followings rights to the migrant worker's rights to leave and enter the State of origin.<sup>75</sup> The brutal living and working conditions and physical and sexual abuse that many migrant workers must endure are covered by the confirmation of their 'right to life' <sup>76</sup> and prohibition against cruel, inhuman or degrading treatment of punishment<sup>77</sup> as well as slavery or servitude and forced or compulsory labour.<sup>78</sup> Migrant workers are also entitled to basic freedoms like the freedom of thought, conscience and religion,<sup>79</sup> and the right to hold and express opinions <sup>80</sup> Their property should not be confiscated arbitrarily <sup>81</sup> The Convention then goes on to explain in detail the need to ensure due process for migrant workers and members of their families investigations, arrests and detentions are to be carried out in accordance with established procedures. Their rights to equality with nationals of the State before the courts and tribunals must be respected. They must be provided with necessary legal assistance, interpreters and information in a language understood by them. The arbitrary expulsion of migrant workers is prohibited <sup>82</sup> A migrant worker is entitled to his or her honor and reputation and also to privacy, which extends to one's home, family and all communications.<sup>83</sup> Migrant workers are to be treated as equal to the nationals of the host country in respect of remuneration and conditions of work, overtime, weekly rest, health, restrictions on homework, holidays with pay, safety, hours of work, minimum age, termination of work contract, etc.<sup>84</sup> Equality with nationals extends also to social security benefits and emergency medical care.<sup>85</sup> Information should be made available to migrant workers free of charge and in a language understood by them<sup>86</sup> Migrant worker must have rights to temporarily absent for family reason or obligation. They should have the right to move freely in the territory of the State of employment and they should also be free to choose where they wish to reside.<sup>87</sup>

In addition, the areas mentioned in article 25, migrant workers and members of their families shall enjoy equality with nationals of the State of employment in the following areas:

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<sup>69</sup> Korea ratified in December 1997.

<sup>70</sup> Korea ratified in December 1998

<sup>71</sup> Korea ratified in January 1999

<sup>72</sup> Korea ratified in March 2001

<sup>73</sup> Ryszard Cholewinski, Richard Perruchoud, Euan MacDonald, International Migration law Developing paradigms and Key Challenges edited by, Cambridge University Press. p257.

<sup>74</sup> Source, ministry of Justice.

<sup>75</sup> International Convention on the Protection of the Rights of All Migrant Worker's and Member of Their Families, Art. I.

<sup>76</sup> Ibid Art 9.

<sup>77</sup> Ibid Art.10.

<sup>78</sup> Ibid Art.11.

<sup>79</sup> Ibid Art.12.

<sup>80</sup> Ibid Art.13.

<sup>81</sup> Ibid Art 15.

<sup>82</sup> International Convention on the Protection of the Rights of All Migrant Worker's and Member of Their Families, Art. 22.

<sup>83</sup> Ibid Art. 22.

<sup>84</sup> Ibid Art. 25.

<sup>85</sup> Ibid Art. 28.

<sup>86</sup> International Convention on the Protection of the Rights of All Migrant Worker's and Member of Their Families, Art. 33.

<sup>87</sup> Ibid Art. 39.

access to education, vocational guidance and placement services, vocational training, retraining, housing including social housing schemes, protection against exploitation in respect of rents, social and health services, co-operatives and self-managed enterprises, access to and participation in cultural life<sup>88</sup> Members of the families of migrant workers also shall enjoy equality with national of States of employment in having access to these services. Migrant workers shall enjoy sametreatment for protection of dismissal, access to public work scheme, unemploymentbenefit, and access to alternative employment in the matter for loos or termination of work. After sacking a migrant worker has to rights to complainbefore the authority in the state of employment.<sup>89</sup> They shall have the right to equal treatment with nationals and be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law<sup>90</sup>

'No one wants to eat kimchi made in China. Koreans want made-in-Korea food. Migrant workers are willing to work here. Protecting migrant workers should be implemented not just in law, but in practice.' said the researcher. 'This would be a win-win mechanism.'<sup>91</sup>

#### **IV. Actual Limitations of the Protection of the migrant worker's rights in Korea.**

##### **4.1 Fact findings**

1. Lack of national strategy plan for discrimination and social incorporation.
2. Insufficiency of monitoring workplace by regular basis under the Ministry of Justice.
3. Deficiency of law for diversity multiculturalism and anti-discrimination.
4. Shortage of law to prevent migrant worker and their families rights by the police, coast guard, immigration officer, employers, and health authorities and so on.
5. Article 18 of Employment Permit System act has made great hindrance for a migrant worker.
6. Starved of ratification of ILO convention also make difficulties toward the migrant worker's' rights.
7. Inadequacy of clear guidelines regarding violation ofEPS act.

##### **4.2With regard to Govt. of Republic of Korea:**

1. Increasing comprehensive national anti-discrimination legislation, with provisions to prohibit direct and indirect discrimination on ground of actual or presumed nationality or national origin andnon-citizen to guarantee supportive judicial, organizational and other remedies.
2. Elaborating a National Strategy and Plan of Action addressing migration, discrimination, and integration.
3. Promotion of respect for diversity and multiculturalism, combating negative stereotypes and misinformation regarding foreigners, exercising anti-discrimination actions, dispiritingbiased treatment by authorities.
4. Governments must introduced laws, regulations, policies and procedures to prevent abuses of migrant workers and their families by the immigration officers.
5. Governments must introduced laws, regulations, policies and procedures to prevent abuses of migrant workers and their families by the coast guard.
6. Governments must introduced laws, regulations, policies and procedures to prevent abuses of migrant workers and their families by the by the police.
7. Governments must introduced laws, regulations, policies and procedures to prevent abuses of migrant workers and their families by the by employers.
8. Governments must set in place laws, policies and measures to prevent abuses of migrant workers and their families by schools and educational authorities.
9. Governments must introduced laws, regulations, policies and procedures to prevent abuses of migrant workers and their families by the by health authorities.
10. Ratify, incorporate fully into domestic law and implement in policy and practice the International Convention on the Protection of the Rights of All Migrants Worker's and Members of Their Families to ensure that the rights of all migrant workers will be respected and protected in Korea.
11. Ratify and implement ILO conventions, in particular the four fundamental ILO Conventions which Republic of Korea has not yet ratified: no. 87 (Freedom of Association and Protection of the Right to Organize), no. 98 (Right to Organize and Collective Bargaining), no. 29 (Forced or Compulsory Labour), and no. 105 (Abolition of Forced Labour);
12. Ratify ILO Convention No. 181

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<sup>88</sup> Ibid Art. 43.

<sup>89</sup> Ibid Art. 54.

<sup>90</sup> Ibid Art. 18.1.

<sup>91</sup><http://www.lexisnexis.com/ap/academic/?lang=kr>

#### **4.3 With regard to female migrants**

13. For domestic violence, The Korean Government should mitigate through application for naturalization. Without marriage, the woman who belongs to child with Korean men should be entitled to residency regardless their marriage status.
14. The Government should make and arrange to give an opportunity for foreign spouse to learn Korean language and take initiative for cultural and social integration program. Government also takes initiative for providing information regarding health care system in the Republic of Korea.
15. For domestic violence, the Government must provide legal help for the victims. Foreign migrant woman must have to rights to consul and access the interpretation facilities in police stations and the courts as well.
16. Government should control the activities of international marriage agency and broker. Some migrant woman victimize by the broker and international marriage agency.

### **V. Conclusion**

There is a significant increase lately in discrimination and violence directed against migrants. Evidences suggest that the violations of migrant rights are also widespread and common. According to the UN Special Rapporteur Ms. Gasbricla Rodriguez Pizarroo, there is an upsurge in tolerance, discrimination, racism and racism in the form of outright violence against migrant in practically every region of the world. The unequal globalization, increase in irregular migration and trafficking, inadequate legal infrastructure have added further to the vulnerability of the migrants.

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