
Legislation and Policies for The Employment of Foreign Worker in Korea

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Abstract

From the 1990s onwards, labour importation to Korea began with the introduction of industrial trainee system which later faced criticism for human and labour rights violations. From a constitutional perspective, this study aims to critically examine prominent trends of Korea laws, institutions, policies and judicial decision on foreign workers in Korea, especially unskilled workers, and to provide recommendation to remedy the problems discussed. The research method used in this research is normative law research method to conduct a literary review because of the characteristics and traditions of law. The approaches used in legal research are the statute approach, the case approach, and the conceptual approach. The result of data analysis is presented in the form of informal method by description. The results of this research are unskilled migrant labourers in Korea consist of unskilled workers and working visit migrants. Working visit is granted to those who are overseas Koreans and qualified for conditions stated in the addenda of the enforcement decree of the Immigration Act. Korea abolished the industrial trainee program and adopted "employment permit system" under "the act on foreign workers' employment, etc." that came into force on 17 August 2004.

Keywords: Employment; foreign worker; unskilled workers

I. INTRODUCTION

Employment is considered as a key component of socio-economic status, or the position held by an individual or group in society that determines that individual or group's access to various resources (Park, Chan, & Williams, 2016). The reported shortage of skilled workers in certain fields demands a better understanding of the companies' needs and of the labour market conditions (Blanco & Rodrigues, 2009).

Employment may be one such arena. Employment is thought to be important for persons' livelihood because it increases financial security and promotes higher living standards, which may stimulate economic activity (Park et al., 2016). Despite such economic advantages to organizations, occupational health scholars suggest that temporary employment may have negative consequences on the workers (Sakurai, Nakata, Ikeda, Otsuka, & Kawahito, 2013). The distribution of costs and benefits among various interest groups matters because the likelihood of passage and successful implementation often depends on the relative configuration of winners and losers from a policy (Tvinnereim & Ivarsflaten, 2016).

The issue is of relevance, especially in developing countries, where the amount of work involved in household duties is greater than in developed countries {clothes are washed by hand, food must be prepared on a daily basis due to lack of refrigeration, water and firewood have to be carried over long distances, etc., (Latorre, 2016)}. South Korea, where construction constitutes a substantial portion of the economy, used to be a source country for migrant workers, and its citizens were willing to immigrate to well-developed countries (Korkmaz & Park, 2018). Foreign-born workers have been shown to

experience poorer working conditions than native born workers. Yet relationships between health and educational mismatch have been largely overlooked among foreign-born workers (Dunlavy, Garcy, & Rostila, 2016).

The literature on the employment effects of buyouts has found mixed effects on net employment at the firm level (Olsson & Tåg, 2018). Foreign participation may have a composition effect in that foreign wage differentials directly contribute to inter-enterprise wage inequality. Competition and technology externalities from multinationals may also have indirect wage spillover effects (Chen, Ge, & Lai, 2011).

The “Act on Foreign Workers Employment, etc.” of Korea defines “Foreign Workers” as “those who do not have the nationality of the Republic of Korea and work or intend to work in business or work placer located in the Republic of Korea for the purpose of earning wages. Foreign workers in Korea consist of two groups: foreign nationals with alleged Korean ancestry who qualify for “Overseas Nationals (F4-Visa)” or “Working Visit (H-2 Visa); and the others who qualify for the E-9 non-professional employment visa. Considering the number of unauthorized migrant workers, the estimate of the total population for foreign workers in Korea is 1.3 million by November 2017.

From the 1990s onwards, labour importation to Korea began with the introduction of industrial trainee system which later faced criticism for human and labour rights violations. Afterwards, in an attempt to facilitate in inflow of foreign labour, employment permit system was introduced. However, the demand for legislative improvement keeps growing due to the inherent problems and managerial issues of the employment permit system. In particular, voice and increasingly being raised in favor of protection and promotion of rights of the foreign workers as direct object of the legal system. Nonetheless, the government and the legislature as well as the judiciary, seem reluctant to come together and solve the problems. Their defensive attitudes are hindering the opportunity to address the underlying principle that foreign workers are also human beings, not mere resources to satisfy economic and practical needs.

The Constitutional Court of Korea has announced that fundamental rights such as human worth and dignity, the right to pursue happiness and equality can be entertained by foreign individuals as “the rights inherent to human being” by nature¹. Particularly, in regard to whether to acknowledge the right to work for foreign workers, it ruled that “the right proper condition necessary for securing human dignity², and hence their rights to a free choice of workplace³. The Constitutional Court includes “the right proper conditions of work” as well as right to the employment opportunity in the right to work and elaborates that “the right to proper working conditions” is guaranteed to foreign workers as it is intended for protection against violations of human dignity and is about the right to safe and healthy working environments, just remuneration, and guarantee of proper working conditions⁴. It also said that working condition means the terms and conditions of labour such as wage, payment methods, working hours and breaks, according to which the workers provide the labour and receive wages⁵. However, a recent decision on departure guarantee insurance indicated that level of protection can differ for nationals and foreigners regarding the rights to work, drawing the line between the level of protection of fundamental rights and acknowledgement of the rights of foreign workers⁶. Eventually, the constitutional court has delivered an unsubstantiated judgment that fundamental rights of foreigners can be limited more easily than those of nationals, further weakening constitutional protection if foreign workers⁷.

This paper, from a constitutional perspective, aims to critically examine prominent trends of Korea laws, institutions, policies and judicial decision on foreign workers in Korea, especially unskilled workers (E-9), and to provide recommendation to remedy the problems discussed. It also seeks to make suggestions for foreign nationals who work or intend to work in Korea to understand and handle the challenges they may face in Korean labour marker.

1. Kccourt 2001. 11.29. 99Heonma494

2. Kccourt 2007. 8. 30. 2004Heonma670

3. Kccourt 2011. 9. 29. 2007 Heonma1083 etc.; Kccourt 2011. 9. 29. 2009 Heonma 351

4. Kccourt 2007. 8. 30. 2004Heonma670

5. Kccourt 2003. 7. 24. 2002Heonba51

6. Kccourt 2016. 3.321. 2014Heonma367

7. Kim, Jihte, The Right of Immigrants, - Inequality and ‘Ethical Territoriality-, Constitutional Law, Vol. 22. No.3 (2016), p. 225

II. METHOD OF RESEARCH

The research method used in this research is normative law research method to conduct a literary review because of the characteristics and traditions of law. The approaches used in legal research are the statute approach, the case approach, and the conceptual approach. The result of data analysis is presented in the form of informal method by description.

III. RESULTS AND DISCUSSION

Current Status of Foreign Employment and Process

Current Status of Foreign Workers in Korea

Foreign Workers

By November of 2017, the estimate of foreign residents in Korea is 2,130,542, accounting for 3% of the total population of Korea. Among these, immigrant workers with work visa amount to 577,000, consisting of 48,000 of skilled workers and 528,000 of unskilled human resources, which are categorized into the following groups: approximately 277,000 unskilled workers (E-9), 15,000 maritime crew (E-10), and 235,000 people with a working visit eligible for overseas in the labour market, there are 1,300,000 foreign workers in Korea including unauthorized workers (246,000)⁸.

Table 1
Types of Immigration Status

Status of Stay	Total	Overseas National (F-4)	Unskilled Worker (E-9)	Working Visit (H-2)	Permanent Residency (F-5)	Student (D-2)	Long-term Residency (F-2)	Etc.
Number	23,130,542	412,450	277,005	235,804	136,002	91,893	40,409	936,929
Rate	100%	19.4%	13.0%	11.1%	6.4%	4.3%	1.9%	44.0%

(2017.11.30., per capita)

Table 2
Current Status of Workers with Work Visa

Type	Total	Skilled Worker	Unskilled Human Resource
Total Number of Workers	577,445	48,732	528,713

(2017.11.30. per capita)

Table 3
Current Status of Unskilled Human Resources

Total	Unskilled Worker (E-9)	Maritime Crew (E-10)	Working Visit(H-2)
529,713	277,025	15,854	235,804

(2017.11.30., per capita)

Table 3
Number of Authorized Workers over Country

Total	P. R. China	Vietnam	Cambodia	Indonesia	Uzbekistan	Nepal	Philippines
	229,780	48,221	38,846	34,509	33,801	32,029	28,992
	Thai	SriLanka	Myanmar	Bangladesh	America	Mongolia	Pakistan
577,445	25,801	24,272	22,272	10,447	10,177	6,881	3,921
	Canada	Kyrgyzstan	England	Timor	Japan	Russia	Etc.
	2,588	2,522	2,275	1,804	1,182	592	16,512

8. Ministry of Justice, Korea Immigration Service Monthly Report (2017. 11), p. 21, 23

Overseas nationals (F-4)

The majority of foreign workers in Korea are “overseas nationals”, who have acquired the right of permanent residence in a foreign country or are residing in a foreign country with a view to living there permanently; 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 (Article 2 of act on the immigration and legal status of overseas Koreans). Overseas nationals can enter Korea with F-4 visa, report their place of residence and stay in Korea up to 3 years; they can also seek jobs or work freely without limitations, with the exception of jobs for unskilled labourers. Overseas nationals do not need to get an entry or re-entry permit during their stay. By November 2017, there are 410,000 overseas nationals resident in Korea⁹.

Working Visit (H-2)

Unskilled migrant labourers in Korea consist of unskilled workers (E-9) and working visit (H-2) migrants. Working visit is granted to those who are overseas Koreans and qualified for conditions stated in the addenda of the enforcement decree of the immigration act. These workers are engaged in jobs in various fields such as unskilled labour works of agriculture, livestock industry or service industry like restaurant jobs. In contrast to those under the employment permit system, foreign workers with working visit can choose employment freely as long as the law allows. Working visit is virtually the same as eligibility for work permit system in the sense that the number of workplace transfers is not limited. Furthermore, there is no limit on how many times a re-entry permit can be renewed, hence H-2 holders can work freely and enter into/depart Korea whenever they want to. Migrant workers with working visit are now than 230,000 by November 2017¹⁰.

Current Status of Indonesian Migrant Workers in Korea

By November 2017, foreign residents in Korea are approximately 2,130,000. Among these, long-term residents staying more than 91 days are about 1,580,000, with 46,212 Indonesia nationals. Since 2013, the number of Indonesia nationals in Korea remains more or less the same that is about 46,000¹¹. 34,509 of these people are granted work permits, apparently mostly as unskilled workers. Indonesia is the 4th largest country in terms of the number of foreign employees in Korea. It is ranked third if China, with mostly overseas Koreans, is excluded. A great number of Indonesia nationals, estimated 12.4% of the total registered unskilled migrant workers, are now hired in Korea. In addition, there are 1,469 Indonesia nationals studying in Korea, including 185 students studying Korean language¹².

History of Foreign Employment in Korea

Industrial Trainee System

Since the 1990s, Korea has suffered a labour shortage in the unskilled labour market. Wage growth due to the development of technology combined with downfall in demand for the unskilled labour in small businesses caused shortage of labour in the market. Korean government had to lift the ban on unskilled labour import and decide to import foreign workers to supply unskilled. In 1991, trainee status was assigned to the foreign workforce by the enforcement decree of ministry of justice, and “industrial technical training program for overseas investment companies” was implemented to import foreign labours. As response to the growing demand for foreign labour, the government allowed small businesses with no foreign investment to participate in the program and utilize foreign workforce. However, the program was abolished as there were many problems such as workers leaving their workplace. In 1994, the industrial trainee system was introduced by private organizations.

However, industrial trainee system also caused various problems as it lacked legal basis and had to follow administrative guidelines instead. It was a distorted system in the sense that obligations and responsibilities between employers and foreign workers were ambiguous, and that it was deviously violating human rights under the name of “trainee”, which was designed to avoid application of labour

9. Ministry of Justice, Korea Immigration Service Monthly Report (2017. 11), p. 4

10. Ministry of Justice, Korea Immigration Service Monthly Report (2017. 11), p. 4

11. Ministry of Justice, Korea Immigration Service Monthly Report (2017. 11), p. 16

12. Ministry of Justice, Korea Immigration Service Monthly Report (2017. 11), p. 30

13. Kccourt 2007 8, 30, 2004 Heonma 670”

law. It was also criticized as de facto human trafficking as private brokers were involved in the outflow of illegal of the workforce.

In the constitutional appeal filed by a foreign trainee in August 2007, the constitutional court of Korea ruled that “the guideline on management and protection for industrial trainee” is unconstitutional as it violates the petitioner’s right to equality stipulated in the constitution. Prior to the constitutional decision, in response to criticism that industrial trainee system has management flaws, violates foreign workers’ human rights and undermines national image, The “act on foreign workers’ employment, etc.” introducing “employment permit system for foreign workers (hereinafter “employment permit system”) was enacted on 16 August 2003 and came into force on 17 August 2004, allowing the employers to legally hire unskilled foreign workers under the direct control of the government.

Introduction of the Employment Permit System

Korea abolished the industrial trainee program and adopted “employment permit system” under “the act on foreign workers’ employment, etc.” that came into force on 17 August 2004. The employment permit system was introduced to facilitate the aims for the government to manage foreign workers in Korea in an organized manner, optimize labour supply and achieve balanced development of the national economy.

The employment permit system requires that employers who have failed to find native workers to legally hire an adequate number of foreign workers. Foreign workers can enter into an employment contract with employees, enter Korea and offer labour at the designated workplace during the contract period.

Process of Employment Permit

The process of foreign workforce selection and introduction for the employment permit system is as follows. Both the sending country and the host country sign the MOU based on the agreement on major policies including quota, and the test of proficiency in Korean is implemented. Then the sending country makes the list of the workers. The list of workers is managed by the host country (Korea). The ministry of employment and labour will issue a document confirming a workforce shortage for the employers unable to find enough Korean workers despite their hiring efforts (the recruiting period must be at least 7 -14 days). According to the permit, the employer will sign the standard employment contract provided visa (E-9 or H-2) is then issued to the employee by Korean consul in the sending country. Foreign workers who concluded labour contract with the employees shall enter Korea and complete employment training before they are allocated to work. However, there is difference in the employment process of foreign workers and overseas nationals. Simplified procedures overseas Koreans are as follows; when the employers make an effort to hire Korean workers and special employment permission is issued, the enter into a contract with the workers and shall report to the authorities.

Policies and Legislation for the Employment of Foreign Workers

Principles on the Employment of Foreign Workers

The employment system of foreign workers in Korea has adopted the employment permit system based upon the principle of prohibition on settlement which means efforts to hire nationals have to be preceded and that foreign employees shall return home when the contract expires. In an attempt to handle various problems with regard to sending labour, employment process and employ

ment realities, it seeks to ensure transparency in the process of selection of foreign workers in the sending country, visa issuance, offering labour in Korea work places, and returning home after termination of the contract. It also clarifies the principle of non-discrimination between countries of origin. These principles are stated express terms in the act on foreign workers’ employment, etc.

Major Issue Regarding Foreign Workers’ Employment

Limitation on the number of workplace transfers

The on foreign workers’ employment requires that unskilled foreign workers (E-9) shall offer labour at a designated employee’s workplace for the contract period. Foreign workers are not allowed to transfer to a new workplace as they want during the contract period without due reasons. Only on the

occasions attributable to the employees not the employees, the workers are allowed to request a workplace transfer.

The constitutional court of Korea ruled that “the 3 times limitation on the number of workplace transfer” in the act does not violate the right to choose a workplace as a fundamental right. There has been a widespread criticism of the decision and related provision of the act¹⁴. National human rights commission of Korea also recommended that the ministry of labour establish an improvement plan for standards of permission regarding workplace transfer of foreign workers¹⁵. It has been long since the UN committee on the elimination of racial discrimination in 2007 expressed concern that there are major barriers to workplace transfers and legal protections of migrant workers under the employment permit system, recommending that the state party take all measures to ensure that migrant workers fully enjoy their rights to work without unfair treatment on the grounds of different nationality¹⁶. It also recommended in 2012 that the state party abolish the limitation of the migrant workers’ ability to change their place of work¹⁷. ILO urged Korea to amend the inflexibility of the employment permit system that limits workplace transfers of foreign workers¹⁸, Amnesty international strongly criticized that the employment permit system in Korea which limits workplace transfer of the foreign workers is a de facto human trafficking¹⁹.

Payment of Departure Guarantee Insurance (Severance Pay After Departure)

Article 13 of act on foreign workers’ employment, etc. regulates the “departure Guarantee insurance” system. The departure guarantee insurance makes the employers save a certain amount of money as retirement pay every month based on the wage stated in the labour contract to prevent delay of wages, temporarily reducing burden for the employers and preventing non-payment of severance pay to the employees. The problem is that such severance payment savings are not instantly accessible to the workers even when there are reasons for payment and that the employees are paid on departure from Korea.

Severance pay is deferred payment of wages, functioning as insurance for the aged and unemployment insurance for the retired in the middle, hence the foundation for the satisfaction of basic human needs²⁰. Nevertheless, the constitutional court of Korea is drawing out logically incompatible decisions: the severance pay is the basic foundation for human survival: it is inevitable that the departure guarantee insurance as a severance pay be received on departure of the employee. In particular, it ruled that “foreigners do not enjoy the right to choose workplace to the same level as nationals although their right holder status is acknowledge²¹, in other words, foreign workers are recognized as holders of fundamental rights in principle, but their right are not fully protected from violations to the same level as those of nationals. As the constitutional court’s decisions relativized the fundamental rights according to the nationality of the right holders, foreign nationals in Korea ended up being granted only a nominal status of right holders, not an actual legal ability to fully enjoy the rights²².

Repatriation Assistance Program for Foreign Workers

The Principle and Current Status of Repatriation of Foreign Workers

Foreign employment policy in Korea relies heavily on the principle that foreign workers shall be repatriated on expiration of the contract period. As most foreign workers occasionally wish to stay in Korea after the period of stay expires, the number of illegal aliens is constantly increasing, intensifying

14. Kim, Namjin, Working Place Transfer Right of Foreign Workers For the human Rights Security, Journal of Study on the Law, Vol. 62 (1026) ;Lee, Boo-Ha, The Freedom of Choice to foreign Worker’s Workplace, World Constitutional Law Review Vol. 17 No.3(2011), pp.55.

15. National Human Rights Commission Korea Recommendation (2008/1/10)

16. OHCHR, CERD/C/KOR/CO/14, 01.Oct. 2007

17. OHCHR, CERD/C/KOR/Co15-16, 23.Oct.2012, p. 3

18. ILO Experts on the Application of Convention and Recommendations (CEACR), 1958 (No.111), ROK, 2014

19. Amnesty International, ASA 25/004/2014, pp. 49.

20. Kccourt 2016/3/31, 2014 Heonma367

21. Kccourt 2011/9/29, 2007 Heonma1083

22. Same opinion, Kim, Jihye, op. cit. p. 236

conflicts with the government that tries to return the foreign workers to their countries of origin. While workers with working visit status are actually allowed to stay permanently, under designated circumstances, because working visit system is a de facto work permit system, period of stay under the employment permit system cannot exceed 9 years and 10 months, which is its fullest extent when the workers cannot hold optimistic job prospects, not to mention that it is a major life decision putting an end to social relationships built throughout their young and middle-aged years. Furthermore, they are likely to suffer from lack of competence in their home countries as they were engaged in unskilled labour in Korea. Confronted with this harsh reality, many foreign workers choose to remain in Korea and become illegal aliens.

Repatriation Assistance Program

Significance of Repatriation Assistance

The underlying principle of current foreign employment system in Korea is that imported labour temporarily remedies labour shortage until the market recovers supply of native workers, ensuring that foreign workers do not fill the positions that could otherwise be filled by Korean workers in the domestic labour market. Therefore, the objective for the repatriation support program aims to support current foreign employment system of Korea that, in principle, denies acquisition of permanent by the foreign workers.

Laws and Institutions Regarding Repatriation of Foreign Workers

The act foreign workers' employment, etc. does not have any provision in regard to repatriation assistance for foreign workers. Article 13 regulates the departure guarantee insurance and trust, article 15 the repatriation expense coverage, and article 16 measures for the employers to settle financial obligations with when foreign workers departs from Korea. However, these are the express provisions that address general rules of workers' rights, not institutional grounds for actual repatriate support. In this regard, no laws or institutions implementing assistance for foreign workers exist in Korea.

Education Programs for the Settlement of Return Migrants

Specific policies and institutions are being operated in accordance with programs designed by public institutions based on administrative guidelines of government labour agencies. It was only after 2004 when a consortium was established to actually launch a reparation assistance program through education of practical skills²³. The specific examples are voluntary reparation program of human resources development services of Korea and the repatriation program of Gyeong-Gi provincial office.

Human resources development services of Korea have implemented support programs for foreign employment since the employment permit system was introduced in 2004. It developed a repatriation assistance program to prevent illegal stay of foreign workers who wish to work for Korean companies in their countries of origin. HRD Korea also facilitates training courses for returning foreign workers who have stayed in Korea for more than 3 years (E-9) or re-entering "diligent" workers (E-9)²⁴, and promotes information sharing by organizing networks among return migrant workers.

IV. CONCLUSION

Based on the discussion above, it can be concluded that unskilled migrant labourers in Korea consist of unskilled workers (E-9) and working visit (H-2) migrants. Working visit is granted to those who are overseas Koreans and qualified for conditions stated in the addenda of the enforcement decree of the immigration act. Korea abolished the industrial trainee program and adopted "employment permit system" under "the act on foreign workers' employment, etc." that came into force on 17 August 2004. The employment system of foreign workers in Korea has adopted the employment permit system based upon the principle of prohibition on settlement which means efforts to hire nationals have to be preceded and that foreign employees shall return home when the contract expires.

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23. Park, Neunghoo, Op. cit, Report, p.25

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