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Aliens and Labour Laws in
East and Southeast Asia:
Labour Rights of
Low-skilled Migrant Workers in
Singapore, South Korea and Japan

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Summary

Japan has not officially accepted low-skilled foreign workers. Instead it has opened ‘the backdoor’ and accepted ‘industrial trainees’. They are not given the status of workers and they are thus out of protections of labour laws. There have been many media report about abusive cases they suffered. In spite of that, the Japanese government has no intention to abolish the scheme.

What kind of labour immigration schemes have other countries surrounding Japan adopted? Low-skilled workers constitute the bulk of migrant workers and they are strictly regulated nonetheless replete with human rights violations. This thesis examines three countries’ labour immigration legislation in East and Southeast Asia: Singapore, South Korea and Japan. Singapore has the strict ‘rotation principle’: female low-skilled migrant workers are subject to mandatory pregnancy test under threat of deportation. Once South Korea had an ‘industrial trainee system’ as today’s Japan has, but it has abolished the system and established a human-rights-oriented scheme. Nonetheless, nearly half of migrant workers remain in an irregular situation. Japan’s ‘industrial trainee system’ will also be examined from a human rights perspective.

This thesis intends to answer the following questions:

- (a) Should Japan open its labour market for foreign low-skilled workers?
- (b) How are migrant workers treated in other countries surrounding Japan?
- (c) What kind of labour immigration policies do those countries have and how are they consistent (or inconsistent) with fundamental human rights treaties?
- (d) Finally, if Japan should change its labour immigration policy, which model is appropriate?

This thesis is divided into four chapters. Chapter 1 introduces Japan’s labour immigration policy and an overview of labour migration in Asia. Chapter 2 investigates the fundamental human rights instruments relevant to migrant workers and the main conventions on migrant workers. Chapter 3 examines the national legislation of the three selected countries; *i.e.* Singapore, South Korea and Japan. Chapter 4 is the conclusion which also contains recommendations to the Japanese government on an appropriate model for labour immigration policy.

Preface

I am very grateful to

- Lee Swepston, my supervisor, for your valuable comments and advice,
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Abbreviations

AMT	Associated Management Training, Japan
ASEAN	Association of Southeast Asian Nations
C***	ILO Convention Number ***
CCPR	International Covenant on Civil and Political Rights
CEACR	Committee of Experts of Application of Conventions and Recommendations, ILO
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	International Covenant on Economic, Social and Cultural Rights
CFA	Committee on Freedom of Association, ILO
EPS	Employment Permit System, Korea
HRW	Human Rights Watch
IET	Individual Enterprise-based Training, Japan
ISTP	Industrial Skill Trainee Programme, Korea
ITP	Industrial Trainee Programme, Korea and Japan
ILO	International Labour Organization
JIL	Japan Institute of Labour Policy and Training
JITCO	Japan International Training Cooperation Organization
LSIO	Labour Standard Inspection Office, Japan
MHLW	Ministry of Health, Labour and Welfare, Japan
MoM	Ministry of Manpower, Singapore
MoU	Memoranda of Understanding
MWC	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
NGO	Non-governmental Organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
SMB	Small and Medium-sized Business
SMJ	Solidarity Network with Migrants Japan (NGO)
UN	United Nations

1. Introduction

1.1. Japan's Labour Immigration Policy

The Japanese government has not officially accepted low-skilled foreign workers. It has expressed its concerns that accepting foreign low-skilled workers may yield negative impacts on society and economy.¹ Therefore, there are no working-visa categories for purpose of employing low-skilled foreigners. Japan has closed 'the front door' toward foreign low-skilled workers while opening 'backdoor', establishing two main channels to receive foreign low-skilled workers: one accepts *Nikkeijin* and the other *industrial trainees* and *technical interns*.

Nikkeijin means ethnic Japanese, and mainly refers to descendants of earlier Japanese emigrants, mostly from Brazil and Peru. In the late 1980s, Japan enjoyed the economic booms and went through labour shortage, mostly in manufacturing and construction. In 1990, the revised the Immigration Control and Refugee Recognition Act (hereinafter Immigration Act) granted second and third generation of Japanese emigrants a renewable stay, each grant up to three years, with unlimited access to labour market. They are subject to labour laws and they can bring in their family. They are allowed to apply for permanent residence permit when they have resided in Japan more than five years continuously and eventually nationality. However, unlike *Aussiedler*, the ethnic German accepted by the German government, they are given neither citizenship nor housing arrangement by the Japanese government. In 2006, the total number of the registered foreign residents in Japan is 2,084,919. Those from Brazil and Peru amounted to 371,700 people and comprised 17.8 per cent of the total registered foreign residents.²

The Industrial Training Programme (ITP) was established in also 1990 and under which many foreigners provide cheap low-skilled labour in Japan as trainees or interns. Numerous media reports have been made about their extremely low wages, long working hours (without pay), confinement, contact/mobility restriction, passport/bankbook withdrawal, and physical/sexual abuse. Journalists and activists call the ITP "hotbeds of slave labour"³ and *the US Trafficking in Persons Report* refers to it for the

¹ For example, *Report on Employment of Foreigners* issued by the Ministry of Health, Labour and Welfare (2002) states that low-skilled labour immigration would increase financial costs for social integration of migrants, among other concerns.

² *Statistics of Registered Foreigners 2006*, the Ministry of Justice, available online, <www.moj.go.jp/PRESS/070516-1.pdf>, visited on 1 November 2007.

³ Yasuda, K. (2007), p. 140, and see also *the International Herald Tribune*, 26 July 2007, "Slave labour" case makes Japan rethink foreign trainee programme', available online, <www.ihf.com/articles/2007/07/26/business/sxlabor.php>, visited on 15 November 2007.

first time in 2007.⁴ The total number of such trainees and interns is estimated around 130,000 - 160,000 by activists and journalists.⁵

On the other hand, the Japanese government issues 14 categories of work-permit visas, which are deemed as high-skilled occupations, regulated by the Immigration Act: professor, artist, religious activities, journalist, investor/business manager, legal/accounting services, medical services, researchers, instructor, engineer, specialist humanities/international services, intracompany transferee, entertainer and skilled labour. The total number of all the working visas except entertainer⁶ issued in 2006 amounted to 33,132. Entertainer visas were issued 48,249 and trainee 92,846.⁷ With *Nikkeijin* added, it can be said that a huge majority of foreigners engage in low-skilled jobs in Japan.

In spite of these facts, the Japanese government has no intention either to abolish the ITP or to establish working visas for low-skilled migrant workers. Some scholars criticize the ITP but only a few scholars argue establishment of such working visas. Others argue that it would cause influx of foreigners and social friction consequently. These arguments, however, sound speculative and neglect the reality, the plights of trainees/interns.

There are a few questions for this study. The main question is “Should Japan open its labour market for foreign low-skilled workers?”. This must be examined from the perspective of human rights of migrant workers. Another question is how migrant workers are treated in other countries surrounding Japan, *i.e.* East and Southeast Asian countries? What kind of labour immigration policies do they have and how consistent (or inconsistent) with fundamental human rights treaties. Finally, if Japan should change its immigration policy, what kind of model is appropriate?

1.2. Labour Migration in East and Southeast Asia

Take a look at labour migration of other countries surrounding Japan. Today, within East and Southeast Asia, many people are moving to foreign countries to look for higher-paying jobs. According to *the United Nations*

⁴ “Some migrant workers are reportedly subjected to conditions of *forced labour* through a ‘foreign trainee’ program” (emphasis added), *available online*, www.state.gov/g/tip/rls/tiprpt/2007/82806.htm, visited 14 November 2007.

⁵ There is no actual data on the number of technical interns. A federation of NGOs criticises the government, “It is neglect of the immigration authority that there is no statistics of actual data”, SMJ (2006), p. 37.

⁶ Entertainer visa has been criticised as a channel of trafficking in women into Japan. The government tightened the rules in 2005 and 2006 respectively, so the number of the visa issuance plunged from 134,879 of 2004.

⁷ Immigration Bureau Statistics, www.moj.go.jp/PRESS/070518-1.pdf, visited on 16 January 2008.

(UN) *World Migrant Stock 2005*, the estimated number of international migrants (including refugees) is 191 million worldwide and 53 million in Asia.⁸ With regard to “migrant workers, immigrants and members of their families”, the ILO estimates that there are 7 million in South and Southeast Asia while 20 million migrant workers, immigrants and members of their families across Africa, 18 million in North America, 12 million in Central and South America, 7 million in South and East Asia, 9 million in the Middle East and 30 million across all of Europe.⁹ However, this estimated “7 million in South and Southeast Asia” is considered “conservative”.¹⁰

According to a paper issued by the International Labour Organization (ILO)¹¹, some characteristics of labour migration in Asia are:

- (a) the vast majority of migrant workers is comprised of low-skilled workers;
- (b) labour migration is mediated by employment agencies, both in countries of origin and countries of destination, with increasing migration costs;
- (c) it is strictly temporary, with limited or no possibility for long-term integration; and
- (d) it is highly regulated, but nonetheless replete of abuse and rights violations.

1.3. Labour Immigration Policies

Some East and Southeast Asian countries with rapid economic growth have actively accepted significant amounts of workers from outside their borders. Hong Kong, Singapore, Taiwan, South Korea, Malaysia and Japan are usually considered as such countries.¹² Among them, it is only Japan which has not officially accepted low-skilled migrant workers. With ‘the back-door policy’, Japan accepts low-skilled foreign labourers not as workers.

South Korea had a similar system, but under pressure from civil society, the government abolished it in 2006. Instead, today’s Korea accepts foreigners as ‘workers’ with more human-rights oriented mechanisms invented. Nevertheless, nearly half of migrant workers remain in an irregular situation

⁸ Available online, <<http://esa.un.org/migration/index.asp?panel=1>>, visited on 9 December 2007.

⁹ ‘Current Dynamics of International Labour Migration: Globalization and Regional Integration’, About MIGRANT web site, ILO, available online, <www.ilo.org/public/english/protection/migrant/about/index.htm>, visited on 9 December 2007.

¹⁰ Young, K. (2006), p. 17.

¹¹ ‘ILO Asia-Pacific Regional Symposium for Trade Union Organizations on Migrant Workers, 1999, Conclusions and Recommendations’, available online, <www.ilo.org/public/english/dialogue/actrav/genact/socprot/migrant/migrant1.htm>, visited on 1 December 2007.

¹² Ball, R. and Piper, N. add Brunei to them. See Ball, R. and Piper, N. (2006), p.215.

and NGOs claim that migrant workers' human rights are still violated under the new Employment Permit System.

Many governments today welcome high-skilled workers such as IT technicians and financial specialists, while they also need a significant number of low-skilled workers such as construction workers and domestic helpers. Governments give the former favourable terms in admission and working conditions. To the contrary, governments give the latter restrictive terms in admission and try to limit their freedoms while working in their countries. This can be called 'the selective system'.

Governments want to preclude low-skilled migrant workers from settling down in their territories, thus most of them are given temporary resident status. This is called 'the rotation principle'.¹³

Singapore has accepted a significant number of migrant workers with the rigorous 'selective system' and the strict 'rotation principle'. Under this policy, low-skilled migrant workers are not allowed to bring in their family, and are given limited or no possibility to get permanent residence permits and eventually citizenship. Female low-skilled migrant workers must have pregnancy test every six months under threat of deportation.

This study will examine how national labour immigration legislations affect migrant workers' human rights in three selected countries in this region; namely Singapore, South Korea and Japan.

Singapore is chosen as a country indicative of 'selective and temporary' immigration policy, Japan as a country persisting in 'the back-door policy' and South Korea as a country which has shifted from 'the back door policy' to 'the front-door policy'.

1.4. Categories of Migrant Workers

Among migrant workers, there are four major distinctions:

- (a) regular migrants and irregular migrants;
- (b) low-skilled workers and high-skilled workers;
- (c) temporary migrants and permanent migrants; and
- (d) women and men.¹⁴

In order to examine national legal systems on labour immigration, this study will be limited to legal migration, *i.e.* regular, low-skilled and temporary

¹³ 'The rotation principle' was originally intended in the Gastarbeiter Programme in Germany (1955-73). It limited the length of time during which foreign workers could stay in Germany, and once this allotted time had run out, the foreign workers were supposed to return to their home countries, to be replaced by new ones.

¹⁴ According to the UN World Migrant Stock 2005, *supra* note 8, female migrants constitute 49.6 per cent worldwide and 44.7 per cent in Asia respectively.

migrant workers of both sexes. At the same time, necessary attention will be paid to migrants in an irregular situation.

1.5. Low-skilled Migrant Workers

In this thesis there is no clear definitions of high-skilled workers and low-skilled workers. Some scholars classify those with a certain years of schooling into 'highly skilled workers'¹⁵ but in this thesis 'high-skilled migrant workers' include so-called professionals, talents and those with qualified skills irrespective of their educational backgrounds, and antithetical to 'low-skilled migrant workers'.

Low-skilled migrant workers by far outnumber the high-skilled. For example, in Singapore in 2006, Work Permit holders (low-skilled workers) took up 86.6 per cent of the all working visas (Employment Pass and Work Permit) holders.¹⁶ This is not only the case with Asia. According to P. Wickramasekara, only 11.7 per cent of all work permit holders was comprised by professionals in 25 EU countries in 2005.¹⁷ A great majority of migrant workers are low-skilled workers.

On the rotation principle, low-skilled workers are temporary residents in countries of employment, and are more vulnerable under threat of deportation. Governments are more concerned with controlling them than protecting them. Low-skilled workers have less ability to negotiate with employers and agencies than high-skilled workers, so they are more likely to be subject to exploitation by brokers, employers and governments even though they are legal migrants.

1.6. Regular Migrants and Irregular Migrants¹⁸

'Illegal migrants' were once a residual category, referring to people entering and working in a country without legal authorization. However, 'illegal' has a normative connotation and conveys the idea of criminality. Thus, the 1994 International Conference on Population and Development recommended the term 'undocumented'; but this is incomplete, since it does not cover migrants who enter the host country legally with tourist documents but later violate their conditions of entry by taking a job, or those with working visas but overstay the periods. International Symposium on Migration in Bangkok

¹⁵ See Martin, P. et al. (2006), pp. 55-57.

¹⁶ See Table 2 in Chapter 3.1. of this thesis.

¹⁷ His presentation in JIL Workshop (2007), see www.jil.go.jp/foreign/event_r/event/documents/2007sopemi/ilo.pdf, p. 11, visited on 1 December 2007.

¹⁸ This section is based on ILO (2004), p. 11.

in April 1999 recommended the term ‘irregular’. Irregularities in migration can arise at various points; departure, transit, entry and return.

1.7. Migrant Workers’ Rights

As a human being, a migrant worker has many different kinds of human rights as well as rights particular to a worker and a migrant, with some restrictions and limitations imposed as an alien. This study will focus on their labour rights, because many employment practices in those countries can lead migrant workers into forced labour.

1.8. Sources

This present thesis is based on literature, primary and secondary sources including articles and researches in the field of labour migration as well as legal documents and academic literature, written in English or Japanese. The recent data regarding labour immigration in Singapore and South Korea rely on the documents presented in a workshop hosted by the Japan Institute for Labour Policy and Training (JIL) in March 2007.¹⁹ This is because I cannot read the Korean language, and the Singaporean government does not release any official statistics on foreign labour.²⁰

1.9. Structure

The following Chapter 2 will examine international human rights instruments of importance to migrant workers, including the two main ILO Migrant Conventions and the UN Migrant Convention. Chapter 3 will take up each country’s national legislation and practices on migrant workers, and examine them under human rights conventions. As conclusions, recommendations will be made to the Japanese government in Chapter 4.

¹⁹ Hereinafter referred as JIL Workshop (2007).

²⁰ Yoo, K. et al. (2004), p. 239.

2. International Instruments

2.1. Fundamental Instruments²¹

The position of migrant workers is connected to their status as aliens. Throughout history, aliens have always been treated differently from citizens. Generally-speaking, the principal universal human rights instruments protect the rights and freedoms of aliens as well as nationals. In spite of this universality, such instruments contain provisions which refer either specifically to non-citizens or which are clearly inapplicable to them. Applied to aliens, some rights are subject to restrictions.

2.1.1. International Covenant on Civil and Political Rights (CCPR)

2.1.1.1. Distinctions of applicability²²

The CCPR proclaims non-discrimination principle in Art. 2 which ensures to 'all individuals' the rights recognized in the Convention without distinction of any kind. Art. 26 also guarantees to 'all persons' equality before the law and equal protection of the law without discrimination on the same grounds as those listed in Art. 2(1).

On the other hand, political rights laid in Art. 25 are accorded only to 'citizens'. The rights to take part in the conduct of public affairs, to vote and to be elected to political office, and to have access to the public services are not guaranteed to aliens, but it does not mean the Convention prevents States affording political rights to aliens.

Art. 12(1) expressly limits the enjoyment of the right to freedom of movement to those lawfully within the territory of the state. In the case of migrant workers, only regular migrants fall into the applicability. Art. 12(2) ensures to everyone freedom to '*leave* any country', but not to *enter* any country. Art. 12(3) furthermore gives States possibility to make those rights prescribed in the previous paragraphs subject to restrictions.

A provision specifically applicable to aliens is Art. 13, addressed to aliens "lawfully in the territory of a State", or migrants in a regular status. It protects them from arbitrary expulsion by giving them procedural safeguards.

²¹ This section is based on Cholewinski, R. (1997), pp. 40-47.

²² *Ibid.*, pp. 50-55.

Certain provisions in the CCPR allow the rights in question to be restricted for a number of specific reasons. They are aforementioned Art. 12 (freedom of movement), Art. 19 (freedom of expression), Art. 21 (the right to peaceful assembly) and Art. 22 (freedom to association). The ‘limitation clauses’ in those provisions present States with the possibility of restricting aliens’ and migrant workers’ rights: “Invoking these clauses, and provided such measures do not amount to the ‘destruction’ of the rights at stake (Article 5), governments can suspend or limit the exercise by aliens of certain rights”.²³

2.1.1.2. Freedom from slavery

Prohibition of slavery and forced labour (Art. 8) is of great importance to migrants’ working conditions, and applicable to everyone regardless of his/her residential status.

2.1.2. International Covenant on Economic, Social and Cultural Rights (CESCR)

2.1.2.1. Distinctions of applicability

The principle of non-discrimination is found in Art. 2(2):

“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The very next clause Art. 2(3), however, has met with criticism as it undermines the spirit of universality and equality underlying the Covenant.²⁴

“Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

Developing countries may limit the way that ‘economic rights’ are applied to non-nationals.²⁵ However, they are only given the discretion to determine ‘to what extent’ these rights might be guaranteed to aliens.²⁶ The economic rights of non-nationals can only be limited and not taken away altogether.²⁷ In exercising their power under the provision, developing countries are to give ‘due regard’ to ‘human rights’ enumerated in international human

²³ Tardou, M. ‘Migrant Workers’ in Bernhardt, R. (ed.) *Encyclopaedia of Public International Law* (Amsterdam, 1981) Instalment 8, pp. 372-373, cited in Cholewinski, R. (1997), p. 55.

²⁴ Cholewinski, R. (1997), p. 58.

²⁵ *Ibid.*, p. 58.

²⁶ *Ibid.*, p. 59.

²⁷ *Ibid.*, p. 59.

rights instruments, and to ‘national economy’, which means that this power may only be exercised if the condition of the national economy so warrants.²⁸

Apart from Art. 2(3), there are no other specific limitation on the rights of aliens in the Covenant.²⁹ For example, the rights to work and to the “enjoyment of just and favourable conditions or work” are guaranteed to “everyone” (Arts. 6 and 7). The right to form and to join trade unions is also guaranteed to everyone (Art. 8).

However, this Covenant contains a general limitation clause in Art. 4:

“The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

This clause can create temptations for States to justify discrimination against non-nationals or migrant workers.³⁰ However, the introduction or the continuation of discriminatory practices can never be ‘compatible with the nature of these rights’, and ‘the promotion of the general welfare’ can never be achieved at the expense of one section of society.³¹

2.1.2.2. Freedom of choice of work³²

Art. 6(1) of the CESCR recognizes “the right of everyone to the opportunity to gain living by work which he/she *freely chooses* or accepts”. Freedom of choice of occupation, work and places of performance are normally construed with regard to the principle of proportionality and necessity, and may therefore contain certain restrictions or even aspects of compulsion. Several legal documents legitimize a reference to “inherent requirements of a job” and to “requirement of the security of the State”, as in ILO Convention No.111 concerning Discrimination in Respect of Employment and Occupation (C111), Arts. 1(2) and 4. Thus, such job requirements may not in themselves be deemed to be discrimination, but it is not an easy task to establish a clear line making it legitimate to resort to “inherent requirements of a job” and to “requirement of the security of the State”.

2.1.2.3. Family protection and assistance

The CESCR encourages States to accord “the widest possible protection and assistance” to the family, because the family is “the natural and fundamental

²⁸ *Ibid.*, p. 59.

²⁹ *Ibid.*, p. 60.

³⁰ *Ibid.*, p. 61.

³¹ *Ibid.*

³² This section is based on Drzewicki, K. (2001), ‘The Right to Work and Rights in Work’, in Eide, A., Krause, C. and Rosas, A. (eds.), *Economic, Social and Cultural Rights: A Textbook, Second Revised Edition*, pp. 233-234.

group unit of society” (Art. 10(1)). The following paragraph states “Special protection should be accorded to mothers during a reasonable period before and after childbirth” (Art. 10(2)). This article does not distinguish aliens from citizens in its applicability.

2.1.3. International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Art. 1(1) defines discrimination based on race, and the following paragraph serves as a limitation clause (Art. 1(2)):

“This Convention shall not apply to distinctions, exclusions, restrictions or references made by a State Party to this Convention between citizens and non-citizens.”

Art. 1(2) was introduced to encourage governments to accept this instruments, otherwise they would have been reluctant to agree to if they had been unable to withhold certain entitlements from aliens, such as political rights and the right to work.³³ However, this clause does not mean to exclude aliens from the protection of the instruments altogether.³⁴ The CERD is universal in coverage, applying to both citizens and non-citizens, like other human rights instruments discussed.³⁵

2.1.4. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

This Convention does not have any provision distinguishing aliens from citizens. Art. 11(2)(a) obliges States to take appropriate measures “in order to prevent discrimination against women on the ground of marriage or maternity and ensure their effective right to work”:

“To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status”

Taking account of CESC, Art. 7 which guarantees to everyone the enjoyment of just and favourable conditions of work, this clause of CEDAW must be applied to foreign women in the territory of a State Party of both the treaties.

³³ Cholewenski, R. (1997), p. 62.

³⁴ *Ibid.*

³⁵ *Ibid.*

2.2. Instruments developed by the ILO

The International Labour Organization (ILO) has a long history in protecting working people since 1919, with unique tripartite system and strong monitoring mechanisms. Human rights have been described as being at the very heart of the ILO's mission.³⁶ The ILO's principal means of promoting and protecting human rights is through standard-setting.³⁷ Standards consist of conventions and recommendations. Conventions are formal legally binding standards that, once ratified, impose obligation upon States in international law while recommendations are informal, non-binding principles such as guidelines.³⁸ Recommendations frequently accompany conventions. As concerns nationality, in principle ILO standards apply to all workers.³⁹

The ILO has adopted two main conventions concerning migrant workers in 1949 and 1975. These conventions will be discussed later.

In 1998, the ILO established the Declaration on Fundamental Principles and Rights at Work and its Follow-up. This Declaration recalls that all Members, even if they have not ratified the conventions regarded as fundamental, have an obligation arising from the very fact of their membership in the Organization to respect, to promote and to realize in good faith and in accordance with the Constitution, four categories of principles and rights at work.⁴⁰ Each principle has identified the two ILO Conventions as the core labour standards as follows:

(1) Freedom of association and the effective recognition of the right to collective bargaining;

- Freedom of Association and Protection of the Right to Organise Convention (No. 87), 1948 (C87);
- Right to Organise and Collective Bargaining Convention (No. 98), 1949 (C98).

(2) The elimination of all forms of forced or compulsory labour;

- Forced Labour Convention (No. 29), 1930 (C29);
- Abolition of Forced Labour Convention (No. 105), 1957 (C105).

(3) The effective abolition of child labour;

- Minimum Age Convention (No. 138), 1973 (C138);

³⁶ Leary, V. 'Lessons from the Experience of the International Labour Organization' in P. Alston (ed), *The United Nations and Human Rights: A Critical Appraisal*, Oxford: Clarendon Press, 1992, pp. 580 and 582, cited in Cholewinski, R., (1997), p. 80.

³⁷ *Ibid.*, p. 587 cited in p. 81.

³⁸ Cholewinski, R. (1997), p. 82.

³⁹ Bartlomei de la Cruz et al. (1996), p. 182.

⁴⁰ ILO (2004), p. 72.

-Worst Forms of Child Labour Convention (No. 182), 1999 (C182).

(4) The elimination of discrimination in respect of employment and occupation;

-Equal Remuneration Convention (No. 100), 1951 (C100);

-Discrimination (Employment and Occupation) Convention (No. 111), 1958 (C111).

The fundamental principles and rights at work are universal and applicable to all people in all States, regardless of the level of economic development. They thus apply to all migrant workers without any distinction. In addition, the 1998 Declaration makes specific reference to groups with special needs, specifically including migrant workers.⁴¹

2.2.1. Freedom of Association

2.2.1.1. Committee on Freedom of Association

Soon after the adoption of C87 and C98, the ILO came to the conclusion that the principle of freedom of association needed a further supervisory procedure to ensure compliance with it in countries that had not ratified the relevant conventions. In 1951, in agreement with the United Nations Economic and Social Council, the ILO set up the Committee on Freedom of Association (CFA) for the purpose of examining complaints about violations of freedom of association, whether or not the country concerned had ratified the relevant conventions. Complaints may be brought against a member state by employers' and workers' organizations.

The CFA is composed of an independent chairperson and three representatives each of governments, employers, and workers drawn from the Governing Body (the executive body of the organization). If it receives the case and finds that there has been a violation of freedom of association standards or principles by dialogue with the government concerned, it issues a report through the Governing Body and makes recommendations on how the situation could be remedied. Governments are subsequently requested to report on the implementation of its recommendations. The CFA may also choose to propose a "direct contacts" mission to the government concerned to address the problem directly with government officials and the social partners through a process of dialogue.⁴² The CFA does not directly supervise the conventions on freedom of association, it supervises the

⁴¹ ILO (2004), p. 72.

⁴² This section so far is based on 'Committee on Freedom of Association' in the ILO website, www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/CFA/lang--en/index.htm, visited on 1 December 2007.

application of the Constitutional principles involved. Nevertheless, it uses the conventions as a reference.

2.2.1.2. Irregular workers' rights

C 87, Art. 2 provides:

“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

ILO (2004) states that the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the CFA have repeatedly reaffirmed the fundamental rights of workers, including migrants, to *form* and *join* trade unions and to be protected against any act of discrimination on the grounds of trade union activities.⁴³

In the Case no. 2121⁴⁴, a complainant (trade union) claimed that the new law specifically restricts the exercise of rights to organize and strike through the clause of that foreigners may exercise such rights only “when they obtain authorization for their stay and residence” in the country. Mentioning to this case, the CFA explicitly expresses that *irregular* migrant workers have the right to *form* trade unions.⁴⁵

Many countries require trade unions to register with the relevant authority. The CFA comments that “If the conditions for the granting of registration are tantamount to obtaining previous authorization from the public authorities for the establishment or functioning of a trade union, this would undeniably constitute an infringement of C 87.”⁴⁶ As shown later, the South Korean authority has rejected an application of a migrants' trade union on the ground that a majority of its members were irregular migrants.

National legislation frequently imposes conditions on the eligibility of representatives for election, which is considered contrary to the principle of free election.⁴⁷ It is up to the organizations themselves to fix the conditions which they consider appropriate.⁴⁸

However, the CFA and the CEACR tone down on this question. Concerning foreign union officers/executives, they state that such legislation should

⁴³ ILO (2004), p. 73.

⁴⁴ See Cases of the CFA, the 327th Report, Spain, 2002, *available online*, <www.ilo.org/ilolex/english/casframeE.htm>, visited on 1 December 2007.

⁴⁵ ILO (2006), p.46, para. 214:

“With regard to the denial of the right to organize to migrant workers in an irregular situation, the Committee recalled that all workers, with the sole exception of the armed forces and the police, are covered by Convention No. 87, and it therefore requested the Government to take the terms of Article 2 of Convention No. 87 into account in the legislation in question”.

⁴⁶ ILO (2006), p.61, para. 294.

⁴⁷ Bartlomei de la Cruz et al. (1996), p. 192.

⁴⁸ *Ibid.*

permit migrant workers to access to trade union posts *after a certain period of residence in the country of employment*.⁴⁹ It may be interpreted that they guarantee the right to form trade unions to migrants, including the irregular, but admits that governments can restrict the right to migrants who have resided in their territories for a certain number of years.⁵⁰

2.2.2. Abolition of Forced Labour

Forced labour today affects sizeable numbers of migrant workers who are transported away from their countries and communities of origin.⁵¹ C 29 defines ‘forced or compulsory labour’ as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. (Art. 2(1)) This definition of forced labour comprises two basic elements: ‘menace of penalty’ as means of keeping someone in forced labour, and ‘not voluntarily’ or lack of consent to work, as the ‘route’ into forced labour.⁵² An ILO report states that many victims enter forced labour situations initially of their own accord, and later they discover themselves unable to withdraw their labour, owing to legal, physical or psychological coercion.⁵³

The report also provides examples of practices which make someone enter and keep in forced labour: deception or false promises about types and terms of work, physical confinement, physical/sexual violence, induced indebtedness, financial penalties, withholding and non-payment of wages, retention of identify documents, dismissal from current employment, exclusion from future employment, and denunciation to authorities (police, immigration) and deportation.⁵⁴ As will be shown later, many migrant workers experience such practices in countries of employment.

⁴⁹ ILO(2006), p.89, para. 420 reads:

“Legislation should be made flexible so as to permit the organizations to elect their leaders freely and without hindrance, and to permit *foreign workers* access to trade union posts, at least *after a reasonable period of residence* in the host country”, (emphasis added).

ILO, General Survey 1994, ‘Freedom of association and collective bargaining’, para 118 reads:

“Since provisions on nationality which are too strict could deprive some workers of the right to elect their representatives in full freedom, for example *migrant workers* in sectors in which they account for a significant share of the workforce, the Committee (CEACR) considers that legislation should allow foreign workers to take up trade union office, at least *after a reasonable period of residence* in the host country”, (emphasis and parentheses added).

⁵⁰ Neither ILO (2006) nor General Survey 1994 refers to any specific case.

⁵¹ ILO, A Global Alliance against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005, International Labour Conference, 93rd Session, 2005, p.1, *available online*, www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=5059>, visited on 20 November 2007.

⁵² *Ibid.*, pp. 5 - 6.

⁵³ *Ibid.*, p.6.

⁵⁴ *Ibid.*

The basic obligation of ratifying States is “to suppress the use of forced or compulsory labour in its all forms within the shortest period possible”. (C 29, Art. 1(1))

2.2.3. Equal Treatment

C 111 requires ratifying States to declare and pursue a national policy aimed at promoting equality of opportunity and treatment and eliminating all forms of discrimination in employment and occupation based on race, colour, sex, religion, political opinion, national extraction and social origin. Nationality is not listed among the grounds of discrimination formally prohibited by C 111. However, the ILO supervisory bodies have frequently reaffirmed that migrant workers are protected by this instrument in so far as they are victims of discrimination in employment and occupation on the basis of any of the prohibited grounds of discrimination enumerated in it.^{55 56} As mentioned in Chapter 2.1.2.2. of this thesis, Arts. 1(2) and 4 serve as limitation clauses.

2.2.4. Private Employment Agencies

Another important convention to migrant workers was established in 1997; the Convention concerning Private Employment Agencies (No. 181) (C181).⁵⁷ Art. 7.1 states “Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers”. Art. 8 obliges states to adopt all necessary and appropriate measures “to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies” by laws or regulations.

2.3. ILO Migrant Workers' Conventions

There are two main ILO Conventions to protect the rights of migrant workers:

- Convention concerning Migration for Employment (Revised 1949), 1949 (No. 97)⁵⁸ ; and
- Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975 (No. 143)^{59 60}.

⁵⁵ ILO (2004), p.75.

⁵⁶ The later adopted convention on migrant workers (No. 143) takes note of this omission and calls for further standards “to promote equality of opportunity and treatment of migrant workers” in its Preamble, the tenth recital.

⁵⁷ Into force in 2000 and 20 ratifications as of 1 December 2007.

⁵⁸ Into force in 1952 and 47 ratifications as of 1 November 2007.

⁵⁹ Into force in 1978 and 23 ratifications as of 1 November 2007.

The C97 obliges State Parties to apply treatment to migrant workers no less than that which they apply to their own nationals, in respect of remuneration, working hours, union membership, accommodation, social security and so on (Art. 6). By 1975 governments had become increasingly concerned about unemployment and the irregular migration.⁶¹ The focus shifted from facilitating the migration of surplus labour to bringing migration flows under control.⁶² The C143 is divided into two parts dealing with migration in abusive conditions (Part I) and with equality of opportunity (Part II). Part I is devoted to migration in abusive conditions and concentrates on the suppression of clandestine movements and employment of migrant workers.⁶³ Part II expands on C97 with respect to equal treatment,⁶⁴ but the rights found there only apply to lawfully admitted migrants.⁶⁵ State Parties are obliged to declare and pursue a national policy aimed at promoting and guaranteeing equality of opportunity and treatment with respect to employment, occupation, social security, trade unions and even cultural rights.⁶⁶ With the exception of C97, Art. 8 and to some extent of C143, Part II, the instruments do not make a distinction between permanent or non-permanent migrants.⁶⁷

2.3.1. Migrant Workers

The definition of ‘migrant worker’ for the purpose of C97 and C143 is similar:⁶⁸

“a person who migrates [or who has migrated] from one country to another with a view to being employed otherwise than on his/her own account and includes any person regularly admitted as a migrant for employment [migrant worker]. “ (Art. 11(1) in both the Conventions)

Both the Conventions explicitly mention categories of workers which are excluded from their provisions. C97, Art. 11(2) excludes:

- (a) frontier workers;
- (b) artistes and members of the liberal professions who have entered the country on a short-term basis;
- (c) seamen.

C143, Art. 11(2) specifies these three exceptions, plus:

⁶⁰ Hereinafter referred as C97 and C143, respectively.

⁶¹ ILO (2004), p. 75.

⁶² *Ibid.*

⁶³ Niessen, J. (2001), p.393.

⁶⁴ *Ibid.*

⁶⁵ Cholewinski, R. (1997), p. 103.

⁶⁶ *Supra* note 63, p.393.

⁶⁷ ILO (2004), p. 76.

⁶⁸ Cholewinski, R. (1997), p. 101.

- (d) persons coming specifically for purposes of training or education;
- (e) employees of organizations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments.

The exclusion of migrants given in C143, Art.11(2) applies only to the provisions of Part II of the instrument.⁶⁹ Part I does not explicitly permit the exclusion of any category of migrant worker, including trainees.⁷⁰

The provision of category (e) applies essentially to those workers who have special skills, going to a country to undertake specific short-term technical assignments.⁷¹ This provision does not imply that all fixed-term workers can be excluded from the provisions of Part II of C143.⁷² Therefore, typical low-skilled workers in the three selected countries whose employment contracts are usually one or two-year long are applicable of Part II of C143, and they should be treated as equal as nationals on working conditions.

2.3.2. Basic Rights and Equal Treatment

C143 reiterates that member States have a general obligation to respect the basic human rights of *all* migrant workers.⁷³ It also provides that migrant workers should not only be entitled to equal treatment (as provided for in C 97) but also to equality of opportunity, *e.g.* equality with regard to access to employment, trade union rights, cultural rights and individual and collective freedom.⁷⁴

2.3.3. Protection from expulsion

C97, Art. 8 prohibits expulsion of migrant workers admitted to the territory of a member State on a permanent basis because of loss of occupation on account of illness or injury arising after entry to the country of employment.⁷⁵ C143 contains more forceful provision against unfair

⁶⁹ ILO General Survey 1999, 'Migrant Workers', para. 110, *available online*, <http://training.italo.it/ils/CD_Use_Int_Law_web/Additional/Library/English/ILO_S_B/99_frset.htm>, visited on 1 December 2007.

⁷⁰ *Ibid.*, para. 114: the CEACR "notes the report of the Republic of Korea which indicates that 'industrial trainees' outnumber other foreign workers, but are not covered by the Labour Standards Act, and the Government questions whether this is in conformity with Convention No. 143. The Committee affirms that trainees are excluded from the definition of 'migrant worker' as given in Article 11(2)(d) of Convention No. 143, but stresses that this applies only to the provisions of Part II of the Convention".

⁷¹ *Ibid.*, para. 115.

⁷² *Ibid.*

⁷³ ILO (2004), p.75.

⁷⁴ *Ibid.*

⁷⁵ Cholewinski, R. (1997), p. 129.

removal.⁷⁶ C143, Art. 8(1) provides that legally resident migrants are not to be regarded as being in an irregular situation simply because of their loss of employment, which should not in itself imply the withdrawal of a work or residence permit.⁷⁷

2.3.4. Freedom to choose work

C143, Art. 14(a) reads:

A Member may—

(a) make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject to the conditions that the migrant worker has resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his/her first work contract;

It implies that:

- (1) The right to choose work is a fundamental right (CESCR, Art. 6(1));
- (2) But it can be subject to restriction (see 2.1.2.2. of this paper);
- (3) States can impose restriction on this freedom, but for the maximum two years.⁷⁸
- (4) In other words, States must guarantee free choice of work to migrant workers who have resided in their territories lawfully for two years.
- (5) Any restriction must not limit the geographical mobility of migrant workers, although mobility might be indirectly affected as a result of the issue of work permits which have certain occupational conditions attached to them.⁷⁹

Art. 14(a) is a remarkable achievement which, at least on its face, greatly decreases state control over the employment of migrant workers and contributes to an overall reduction in their exploitation.⁸⁰ However, this provision has been the most serious obstacle to the ratification of Part II of C143.⁸¹

C143, Art. 14(c) allows States to impose permanent restrictions on migrant workers on access to limited categories of employment or functions where this is necessary in the interests of the State.⁸²

⁷⁶ *Ibid.*, p. 130.

⁷⁷ Cholewinski, R. (1997), p. 130.

⁷⁸ *See supra* note 69, para. 383: “Article 14 of the Convention authorizes certain restrictions on the principle of equality of treatment as regards access to employment. Some of these, which are general in scope, allow States to make the free choice of employment subject to temporary restrictions during a prescribed period which may not exceed two years”.

⁷⁹ Cholewinski, R. (1997), p. 109.

⁸⁰ *Ibid.*, p. 110.

⁸¹ *Ibid.*, p. 111.

⁸² *See supra* note 69, para. 383.

2.3.5. Trade Union Rights

The rights to trade unions are inscribed in C97, Art. 6.1 and C143, Art. 10, in order to guarantee equality of opportunity and treatment to *regular* migrant workers: they are described as the rights to membership of trade unions and enjoyment of the benefit of collective bargaining (C97), and trade union rights and collective freedoms (C143).

2.3.6. Ratifications

Unfortunately, the ILO instruments concerning migrant workers seem to have been generally ignored by the international community, particularly by countries to which migrant workers tend to migrate.⁸³ C143, adopted in 1975, has received only 23 ratifications as of 1 December 2007, with only a handful of migrant-receiving countries.

2.4. UN Migrant Workers Convention

The General Assembly of the UN adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC)⁸⁴ in 1990, and it entered into force in December 2003. The ILO contribution to drafting CMW was quite considerable, largely as result of relationship with influential countries, as well as officially submitting papers to the General Assembly.⁸⁵

It is said that MWC is the most comprehensive international convention aiming at the protection of the rights of migrant workers and their families.⁸⁶ The Convention seeks to establish minimum standards that State parties should apply to migrant workers and members of their families, irrespective of their status.⁸⁷ The Convention consists of nine parts. Part III (Arts. 8-35) is a reiteration of the basic rights which are enshrined in the international human rights treaties now signed and ratified by many nations, guaranteed to *all* migrant workers and their families, irrespective of their migratory status⁸⁸, as shown below.

⁸³ Cholewinski, R. (1997), p. 135.

⁸⁴ 37 ratifications as of 18 July 2007.

⁸⁵ Cholewinski, R. (1997), p. 145.

⁸⁶ See Niessen, J. (2001), p. 391.

⁸⁷ OHCHR, p. 4.

⁸⁸ *The Global Campaign for Ratification of the Convention on the Rights of Migrants, Handbook, Section III: Importance and Content of the Convention*, www.migrantsrights.org/LAYHNDBK3.html#SECTION_III, visited on 1 December 2007.

(a) Basic freedoms

MWC provides for the right to life (Art. 9) and prohibition against cruel, inhuman or degrading treatment or punishment (Art. 10) as well as slavery or servitude and forced or compulsory labour (Art. 11). Migrant workers are also entitled to basic freedoms like the freedom of thought, conscience and religion (Art. 12), and the right to hold and express opinions (Art. 13), the right to privacy (Art. 14) and the right to property (Art. 15).

(b) Due process

Investigations, arrests and detentions are to be carried out in accordance with established procedures (Art. 16). Their right to equality with nationals of the State before the courts and tribunals must be respected (Arts. 17 and 18). They must be provided with necessary legal assistance, interpreters and information in a language understood by them (Art. 18). When imposing a sentence, humanitarian considerations regarding the person's migrant status should be taken into account (Art. 19). The arbitrary and collective expulsion of migrant workers is prohibited (Art. 22).

(c) Protection from expulsion based on lack of remunerated work (Art. 20).

(d) Equality with nationals

Migrant workers should be treated as equal to the nationals of the host country in respect of remuneration and conditions of work (Art. 25), social security benefits (Art. 27) and emergency medical care (Art. 28).

(e) Right to information

They have the right to be informed by the States concerned about their rights and obligations in those States. Such information should be made available to migrant workers free of charge and in a language understood by them (Art. 33).

Further rights are granted to *regular* migrant workers in Part IV (Arts. 36-56). Some particular rights will be discussed as follows.

2.4.1. Migrant Workers

MCW contains the most comprehensive definition of 'migrant worker' found in any international instruments concerned with migrants.⁸⁹ Art. 2(1) defines a migrant worker as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national". It applies to migrants in past, present and future situations. Art. 3 makes a list of persons excluded from MWC's coverage: employees of international organizations, government officials, and "persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other co-operation programmes", investors, refugees and stateless persons, students and trainees, and non-national non-

⁸⁹ Cholewinski, R. (1997), p. 149.

resident seafarers and workers on an offshore installation.⁹⁰ However, the exclusion of students and trainees from WMC's application was not automatic. It is noteworthy that the ILO in its observations strongly urged the drafters to ensure the protection of "all persons working in a country other than their own, whatever the nature of their activity or contractual status, including refugees, stateless persons, students and trainees whenever they are economically active".⁹¹

2.4.2. Protection from Expulsion

MWC, Art. 20(2) protects all migrant workers and their family members from deprivation of residence/work permit or expulsion "merely on the ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorization or permit". Further provisions are set in Arts. 49(2) and 51 in regard with regular migrant workers, stipulating that migrant workers "shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permits or similar authorizations", unless "the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted" (Art. 51). Such exceptional activity mentioned in Arts. 20 and 51 seem corresponding to that engaged by "specified-employment workers" stipulated in Art. 2(g).

Any migrant worker is entitled to protection against arbitrary and collective expulsion under the MWC (Art. 22). Any expulsion decision must be assessed on an individual basis and be subject to due process (Art. 22(1) and (2)). Migrant workers have the rights to submit the reason he/she should not be expelled and to have his/her case reviewed by the competent authority until the final decision is made by a judicial authority (Art. 22(4)). Art. 22(6) accords a migrant worker a reasonable opportunity before and after departure to settle any claims for wages and other entitlements due to him/her and any pending liabilities.

2.4.3. Regional Mobility

Regular migrant workers have the right to move freely in the territory of the State of employment and freedom to choose where they wish to reside. These rights shall not be subject to any restrictions except those are necessary to protect national security, public order, public health and morals, or the rights and freedoms of others, when such restrictions are provided by national law and consistent with the other rights recognized in the

⁹⁰ *Ibid.*, p. 153.

⁹¹ ILO, Governing Body, 235th Session, Geneva, Feb.-March 1987 Recent Events in the United Nations System (Draft International Convention on the Protection of the Rights of All Migrant Workers and their Families) ILO Doc. GB. 235/IO/ I /3, 2, Appendix, para. 3, cited in Cholewinski, R. (1997), p. 154.

Convention (Art. 39).

2.4.4. Free Choice of Employment

Arts. 52 and 53 are concerned with the right to free choice of employment of regular migrant workers. This right is subject to a number of significant restrictions reflecting the interest of states to retain sovereignty.⁹² Art. 52(1) enunciates the principle that “migrant workers in the State of employment shall have the right freely to choose their remunerated activity”. However, the remainder of Art. 52 lists a number of restrictions and conditions on this principle. Art. 52(2) applies to “any migrant worker”. A state of employment can restrict the access of migrant workers “to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation” (Art. 52(2)(a)).

According to Art. 52(3), further restrictions can be imposed on temporary migrant workers (“migrant workers whose permission to work is limited in time”). A state may make free choice of employment subject to the condition that migrant workers have been lawfully resident and employed in its territory for a certain period of time: it should not exceed two years (Art. 52(3)(a)). Access to employment by temporary migrant workers may be limited further in accordance with a policy granting priority in employment to nationals and to those persons ‘assimilated’ to nationals for this purpose by virtue of national legislation, or bilateral or multilateral agreements.⁹³ This limitation must be ceased if a migrant worker has been resident and employed lawfully in a host country for a certain period of time: it should not exceed five years (Art. 52(3)(b)).

The time-periods in these provisions are only recommendatory.⁹⁴ Consequently, States have discretion whether to increase these limits without necessarily infringing MWC.⁹⁵ These provisions of MWC hardly advance the economic and social situation of migrant workers.⁹⁶ They significantly undermine the progress made in this area by C143, Art. 14(a), which grants migrant workers free access to most categories of work after two years of residence and employment, regardless of whether they are admitted indefinitely or temporary into the state of employment.⁹⁷

2.4.5. Trade Union Rights

MWC proclaims that regular migrant workers have the right to *form* trade

⁹² Cholewinski, R. (1997), p. 161.

⁹³ Cholewinski, R. (1997), p. 162.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, p. 163.

⁹⁷ *Ibid.*

unions in the state of employment (Art. 40) but requires State Parties only to recognize that irregular migrant workers have the right to *join* existing trade unions and take part in their meetings and activities (Art. 26).⁹⁸ Both provisions permit identical limitation (para. 2) on the rights expressed in the paragraph 1.

With regards to the protection of the trade union rights of migrant workers in an irregular situation, MWC has been criticized as departing from existing international standards in CCPR (Art. 22), CESCR (Art. 8) and ILO instruments (such as C87, Art. 2 which proscribes discrimination on the basis of nationality).⁹⁹

2.5. Other Relevant Instrument

After the MWC was adopted, another international instrument of direct importance to migrant workers was established in 2000: the UN Trafficking Protocol¹⁰⁰ requires State Parties to criminalize acts of trafficking, to protect victims of that crime and also to found a framework for international cooperation.

2.6. Instruments developed by Regional Organizations

The European Convention for the Protection of Human Rights and Fundamental Freedom, the African Charter on Human Rights and the American Convention on Human Rights contain rights beneficial to migrant workers in countries covered by the regional organizations respectively. Dissimilar to Europe, Africa and the Americas, the Asian region does not have inter-governmental organization to facilitate establishment and protection of human rights. Asia is the only region in the world, which lacks a regional human rights commission.¹⁰¹ In Asia, there is no institutional mechanism through which regional human rights issues can be addressed.¹⁰²

Nevertheless, in recent years many countries in the region have begun to realize the need to cooperate on migration because of the alarming increase in the trafficking of women and children.¹⁰³ The first regional consultation process in Asia was launched in Manila by 17 countries in 1996. This

⁹⁸ See OHCHR, p. 8.

⁹⁹ Cholewinski, R. (1997), p. 164.

¹⁰⁰ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, entered into force in 2003, signed or ratified by 115 countries as of 1 November 2007.

¹⁰¹ Oishi, N. (2005), p.184.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

'*Manila Process*' provides a regular forum for migration authorities to exchange information on trends and policy measures concerning irregular migration and trafficking.¹⁰⁴ The International Organization for Migration (IOM) and the Office of the United Nations High Commissioner for Refugees (UNHCR) cosponsor *the Asia Pacific Consultations (APC)*. Since 1996, it has provided a forum for Asian and Pacific countries to consult on population movements in the region, including those of migrants, refugees, and internally displaced persons.¹⁰⁵

The Bangkok Declaration on Irregular Migration was adopted by 18 governments participating in the International Symposium *Toward regional Cooperation on Irregular/Undocumented Migration* in 1999. Although addressing the specific context of irregular migration, this constitutes a major step towards a regional approach to migration in general.¹⁰⁶

In May 2004, the UN Global Commission in International Migration (GCIM) organized its Regional Hearing for the Asia-Pacific Region in Manila, attended by 160 participants from governments and civil societies. An encouraging outcome of this Hearing was the recognition given to the need for effective multilateral governance of labour migration.¹⁰⁷

This Hearing called for a broadening of mandate of the Asia Pacific Economic Cooperation (APEC).¹⁰⁸ ¹⁰⁹ There is one mechanism for addressing labour rights within APEC, the Human Resource Development Working Group, established in 1990. However, this Group is constrained to introduce such issues as labour standards and workers' rights because of the narrow definition of APEC's central concerns associated with the liberalization of trade and investment.¹¹⁰

Another key regional body, the Association of Southeast Asian Nations (ASEAN) has its own development on protection and promotion of human rights of migrants in the region. ASEAN was formed in August 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand, with the aims of economic growth, social progress and cultural development in the region. Now Brunei, Cambodia, Laos, Myanmar and Vietnam have joined it. On 13 January 2007, ASEAN adopted *Declaration on the Protection and Promotion of the Rights of Migrant Workers*.¹¹¹ An NGO criticizes it for the

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ Ball, R. and Piper, N. (2006), p. 220.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, p. 221.

¹⁰⁹ APEC is an informal forum that promotes economic growth and trade expansion among its 21 members: Australia; Brunei Darussalam; Canada; Chile; the People's Republic of China; Hong Kong, China; Indonesia; Japan; the Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; the Philippines; the Russian Federation; Singapore; Chinese Taipei; Thailand; the United States of America; and Viet Nam.

¹¹⁰ Ball, R. and Piper, N. (2006), p. 222.

¹¹¹ See this ASEAN's page, www.aseansec.org/19264.htm, visited on 28 December 2007.

minimum involvement of the civil society in the drafting process, and lack of monitoring mechanism by the civil society, while encouraging the States to appreciate and implement the Declaration.¹¹² On 20 November 2007, the ASEAN Charter was signed by all the ten Member state leaders.¹¹³ This Charter calls for the establishment of an ASEAN human rights body as a new organ of ASEAN, in order to promote and protect human rights and fundamental freedoms of peoples in ASEAN. It needs all Member states' ratifications to make this Charter come into force.

Some NGOs have expressed their laments over the non-mention of migrants' rights in the Charter. One said "One of the biggest disappointments (of the Charter) is there's nothing at all in recognising the rights of migrant labour. Charter talks about freer movement of labour but not their rights".¹¹⁴

Nonetheless, the Declaration and the Charter can lead countries concerned to recognition of regional cooperation to promote and protect migrants' human rights. There have been endeavours to enhance collaboration between ASEAN and the three East Asian Countries, China, South Korea and Japan, in social welfare and development (ASEAN Plus Three). In a long run, these ASEAN's movements may influence those countries.

2.7. Bilateral Agreements

Labour sending countries and receiving countries are not equal in political power. Sending countries' governments are eager to increase the number of employment contracts¹¹⁵ and they compete with one another to find spaces for their workers abroad.¹¹⁶ Thus it is extremely difficult for sending states to address the plight of their citizens working abroad.¹¹⁷ Even when there are problems such as maltreatment (which includes violence and abuse), non-payment of wages, and violations of contracts, the officials of sending states often find it difficult to confront receiving states in a forthright manner, let alone compel them to investigate the problems and punish employers who are mistreating migrant workers.¹¹⁸ A sending state that responds too forcefully against a receiving state can easily find its immigration quota cut, and lose 'job orders' to other sending states.¹¹⁹

¹¹² Statement of Migrant Care (an Indonesian NGO) made on 11 July 2007, cited in www.december18.net/web/papers/view.php?paperID=4946&menuID=41&lang=EN, visited on 28 December 2007.

¹¹³ See this ASEAN's page, www.aseansec.org/21085.htm, visited on 28 December 2007.

¹¹⁴ Remarks of Jenina Joy Chavez, Philippines Programmes Coordinator of the Focus on the Global South, cited in *Inter Press Service News Agency*, 21 November 2007, <http://ipsnews.net/news.asp?idnews=40147>, visited on 28 December 2007.

¹¹⁵ See Oishi, N. (2005), p.85-86.

¹¹⁶ *Ibid.*, p. 62.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

Yet this does not mean that sending states take no action.¹²⁰ Whenever possible, they attempt to sign bilateral agreements with receiving states to secure large-scale quotas and to ensure that their migrant workers will be protected from abuse.¹²¹ Receiving states, to the contrary, prefer to avoid making any commitments on the matter.¹²² As a compromise, states often conclude bilateral agreements in the form of memorandums or notes that do not entail any legal liabilities.¹²³ These basic agreements between sending and receiving states at least provide a frame of reference to which both parties can turn when problems occur; however, they do not necessarily protect migrant workers.¹²⁴ In an extreme case, an ILO report points out that a Memorandum of Understanding between Indonesia and Malaysia would allow employers to hold workers' passports.¹²⁵

As shown later, the Memoranda of Understanding (MoU) with Korea and its designated sending countries are advanced in an attempt to protect migrant workers from covetous employment agencies as well as to reduce irregular migration.¹²⁶ In such MoU, Korea demands sending countries' governments to be responsible for recruiting, selecting and sending their workers. The Korean government has taken sanctions against Indonesia and Nepal: it suspended the recruitment of Indonesian workers and ceased accepting Nepali workers after discovering the local brokers' improper activities and overcharging prospective workers in those countries respectively in 2005.¹²⁷ However, there is evidence that a number of labour-sending countries are failing to stop exorbitant fees being charged by recruitment agencies.¹²⁸

Such Korean efforts should be evaluated. Still, their MoU are not completely free from political concerns either. Y. Park admits that diplomatic relationship has affected selecting sending countries and deciding quota of workers. When Korea canvassed for a world exposition, the number of workers from countries which supported it was "considered".¹²⁹

Nonetheless, the role of the sending states is crucial to protect the human rights of migrant workers – or their nationals – in countries of employment, because an international legal framework for protecting them is still lacking in Asia. This leaves bilateral agreements as the only available mechanism for now. Migrant workers as nationals can demand their governments to

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ ILO, *Overview of Key Issues related to Domestic Workers in Southeast Asia*, 2006, p. 11, available online,

www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=6497, visited on 22 November 2007.

¹²⁶ Yoo, K. (2005), p.10.

¹²⁷ AI (2006), p. 20.

¹²⁸ *Ibid.*

¹²⁹ His remarks in JIL Workshop (2007), see JIL (2007) b, p. 27 (Japanese).

make endeavours to protect their human rights in destination countries through diplomatic channels.

Still, a bilateral agreement on migrant workers seems like an employment contract: Without substantial labour unions or effective labour laws, it would be unfair against workers. Thus, facilitating regional/global cooperation, including reaching multilateral agreements and establishment of the regional human rights commission, is more desirable.

3. Country Studies

In this chapter, Singapore, South Korea and Japan will be examined regarding each country's national legal systems on low-skilled migrant workers. Each system will be reviewed as to whether it is consistent with its ratified conventions and also the other conventions.

Table 1: Signatory or Ratification Status of Relevant Instruments to Labour Migration

Instruments	Singapore	Korea	Japan
CCPR	Y	Y	Y
CESCR	N	Y	Y
CERD	N	Y	Y
CEDAW	Y	Y	Y
C87(Freedom of Association and the Right to Organize)	N	N	Y
C98(Right to Organize and Collective Bargain)	Y	Y	Y
C29(Forced Labour)	Y	N	Y
C105(Abolition of Forced Labour)	D	N	N
C111(Discrimination)	N	Y	N
C97(Migration for Employment)	N	N	N
C143(Migrant Workers/Supplement)	N	N	N
C181(Private Employment Agencies)	N	N	Y
MWC	N	N	N
Trafficking Protocol	N	S	S

Y	ratification
S	signature
N	No
D	denounced

3.1. Singapore

Singapore has ratified CCPR, CEDAW, C98 (Right to Organize), and C29 (Forced Labour). C105 (Abolition of Forced Labour) was once ratified in 1965 and later denounced in 1979.

The foreign labour accepting legislation of Singapore is taken as an example of a 'selective' state policy.

Generally speaking, the foreign workforce in Singapore may be divided into three categories: professionals and high-skilled workers who are eligible for Employment Pass (P1, P2 or Q Pass), middle-skilled workers who are given S Pass, and low-skilled workers who are granted Work Permits (as 'Foreign Workers' or 'Foreign Domestic Workers').

Table 2: Migrant Workers in Singapore

Skill level	Scheme	Type of Pass	Salary range (SGD)	Total	Sub-total	Percentage
High-skilled	Employment Pass	P Pass	More than 3500	670 000	65 000	9,7%
		Q Pass	More than 2500			
Mid-skilled	(Employment Pass)	S Pass	1800 or more		25 000	3,7%
Low-skilled	Work Permit	R Pass	1800 or less		580 000	86,6%
					Domestic workers	160 000
					Construction Workers	135 000
					Others	285 000

Source: Based on Yap M. T. and C. Wu (2007) pp. 16-17.

Notes: As of December 2006.

S Pass belongs to the Employment Pass scheme, but in this study 'Employment Pass holders' refers to workers with P or Q Pass.

Here I will compare the Employment Pass scheme and the Work permit scheme, because workers with the former can enjoy privileges while workers with the latter are more restricted. A set of features of S Pass is between them, whose holders are subject to some restrictions while enjoying some privileges.

The distinction between the categories is not by occupations but by monthly salary. Those who earn more than SGD 2,500¹³⁰ a month are entitled to apply to Employment Passes. On the other hand, Work Permits are given to those whose monthly salaries are SGD 1,800 or less.

Employment Pass or Work Permit is granted to an employment made by a Singaporean employer and his/her foreign employee. In this thesis, Employment Pass holders or Work Permit holders refer to workers with such Pass or Permit.

The Employment Pass scheme is regulated by the Employment of Foreign Workers Act. This Act requires employers of such foreign workers to apply for a non-transferable Work Permit in regard to the worker and the type of work that is to be done.¹³¹ The validity of the Work Permit is specific to the particular worker which it was applied for, and only with regard to the industry or occupation specified.¹³² In return, foreign workers are only permitted to work for the employer listed in his/her Work Permit.¹³³ Work Permit is valid for two years and low-skilled workers will be allowed to remain in Singapore for a maximum of 18 years.¹³⁴

¹³⁰ SGD 100 is approximately USD 69, as of 19 November 2007.

¹³¹ Yap M. T. and Wu, C. (2007) p. 2.

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*, p. 16.

As mentioned in Chapter 1.5., the majority of the foreign workforce is comprised by low-skilled workers (Work Permit holders), some 580,000 people, while Employment Pass holders amount to 65,000 in December 2006.¹³⁵

3.1.1. Residence Permit and Employment

Both an Employment Pass holder and a Work Permit holder are bound to specific employers who have applied for Pass or Permit in order to hire the employee. The employees have to leave Singapore on completion of the work contract. However, Employment Pass holders are mainly left to their own devices.¹³⁶ Employment Pass holders have freedom to choose and later change employment.¹³⁷

If an Employment Pass holder wants to change jobs, the new employer has to apply to a new Employment Pass for him/her. However, as effect with 1 January 2007, Employment Pass holders, with certain years of working experience on P or Q Pass¹³⁸, are eligible for a Personalised Employment Pass (PEP). When changing employers, a PEP holder does not have to apply for a new Employment Pass and remains in Singapore for up to six months between jobs. This new scheme gives the professionals flexibility.

To the contrary, Work Permit holders are at the mercy of the employers. Work Permit holders are not allowed to change employers unless the Ministry of Manpower has reasons to believe that they are being exploited (*e.g.* domestic helpers being forced to engage in non-domestic work).¹³⁹ Among them, domestic workers and construction workers are allowed to change employers if they obtain the current employer's consent for transferring the worker to the new employer.¹⁴⁰ Yap M. T. and C. Wu (2007) state that "In the event of termination of contract, migrant workers will be repatriated upon settlement of all outstanding wages or money" (p.5). On the other hand, HRW describes this "power imbalance" as:

"Employers have the power to repatriate a domestic worker at any time during the contract. They can also reject or approve a domestic worker's wish to transfer employers in the middle or at the end of a two-year contract. [...]"

¹³⁵ S Pass holders amount to 25,000. *See* Table 2.

¹³⁶ Yap M. T. and Wu, C. (2007) p. 16.

¹³⁷ ILO (2003), p.343: "Foreign workers on Employment Pass have free choice of employment, occupation and industry. They also have the freedom of change employment and place of residence".

¹³⁸ At least two years on P Pass and at least five years on Q Pass respectively.

¹³⁹ *See* ILO (2003), p. 343.

¹⁴⁰ *See* MoM website about migrant domestic workers,

www.mom.gov.sg/publish/momportal/en/communities/work_pass/foreign_domestic_workers/during_employment/change_of_employer.html, and about migrant construction workers,

www.mom.gov.sg/publish/momportal/en/communities/work_pass/work_permit/during_employment/change_of_employer.html, visited on 1 December 2007. *See* also HRW (2005) p.29.

They (=domestic workers) may fear to report abuse as their employers can deny them transfers and repatriate them to their home country.”¹⁴¹

View from universal instruments

Without ratifying C143 and MWC, the state has no obligation to secure migrant workers residence permit in the event of unemployment.

Without ratifying CESCRC and C143, Singapore has no obligation to give migrant workers the freedom to choose employment.

However, it must be noted that the ILO suggests that the threat of “dismissal from current employment”, “exclusion from future employment” and “deportation” can be used as the means of keeping someone in forced labour.¹⁴²

As Singapore has ratified C29 as well as CCPR which prohibits “forced labour” (Art. 8(3)), it “undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period”, if it considers any.

3.1.2. Security deposit to implement repatriation

Employers shall post a SGD 5,000 security deposit for each foreign worker who they hire with Work Permit. It will be refunded to them upon the cancellation of the work permit and repatriation of the worker. To the contrary, the security deposit would be forfeited if a foreign worker goes missing and the employer cannot repatriate him/her within a month, or in the case of a foreign female worker, if she delivers a child in Singapore.¹⁴³

The Singapore government enacted this policy in an attempt to control illegal immigration and to ensure that employers have adequate funds to repatriate the workers on completion of their contracts.¹⁴⁴ Instead, this burden of security deposit makes employers watch over their foreign employees’ movements. HRW (2005) reports that many employers confiscate domestic helpers’ passports and Work Permits, seldom give them a rest day and sometimes lock them in the workplace, because they are afraid of the workers’ ‘running away’.

¹⁴¹ HRW (2005), p 29, parentheses added.

¹⁴² ILO (2005), p. 6.

¹⁴³ Yap M. T. and Wu, C. (2007), p. 3.

However, *Conditions of Work Permit/ Visit Pass for Foreign Worker, Section 10* describes “a female foreign worker ... shall not become pregnant or deliver any child in Singapore during the validity of her Work Permit/ Visit Pass ” and which makes many Singaporeans believe the security bond is forfeited at the level of pregnancy. Human Rights Watch clarified by interviewing officials of MoM that what is forbidden is to give birth in Singapore. See HRW (2005), p 91.

¹⁴⁴ HRW (2005), p. 4.

View from universal instruments

There is no international instrument mentioning to security deposit imposed on employers, but it can make them want to control their migrant workers movements. Here again, the ILO states that retention of identity documents and physical confinement may be means of imposing forced labour.¹⁴⁵

3.1.3. Levy and no statutory minimum wage

In addition to security deposit, employers are further required to pay a foreign worker levy for each worker employed. Yap M. T. and C. Wu explain the purpose of it:

“The levy is a price mechanism to regulate the number of foreign workers who, because of their willingness to accept lower wages, could out-compete local workers in terms cost to employers.”¹⁴⁶

In Singapore, there is no statutory minimum wage. As low-skilled migrant workers with Work Permit have little ability to negotiate the terms of their employment, employers can hire them with considerably low salaries. The levy system is aimed to fill the gap between foreign workers and the locals in terms of cost to some extent, and consequently to prevent an influx of migrant workers. In other countries such as Taiwan, South Korea and Japan, where a national minimum wage is applicable to migrant workers as well as the locals, such a system as levy does not exist.

View from universal instruments

Without ratifying CESC, C111, C143 and MWC, Singapore has no specific obligation to treat migrant workers as equal as nationals in employment.

3.1.4. Family Life and Pregnant Worker

The most significant characteristic of temporary migrant worker programmes is to preclude low-skilled workers from settling down in host countries. In Singapore, Work Permit holders are not allowed to bring in their family while Employment Pass holders are accorded that privilege. What is more restricted is that Work Permit holders are prohibited to marry citizens or permanent residents of Singapore without the prior approval of the Controller of Work Permits. Female migrant workers are further required to undergo mandatory pregnancy test every six months, with the threat of immediate deportation in the case of positive test result.¹⁴⁷

¹⁴⁵ ILO (2005), p.6.

¹⁴⁶ Yap M. T. and Wu, C. (2007) p. 2.

¹⁴⁷ ‘Conditions of Work Permit/ Visit Pass for Foreign Worker’ issued by Ministry of Manpower:

“9. The foreign worker shall not go through any form of marriage or apply to marry under any law, religion, custom or usage with a Singapore Citizen or Permanent

View from universal instruments

The rights to family life (CCPR, Art. 23 and CESC, Art. 10(1)) and private life (CCPR, Art. 17) are more concerned but here the discussion is limited to labour rights.

Working women with pregnancy should have special protection (CESC, Art. 10(2)). More precisely, CEDAW, Art. 11(2) (a) stipulates:

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, State Parties shall take appropriate measures:

(a) To prohibit, subject to the imposing of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status.

However, Singapore has made a reservation to Art. 11 of CEDAW.¹⁴⁸ In its initial report¹⁴⁹ to the Committee of Elimination of Discrimination of against Women, the government explains one of the reasons of this reservation as follows:

“Whereas in the case of Article 11, paragraph 2, the reservation is in regards to persons in managerial, executive and confidential positions, seamen as well as domestic workers, who are excluded from the Employment Act. The Act stipulates the minimum terms and conditions of employment, including *maternity protection* and *maternity benefit*.” (para. 12.1) (emphasis added)

It relates the reason of exclusion of seamen, domestic workers and persons in confidential positions from the Act to the nature of their work. Hence, it

Resident in or outside Singapore, without the prior approval of the Controller, while he/she holds a Work Permit, and also after his/her Work Permit has expired or has been revoked.”

“10. If the foreign worker is a female foreign worker, the foreign worker shall not become pregnant or deliver any child in Singapore during the validity of her Work Permit/Visit Pass, unless she is a Work Permit holder who is already married to a Singapore Citizen or Permanent Resident with the approval of the Controller”,

available online,

www.mom.gov.sg/publish/etc/medialib/mom_library/work_pass/files/for_business_employers.Par.11556.File.dat/WPCM001%20WP%20Appln%20Form%20for%20FW%20or%20Trainee%20in%20Non-Domestic_compile.pdf, visited on 1 November 2007.

The MoM also demands a report from an employer who finds his/her female migrant worker pregnant. Go to this MoM website

<http://ifaq.mom.gov.sg/ifaq/explorefaq.asp?projectid=2861558&category=29006&strpage=3>, and click “What if my female Work Permit holder gets pregnant?”, visited on 25 January 2008.

¹⁴⁸ Once Singapore made reservations to Arts. 2, 9, 11 and 16 of CEDAW, but later it withdrew the reservation to Arts. 9 in 2007. See this UN news,

www.un.org/News/Press/docs/2007/wom1647.doc.htm, visited on 25 January 2008.

¹⁴⁹ CEDAW/C/SGP/1, 18 January 2000. The country report was submitted in October 1999, available online,

<http://daccessdds.un.org/doc/UNDOC/GEN/N00/282/95/IMG/N0028295.pdf?OpenElement>, visited on 1 January 2008.

claims, this exclusion is not gender-based, so it does not constitute discrimination against female workers. (para. 12.2)

In its Report which examines Singapore's initial and second country reports,¹⁵⁰ the Committee expresses concerns that the failure to extend the Employment Act to domestic workers results in discrimination against women domestic workers and in denial of legal protection.

It is not only domestic workers but also all female Work Permit holders who are subject to mandatory pregnancy test under threat of deportation if positive.¹⁵¹ The Singaporean government has not informed the Committee of this practice in its three country reports¹⁵² so far. The Committee has not mentioned anything to this matter.

3.1.5. Permanent residence and citizenship

Employment Pass holders are eligible to apply for Singapore permanent residence and eventually citizenship for themselves and their families. Yap M. T. and C. Wu (2007) state that "an average of nearly 40,000 become permanent residents and 8,000 new citizenships were granted annually over the period 2001-2005, 'many' of whom were *professionals* and *skilled workers* who had held employment passes to work in Singapore".¹⁵³

3.1.6. Employment Agencies

The Singaporean government regulates employment agencies through the Employment Agencies Act. The law regulates application, renewal, and revocation of licenses. However, HRW (2005) points out that the government does not enforce this law so as to protect workers.¹⁵⁴

Employment agencies are required to look after the welfare of the foreign workers while they are in Singapore and mediate between workers and employers in case of disputes.¹⁵⁵ However, this does not function well and

¹⁵⁰ Report of the Committee on the Elimination of Discrimination against Women, 24th session (15 January – 2 February 2001) and 25th session (2-20 July 2001), A/56/38, para. 77, available online,

<<http://daccessdds.un.org/doc/UNDOC/GEN/N01/534/56/PDF/N0153456.pdf?OpenElement>>, visited on 1 January 2008.

¹⁵¹ See *supra* note 147.

¹⁵² Singapore's second and third country reports are available at

<<http://daccessdds.un.org/doc/UNDOC/GEN/N01/359/10/IMG/N0135910.pdf?OpenElement>> and

<<http://daccessdds.un.org/doc/UNDOC/GEN/N04/624/53/PDF/N0462453.pdf?OpenElement>>, visited on 1 January 2008.

¹⁵³ Yap M. T. and Wu, C. (2007) p. 1, emphasis added.

¹⁵⁴ HRW (2005) p.101: "The law permits the government to inspect the agencies but such inspections do not take place routinely and generally occurs only as a result of complaints".

¹⁵⁵ Yap M. T. and Wu, C. (2007) p. 25.

many disputes have dragged on unsettled.¹⁵⁶ M. Ruth (2003) reports there were 1,100 licensed private agencies in Singapore as of March 2001.¹⁵⁷ Due to this intense competition between agencies, it has been reported that they need to pay employers “kick back fee” to “reserve” their work permits and also some of them offer employers free recruitment services.¹⁵⁸ Consequently, they have to shift the cost to workers to make profits.¹⁵⁹ HRW (2005) illustrates many exploitative cases made by employment agencies by imposing extortionate fees on migrant domestic workers.¹⁶⁰

View from universal instruments

Singapore has not ratified either C181 (Convention on Private Employment Agencies) or C97. The former prescribes that “Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers” (Art. 7.1), and under the latter, migrant workers can utilize public employment service free of charge (Art. 7.2).

Once again, induced indebtedness and financial penalty are also considered as indicators of forced labour.¹⁶¹

3.1.7. Trade Unions

Workers under national laws are allowed to join unions regardless of their nationality, subject to the unions’ rules and constitution.¹⁶² However, foreign workers who wish to be *officers* of their unions are only allowed to do so with the permission of the Minister of Manpower.¹⁶³ Labour unions are not allowed to help migrant members in the case of termination of employment. Employment of Foreign Workers Act, Section 9(4) stipulates as below (emphasis added):

- (4) The termination of the employment of a foreign employee under subsection (1) shall *not* be —
 - (a) capable of negotiation with a trade union representing the foreign employee;
 - (b) a matter in respect of which any form of industrial action may be taken by any such trade union;
 - (c) the subject-matter of a trade dispute or of conciliation proceedings or any method of redress whether or not under any written law; and

¹⁵⁶ Yap’s remark in the JIL Workshop, translated into Japanese. See JIL (2007) b.

¹⁵⁷ Ruth, M. (2003), p. 43.

¹⁵⁸ *Ibid.*, p. 13.

¹⁵⁹ *See ibid.*, pp. 13-14.

¹⁶⁰ *See* HRW (2005), p.53: “Indonesian domestic workers typically enter employment with salary deduction of six to ten months. Other workers, including Sri Lankan and Filipina, often have three to six months of their salary withheld”.

¹⁶¹ ILO (2005), p. 6.

¹⁶² ILO (2003), p. 342.

¹⁶³ Trade Union Act, Section 30(3): “No person who is not a citizen of Singapore shall act as an officer of a trade union or any branch thereof unless the prior written approval of the Minister has been obtained”.

(d) any industrial matter within the meaning of the Industrial Relations Act.

View from universal instruments

Singapore has ratified C98 but not C87.

Regarding officers, as the CFA and the CEACR state¹⁶⁴, the criteria for permission for foreigners to be union officers should be flexible so that to make those in their countries for a reasonable period to be eligible. The provision of the Trade Union Act itself does not tell about the criteria.

With respect to trade unions' ability to negotiate for foreigners, in the aforementioned Case 2121, the CFA also emphasizes that "unions must have *the right to represent and assist workers* covered by the Convention (C87) with the aim of furthering and defending their interests".¹⁶⁵ In other Cases, the CFA has repeatedly stressed that "freedom of association implies not only the right of workers and employers to form freely organizations of their own choosing, but also *the right for the organizations themselves* to pursue lawful activities for the defence of the occupational interests of their members".¹⁶⁶ Prescribing trade unions not to help their members in the event of termination of contract, which is a critical matter to workers, constitutes infringement of this unions' right. Singapore has ratified C98 but not C87. Even though, freedom of association enshrined in C87 is prerequisite for the provisions of C98. The state should respect the freedom of association and the consequent right to assist their members.

3.1.8. Labour Laws

The Singaporean Employment Act covers the basic terms and working conditions of all employees, including migrant workers. However, it excludes those employed in managerial, executive or confidential positions and seamen from its scope.¹⁶⁷ In addition, the significant provisions of the Act apply only to those who earn SGD 1,600 per month or less.¹⁶⁸ It can be said that low-skilled workers are more protected by this labour law than high-skilled workers. However, the Employment Act excludes domestic workers from its application and also the application of the Workmen's Compensation Act which provides compensation for workplace injuries and occupational illness.¹⁶⁹ Foreign domestic workers reach to approximately

¹⁶⁴ See Chapter 2.2.1.2. of this study.

¹⁶⁵ *Ibid.*, Case No. 2121, para. 561, parentheses and emphasis added.

¹⁶⁶ The 308th Report, Case No. 1934, Cambodia, 1997. See also ILO (2006), p. 103, para. 495.

¹⁶⁷ See Employment Act, Section 2.

¹⁶⁸ Section 33, Part IV and section 115 of Employment Act shall apply to other employees who are in receipt of a salary not exceeding \$1,600 a month.

The subtitle of Section 33 is "Priority of salary to other debts.", Part IV "Restdays, hours of work, holidays and other conditions of service." and Section 115 "Commissioner's power to inquire into complaints."

¹⁶⁹ See Chapter 3.1.4. of this study.

160,000 and 27.5 per cent of all Employment Permit holders.¹⁷⁰ JIL (2007)a points out that this absence of legal protections is the biggest reason for many cases of abusive treatment.¹⁷¹ In reality however, in most Asian countries domestic workers are excluded from national labour laws and protections,¹⁷² including South Korea and Japan. *Industrial trainees* in Japan, which will be discussed later, are also excluded from national labour laws and protections.

3.2. South Korea (the Republic of Korea)

South Korea (Korea hereinafter) has ratified CCPR, CESC, CERD, CEDAW, C98 (Right to Organise and Collective Bargain) and C111 (Discrimination).

Table 3: Migrant Workers in Korea

Year, month	Total	Workers with employment visa	Trainees		Irregular migrants
			Companies with factories abroad	Industrial training scheme	
1997.12	245 399	15 900	32 656	48 795	148 048
Percentage	100,0	6,5	13,3	19,9	60,3
2000.12	285 506	19 063	18 504	58 944	188 995
Percentage	100,0	6,7	6,5	20,6	66,2
2001.12	329 555	27 614	13 505	33 230	255 206
Percentage	100,0	8,4	4,1	10,1	77,4
2002.12	362 597	33 697	14 035	25 626	289 239
Percentage	100,0	9,2	3,9	7,1	79,8
2003.12	388 816	200 039	11 826	38 895	138 056
Percentage	100,0	51,5	3,0	10,0	35,5
2004.12	421 641	196 603	8 430	28 125	188 483
Percentage	100,0	46,6	2,0	6,7	44,7
2005.12	345 579	126 497	6 142	32 148	180 792
Percentage	100,0	36,6	1,8	9,3	52,3
2006.06	394 511	166 599	6 806	31 886	189 220
Percentage	100,0	42,2	1,7	8,1	48,0

Source: Park, Y. (2007), except '2003.12'.

'2003.12' is extracted from Yoo, K. et al. (2004), p. 203.

3.2.1. General observation

In Korea, the immigration scheme for high-skilled workers is different from that for low-skilled workers.

For high-skilled workers, based on the Immigration Control Act, it is possible to be employed in Korea after being issued with the following

¹⁷⁰ Yap, M. T. and Wu, C. (2007), p. 16.

¹⁷¹ JIL (2007)a, p. 159.

¹⁷² *Supra* note 125, p. 3.

types of visas: professors, teaching foreign languages, research, special technology instruction, specialty occupations, arts and entertainment, and other particular occupations. For low-skilled workers, the two major channels through which they have worked legally in Korea are *the Industrial Trainee Programme* and *the Employment Permit System*.

In Korea, there is not such a big gap between treatment of high-skilled workers and low-skilled workers. Here are some of the restrictions imposed only on low-skilled workers under the Employment Permit System of 2004. A low-skilled worker:

- (a) is not allowed to bring in his/her family;^{173 174}
- (b) is not allowed to change employment without employer's permission during his/her working permit is valid;¹⁷⁵ and
- (c) is not allowed to extend his/her stay in Korea after three-year working period, he/she has to leave there for at least one year before reentry.¹⁷⁶

In the following sections, I will study the Korean immigration policies for low-skilled workers.

3.2.2. Trainee Programmes

Korea was a labour-sending country until the mid-1970s. Since the late 1980s the Korean economy has made a progressive growth. It has increased the number of well-educated people and led them to shun so-called '3-D'¹⁷⁷ sectors, and eventually labour shortage prevailed in those sectors. This 'demand' pulled up foreign low-skilled workers from the other Asian countries. Most of them could be classified as irregular migrant workers because they came to Korea with documents only allowing sightseeing or visiting locals, and worked illegally and overstayed their visas in Korea.¹⁷⁸

To cope with labour shortage, the Korean government introduced *the Industrial Skill Trainee Programme* (ISTP) for overseas-invested firms in November 1991. This followed the preceding Japanese Programme.¹⁷⁹ This Korean programme allowed companies with overseas branches to bring non-Korean staff to Korea for training. The duration of the training was six months, with the possibility of a further six-month extension.

While the main beneficiaries of the ISTP were the large overseas-invested companies, the small and medium-sized businesses (SMBs) still suffered

¹⁷³ Special Rapporteur (2006), para. 23.

¹⁷⁴ Park, Y. (2007) explains that "This is designed to dissuade foreign workers from permanently staying in Korea". This author does not put page numbers.

¹⁷⁵ AI (2006), p. 21.

¹⁷⁶ Special Rapporteur (2006), para. 21; and EPS Act, Art. 18.

¹⁷⁷ 3D stands for Difficult, Dirty and Dangerous.

¹⁷⁸ See JIL (2007)a, pp. 23-24 (Japanese).

¹⁷⁹ Remarks of Young-bum Park in JIL Workshop, translated into Japanese. See JIL (2007)b, p.26.

from labour shortage. Therefore, the Korean government established *the Industrial Trainee Programme* (ITP) in November 1993. Under this programme, foreigners were introduced as trainees for small and medium-sized manufacturing firms for a period of one year and where necessary, another extended year. A total of 20,000 industrial trainees were introduced for the initial year of the ITP. Later, this programme had been expanded in the number of workforce (quota) and sectors where migrant workers could engage.

However, the ITP was criticised because the migrants were classified as trainees, not employees, and therefore not entitled to the national labour laws. In 1995, the government started to protect the trainees as workers. Since that year, the industrial trainees have been subject to the Industrial Accident Compensation Insurance, the National Health Insurance and the Minimum Wage Law, and some of the protective provisions of the Labour Standards Act and the Industrial Safety and Health Act.¹⁸⁰

In 2000, *the Post-training Employment Programme* was established in order to alleviate problems caused by the ITP. Under this new programme, an industrial trainee, after one-year training period, can be qualified to reside and work in Korea with a title of ‘worker’ not ‘trainee’ for an additional two years.¹⁸¹

Still, criticism against the ITP was persistent because those trainee programmes continued to deny trainees the legal status of workers and employers rarely fulfil their obligations to their trainee employees. There are numerous reports of employers’ discriminatory treatment and abusive behaviour toward foreign trainees.¹⁸² Many of the trainees had paid extremely high brokerage fee for coming to Korea.¹⁸³ Moreover, the limited number of trainees introduced under the ITP could not meet the demand of the manpower-hungry small and medium businesses for foreign workers.¹⁸⁴ As a consequence, many industrial trainees deserted their workplaces and moved to better paid jobs, running the risk of becoming irregular workers.¹⁸⁵ In 2005, the Korean government announced that the *Industrial Trainee Programme* and eventually *the Post-training Employment Programme* would be abolished by January 2007.¹⁸⁶

¹⁸⁰ AI (2006), p. 17.

¹⁸¹ Yoo, K. (2005), p. 8.

¹⁸² AI (2006), p. 17.

¹⁸³ Park, Y. (2007).

¹⁸⁴ Yoo, K. et al. (2004), p. 207.

¹⁸⁵ AI (2006), p.18: “By April 2004, it was estimated that nearly 53 per cent of industrial trainees had left their industrial trainee positions and moved to better paying jobs, many as irregular workers”.

¹⁸⁶ *Ibid.*, p. 18.

3.2.3. Employment Permit System (EPS)

The *Employment Permit System Act* entered into force in August 2003. It was intended to give migrant workers legal status and to put to an end to human rights violations against them.¹⁸⁷ Article 22 prescribes:

”An employer shall not give unfair and discriminatory treatment to foreign workers on grounds of their status.”

The word ”status” in this article seems to include ”illegal status”, because the Ministry of Labour has formulated the Guidelines for Handling Complaints of Migrant Workers under which the Labour Standard Act and other labour-related laws shall be applied to the undocumented migrant workers.¹⁸⁸

This Act has adopted some other radically-improved mechanisms aimed to protect foreign workers’ human rights. Still, NGOs are criticising its defects. First its advantages and later its negative impacts will be examined.

3.2.4. Positive aspects of the EPS

First of all, it prohibits discrimination against foreign workers. Amnesty International describes the enactment of this law:

“By passing this (2004 Employment Permit System) Act, South Korea became the first labour importing country in Asia to attempt to protect the rights of migrant workers through legislation.”¹⁸⁹

It also recognizes their rights to have access to a system of redress against employers in cases of overdue wages and industrial accidents.¹⁹⁰

Second, in regard to recruitment and placement, it aims to exclude private agencies who are inclined to overcharge migrants as well as to reduce illegal migration¹⁹¹. The Korean government makes Memoranda of Understanding (MoU) with designated sending countries.¹⁹² In such MoU, the Korean government demands that sending countries’ governments¹⁹³ are responsible for recruiting, selecting and sending their workers. Upon arrival,

¹⁸⁷ *Ibid.*

¹⁸⁸ However, Yoo, K. (2005), p.13 states ” the undocumented migrant workers tend to evade reporting to the administrative authorities because of their illegal status, making it difficult for the authorities to find ways of providing adequate protection to the illegal workers.”.

¹⁸⁹ AI (2006), p. 18, parentheses added.

¹⁹⁰ *Ibid.*

¹⁹¹ See Yoo, K. (2005), p.10.

¹⁹² There are seven selected countries, namely Thailand, Vietnam, the Philippines, Mongolia, Sri Lanka, Uzbekistan and Pakistan.

¹⁹³ Or government-affiliated public agencies. For example, the Philippine Overseas Employment Administration (POEA) is appointed as the responsible agency.

the Korean public agencies¹⁹⁴ are in charge of the placement service for them.¹⁹⁵

As shown in Chapter 2.7. of this study, the South Korean government has taken sanctions against countries where it discovered local brokers' engaged in improper activities and overcharging prospective workers. Nonetheless there is evidence that a number of labour-sending countries are failing to stop exorbitant fees being charged by recruitment agencies.¹⁹⁶

View from universal instruments

Korea has not ratified C97 and MWC but the principles and measures taken under the EPS satisfy the provisions in the Conventions as below:

- (a) equal treatment between nationals and migrants in employment (C97, Art. 6 and MWC, Art. 25);
- (b) government's responsibility to recruitment and placement of labour migration (C97, Art. 7 and the MWC, Art. 66(1)).

3.2.5. Negative aspects of the EPS

There are two major problems under the ESP; one is the large number of irregular workers and the other is the restriction on changing employment.

3.2.5.1. Irregular workers

A majority of the total migrant workers in Korea is irregular workers, who counted 48.0 per cent and 189,220 persons in 2006. With the adoption of the EPS in August 2003, the Government set the regularization process of irregular migrant workers as follows:¹⁹⁷

Irregular migrants who had been in Korea as of 31 March 2003:

- (1) For less than three years: eligible for sojourn status;
- (2) Between three years and four years: eligible for visa issuance certificate but must first leave the country until 15 November 2003. After that they should return to Korea within three months to be employed legally; and
- (3) For more than four years: no possibility to legalize their status and must leave Korea by 15 November 2003 or will be deported.

The number of irregular workers in 2002 amounted to 289,239 and took up 79.8 per cent of total migrant workers, but in 2003 they dropped sharply to 138,056 persons and 35.5 per cent respectively. It was partly due to the

¹⁹⁴ The Employment Security Center (public employment service) and the Korean Manpower Agency under the Ministry of Labour.

¹⁹⁵ Park, Y. (2007).

¹⁹⁶ AI (2006), pp. 20-21.

¹⁹⁷ See the Employment Permit System Act, Addenda, Article 2.

legalisation measures toward those who had stayed in Korea less than four years,¹⁹⁸ and partly due to a series of harsh crackdown on those who had stayed there for more than four years.

Since the following November 2003 when the moratorium had expired, the Korean government has conducted a series of operations with the intention of weeding out irregular migrant workers. Thousands of irregular migrant workers have been arrested, and almost all of them have been deported back to their countries.¹⁹⁹ In 2003 and in 2004, 5,861 and 9,307 were forcibly deported respectively.²⁰⁰

A range of abuses by police and immigration officials has been reported in the context of operations. Some have carried out arrests without appropriate documentation including arrest warrants or detention order papers.²⁰¹ The migration officials can issue detention/deportation orders.²⁰² The Korean National Human Rights Commission (NHRC) published a survey that 15 per cent of those arrested has suffered injuries in 2005.²⁰³ Regular migrant workers have also been detained and interrogated by immigration officials in an effort to get them to reveal the whereabouts of irregular migrant workers.²⁰⁴ In addition, it was reported that in many cases, irregular migrant workers who have suffered long-term or permanent injuries as a result of industrial accidents have been forced to leave Korea immediately after medical treatment without compensation.²⁰⁵ Finally, the NHRC expressed its concern in June 2005 about the manner of the operations, arguing that police and immigration officers had been violating the basic rights of irregular immigrants.²⁰⁶

In spite of the government's efforts, a considerable amount of migrant workers remain irregular in Korea. As of June 2006, the number of irregular migrant workers reached to 189,220 and took up 48.0 per cent of total migrant workers.²⁰⁷ AI (2006) depicts their plights as follows:

“Irregular migrant workers are heightened risk of exploitation and human rights abuses. Their lack of legal status makes it extremely difficult for them to assert their rights or to seek redress for abuses. Irregular migrant workers are employed in the informal sector or ‘shadow’ economy within which unscrupulous employers are able to exploit their lack of legal status or protection”.²⁰⁸

¹⁹⁸ Special Rapporteur (2006), para. 19 reports “In 2003, the number of irregular migrant workers registered by the Ministry of Labour exceeded 227,000 and 80 per cent of them were afforded legal status under the Employment Permit System”.

¹⁹⁹ AI (2006), p.32.

²⁰⁰ *Ibid.*, p.39.

²⁰¹ *Ibid.*, p.32.

²⁰² *Ibid.*, p.33.

²⁰³ *Ibid.*, p.32.

²⁰⁴ Special Rapporteur (2006), para. 29.

²⁰⁵ *Ibid.*, para. 28.

²⁰⁶ AI (2006), p.33.

²⁰⁷ See Table 3.

²⁰⁸ AI (2006), p. 31.

Special Rapporteur (2006) describes their situation as follows:

“... some migrants ... had been living in the Republic of Korea for more than 10 years without any document under a constant threat of deportation. However, as there was still a high demand for labour, particularly in small and medium enterprises, and because they were long term migrant workers with a good knowledge of the Korean language and better work skills their presence was tolerated.”²⁰⁹

Under South Korean law, trade unions must register with the Ministry of Labour in order to operate legally. In June 2005, the Ministry rejected the application of the Migrant Workers Trade Union on the grounds that a majority of its members were irregular/undocumented migrants. This Ministry’s decision contradicted a Supreme Court ruling in 1997 that every worker, regardless of their legal status, should be guaranteed basic rights, including the right to organize.²¹⁰ In May 2005, one month before the Ministry’s rejection, the leader of this union in an irregular situation was arrested for overstaying his visa.²¹¹

View from universal instruments

Although CCPR, Art. 13 only refers to aliens lawfully in the territory of a state, the UN Human Rights Committee has stated that “the purpose of Art. 13 is clearly to prevent arbitrary expulsions. Thus, the requirements of Art. 13 would not be satisfied with laws or decisions providing for collective (or mass) expulsions”.²¹² So, any expulsion decision should be assessed on an individual basis and be subject to due process.²¹³

MWC, which Korea has not ratified, Art. 22 provides more detailed protections to all migrant workers including those in an irregular situation from arbitrary and collective expulsion (see Chapter 2.4.3 of this study). Art. 22(6) accords a migrant worker a reasonable opportunity before and after departure to settle any claims for wages and other entitlements due to him/her and any pending liabilities. Safety and health conditions of work shall be equal to migrants and nationals (Art. 25.1(a)) even though the migrant is in an irregular situation, thus any migrant worker can demand compensation for injuries he/she has suffered at work under MWC. Deporting him/her without giving any reasonable opportunity to settle his/her claim is, therefore, in breach of this article.

Regarding trade union rights, Korea has ratified C98 but not C87. The latter stipulates the right to establish and join trade unions without previous authorization. Nonetheless, Korea is obliged to respect and ensure “the right to freedom of associations” to “everybody” as provided for in CCPR, Art. 22(1). In addition, CESCR, Art. 8(1) provides further details regarding

²⁰⁹ Special Rapporteur (2006), para. 30, emphasis added.

²¹⁰ AI (2006), p. 29.

²¹¹ *Ibid.*

²¹² CCPR General Comment 15, *the position of aliens under the Covenant*, 1986, para. 10.

²¹³ AI (2006), p. 39.

Korea's obligations in relation to the right to form and join trade unions. Thus, as the national Supreme Court ruling, the Korean government should guarantee the right to form trade unions to irregular migrants.

3.2.5.2. Changing employers

Under the EPS migrant workers are given one-year contracts which have to be renewed annually. The contract can be extended to a maximum of three years. If a migrant worker is refused an extension to a contract and is unable to find alternative work within one month, they are required to leave the country.²¹⁴

Changing jobs is restricted to a total of three times for each migrant worker.²¹⁵ When a migrant worker so wants, he/she can change workplaces only with permission of his/her present employer or in situations which can be attributed to the employer (such as cancellation of contract, rejection of renewal or business shutdown).²¹⁶ Restriction on changing jobs forces migrant workers either to accept poor working conditions and human rights abuses at work, or to leave the company, running the risk of deportation or becoming irregular workers.²¹⁷ The EPS intends to tie the residence status of migrant workers to their position with their initial employers, thus providing the employers with greater power and workers with greater vulnerability.²¹⁸

View from universal instruments

Korea has not ratified C143 and MWC. The former obliges States to grant the freedom to choose work to migrants who have resided in the territories lawfully for two years.²¹⁹ The latter allows States to limit temporary migrants' free choice of employment for a certain period of time.²²⁰ The Korean government's restriction on changing jobs (three times per three years) indeed exceeds the requirements of those conventions.

3.3. Japan

Japan has ratified CCPR, CESC, CERD, CEDAW, C87 (Freedom of Association), C98 (Right to Organize), C29 (Forced Labour) and C181 (Private Employment Agency).

²¹⁴ *Ibid.*, p. 22.

²¹⁵ EPS Act, Art. 25(4).

²¹⁶ *Ibid.*, Art. 25(1).

²¹⁷ AI (2006), p.21.

²¹⁸ Special Rapporteur (2006), para. 54.

²¹⁹ See Chap. 2.3.4. of this study.

²²⁰ See Chap. 2.4.4. of this study.

3.3.1. National Policy on Labour Migration

As mentioned in Chapter 1.1., Japan has not officially accepted low-skilled foreign workers. On the other hand, there are 14 categories of work-permit visas, which are deemed as high-skilled occupations. Those entering Japan on such visas can bring in their family and change employers within the same occupational category stipulated in the visa. In the event of unemployment, they are entitled to receive unemployment benefit within the validity period of residence permit.

As ‘the backdoor policy’ Japan has accepted *Nikkeijin*, and *industrial trainees* and *technical interns* as low-skilled workers. Unlike the former who are accorded a long-term residence permit, the latter are more vulnerable.

3.3.2. Industrial Training Programme

Industrial Training Programme (ITP) was established in 1990 by amendment of the Immigration Act. The training programmes are categorised by the nature of the basic accepting organizations into two major groups: government-based programmes and private ones.²²¹ The former are totally funded by the government’s budget and accept trainees upon request from foreign governments or international organizations.²²² The latter comprise two subcategories: One is called *Individual Enterprise-based Training* (IET) and the other *Associated Management Training* (AMT).²²³

The IET only allows private companies which have foreign joint venture, local affiliates or business counterparts to accept full-time employees of such foreign firms.²²⁴ As many small and medium-sized businesses (SMBs) could not use the IET, they demanded the government to “deregulate” the standards.²²⁵ Several amendments since then make SMB organizations (business associations or cooperatives) eligible to execute or mediate training for member companies. Now SMBs can use trainees through their support. This type of ITP is called *the Association Managed Training* (AMT).

In 1993, further amendment was made and established *the Technical Internship Programme*. Under this system, trainees who pass skill evaluation tests upon completion of a training programme are allowed to practice technology and skills at the same company with a worker status for

²²¹ H. Komai (1997), p. 115.

²²² *Ibid.*

²²³ E. Murakami (2007), p. 37.

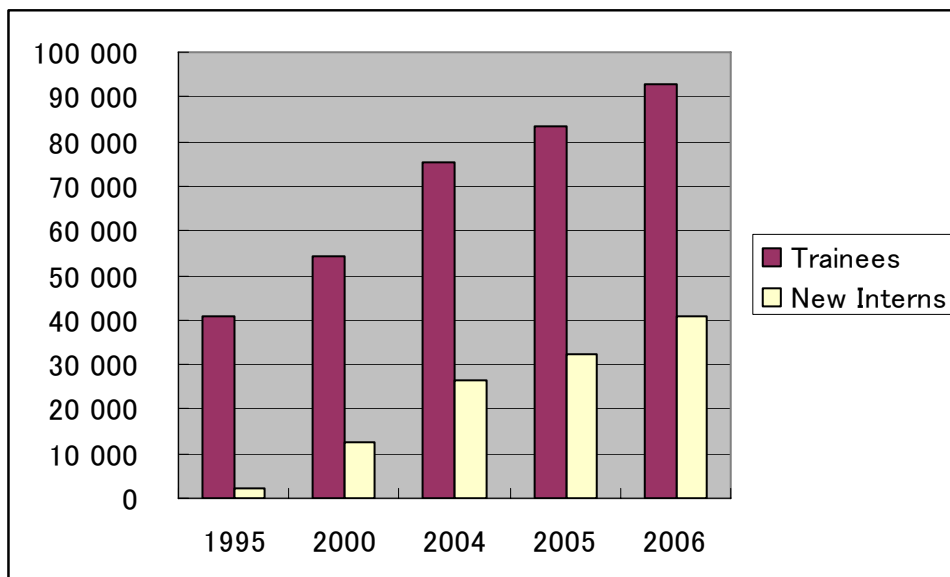
²²⁴ H. Komai (1997), p. 119.

²²⁵ E. Murakami (2007), p. 35.

a maximum of two years.²²⁶ Now manpower-hungry SMBs have become eligible to use low-skilled foreign labour for three years per worker in a row. The number of approved occupations has been expanded from 17 job categories in 1993²²⁷ and 62 in 2007.²²⁸ Those present 62 job categories are divided into seven industries; agriculture/livestock, fishing, construction, food processing, textile, metal manufacturing and other manufacturing. These are considered as ‘declining industries’ providing hard work and low wages and consequently shunned by Japanese nationals.

The numbers of trainees and interns have been increasing. In 2006, Japan accepted 92,837 industrial trainees and 41,000 became technical interns.²²⁹ 66.7 per cent of the trainees were from China, followed by Indonesia far behind (6.1 per cent).²³⁰ The total number of industrial trainees and technical interns was estimated around 130,000 - 160,000 by activists and journalists.²³¹

Graph 1: Total industrial trainees entering Japan and Newly-approved technical interns



Source: MHLW Report (2007), p. 3.

Original source: Ministry of Justice data.

²²⁶ Initially the period was one year and in 1997 it was extended to two years.

²²⁷ E. Murakami (2007), p. 35

²²⁸ JITCO website, www.jitco.or.jp/pdf/TypeofOccupation.pdf, visited on 1 November 2007.

²²⁹ Ministry of Health, Labour and Welfare, ‘Report on Industrial Trainees and Technical Interns’, May 2007, p. 3, *available online*, www.mhlw.go.jp/shingi/2007/05/dl/s0517-2a.pdf, visited on 1 November 2007.

²³⁰ Immigration Bureau statistics 2007, *available online*, www.moj.go.jp/PRESS/070518-1.pdf, visited on 1 November 2007.

²³¹ *Supra* note 5.

3.3.3. Japan International Training Cooperation Organization (JITCO)

There is no specific authority in charge to protect the rights of trainees/interns by inspecting training programmes and hearing their complaints directly.²³² On the other hand, there is a judicial person established by the Japanese government to *facilitate* the ITP by supporting SMEs.

The Japan International Training Cooperation Organization (JITCO) was founded in 1991 under the joint jurisdiction of five Japanese government ministries.²³³ As the JITCO provides comprehensive support and guidance to private companies conducting training programmes, most of all privately accepted trainees (84.6 per cent in 2003)²³⁴ are on programmes supported by the organization.

The JITCO charges private companies for its services: its total income gained from private companies in the 2006 fiscal year amounted to some JPY 1.87 billion (USD 16 million) and took up 75.8 per cent of all its revenue (most of the rest was the government subsidies).²³⁵ Besides such services, the Guidelines issued by the Ministry of Justice requires any person wishing to go on practical training as an intern to declare his/her intention to the JITCO, the *sole* institution in charge of evaluating applicants' training achievements.²³⁶

The JITCO regularly visit training companies to make sure whether the training is implemented as planned. However, that is part of their supporting services to give companies their advice; they just read documents and look over workplaces and dormitories.²³⁷ Komai, H. criticised the JITCO for trying to evade responsibility by claiming that it has no power of guidance and supervision.²³⁸ Today the JITCO has become a 'migration-industry giant' from which Japanese government officials can benefit.²³⁹

²³² Terasawa, K. (2000), p. 228.

SMJ (2007), P. 37 describes this problem:

“the structural problem of this system is the nonexistence of a national organization responsible for the whole system. The Immigration Control Bureau is in charge of the trainees system but only within the framework of immigration control. The on-the-job training (intern) stage is handled by the Ministry of Health, Labour and Welfare, although its range is limited to labour laws and regulations”.

²³³ Justice; Foreign Affairs; Economy, Trade and Industry; Health, Labour and Welfare; and Land, Infrastructure and Transport.

²³⁴ Murakami, E. (2007), p.38.

²³⁵ JITCO's website (Japanese), <www.jitco.or.jp/pi/2006shushikeisansho.pdf>, visited on 16 November 2007.

²³⁶ Komai, H. (1997), p. 127, emphasis added.

²³⁷ Yasuda, K. (2007), p. 126.

²³⁸ See Komai, H. (2001), p. 40, and *Tokyo Shimbun Newspaper*, 28 May 2007 (Japanese).

²³⁹ *Ibid.*

3.3.4. Associated Management Training (AMT)

Under this system, SMB cooperative organizations are designed to firstly receive foreigners and provide off-the-job trainings such as Japanese language. They are supposed to arrange on-the-job training at the member companies where trainees/interns are actually ‘employed’. Such associations are called ‘first accepting bodies’ and the companies ‘second accepting bodies’.

Today, nearly 60 per cent of all foreign trainees are accepted through the AMT into SMBs.²⁴⁰ Almost of all technical interns are hired by companies under this system (96 per cent in 2005).²⁴¹

Human rights violations of foreign trainees/interns are most persistent in the AMT system. According the MHLW Report²⁴² :

- (a) it cited 12 abusive cases reported by the press. All of the cases were occurred in the AMT system (pp. 5 and 18);
- (b) the Immigration Bureau have admitted 482 cases of misconduct for recent three years (2003-2005) such as “false document”, “training did not match the plan”, “overtime training”, “violence imposed to trainees/interns” or “ID confiscation”. Among them 470 cases (97.5 per cent) were occurred in the AMT (p. 6); and
- (c) the Labour Standard Inspection Offices nationwide found that 731 companies breaching labour laws with regard to employing interns in 2005. It comprises 80.7 per cent of all the companies inspected (p. 6).

It also quotes statistics (monthly, 2005):

- (a) average training allowance: JPY 66,000²⁴³;
- (b) average wage to interns: JPY 118,000;
- (c) average statutory minimum wage²⁴⁴: JPY 118,000; and
- (d) average initial wage to high-school finishers: JPY 153,000.

These figures show that trainees are paid lower than the statutory minimum wage. Interns, who have worker status, are paid less than nationals without occupational experience. Industrial trainees are not protected by labour laws. They are out of scope of the Labour Standards Law, the Minimum Wage Act and the Occupational Injury Compensation Act. Trainees can not receive wages. Instead, the companies pay ‘training allowance’ but it is not obligatory. Technical interns are treated as workers, but in many cases, their situations are not so different from those of trainees.²⁴⁵ The MHLW Report

²⁴⁰ See Table 4.

²⁴¹ MHLW (2007), p.7.

²⁴² *Supra* note 229.

²⁴³ JPY 1,000 is approximately USD 8.87 as of 30 December 2007.

²⁴⁴ A statutory minimum wage varies in 47 prefectures.

²⁴⁵ K. Yasuda (2007), p. 60.

admits that “in practice, industrial training (one year) and following internship (two years) are considered ‘one set’ by people concerned” (P.12).

An NGO federation, SMJ describes the AMT as follows:

“Small and medium-scale businesses in the declining industries rush to cheap labour for their survival without minding the violation of laws. Agencies (= SMB associations)* take advantage of their demands and sell them trainees by disguising themselves as ‘organizers’ in the form of cooperatives. Excessive competition has made the trainees’ wages destructively lowered and the hourly wages are sometimes around three hundred yen (approx. USD 2.50). The trainees and interns are paying all the prices. No law and morality is accepted there”²⁴⁶

Table 4. Current Status of Overseas Trainees Entering Japan

Year		2000		2003		2005		
Programmes of Trainees component ratio		Persons	per cent	Persons	per cent	Persons	per cent	
Total		54 049	100,0	64 817	100,0	83 319	100,0	
Government Organizations	Sub-total	13 030	24,1	13 482	20,8	*	*	
Private Host	Sub-total	41 019	75,9	51 335	79,2	*	*	
	Supported by JITCO	Total	31 898	59,0	43 457	67,0	57 050	68,5
		<i>IET</i>	9 023	16,7	8 606	13,3	7 570	9,1
		<i>AMT</i>	22 875	42,3	34 851	53,7	49 480	59,4
	Direct application	9 121	16,9	7 878	12,2	*	*	

Sources:

Total each year; Immigration Bureau statistics, see footnote 7.

Year 2000; Yoo, K., et al. (2004), p.252.

Year 2003; based on Murakami, E. (2007), p. 38 and *Report of Workshop on the ITP*, the Ministry of Economy, Trade and Industry, 14 May 2007, p. 4, *available online*, <www.meti.go.jp/press/20070514005/gaikokujinkenshu-torimatome.pdf>, visited on 1 February 2008.

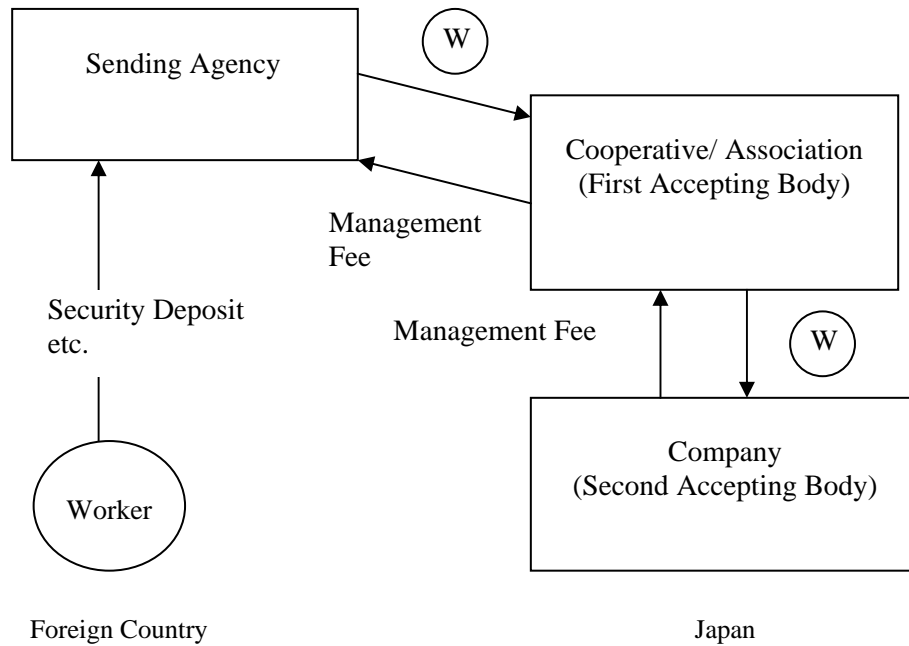
Year 2005; website of Japan China Science Technology and Culture Center, *available online*, <www.jcst.or.jp/html/goriyo-annai10.htm>, visited on 1 February 2008.

Original source is JITCO White Paper each year. JITCO does not publish such statistics online, instead it sells White Paper JPY 2,000 each copy.

Note: Direct application refers to cases without support from JITCO.

Figure 1. AMT

²⁴⁶ SMJ (2007), p. 38, parentheses* added.



3.3.5. Legal Cases

In this section, there are three major cases taken to law courts in recent years. All the plaintiffs were former foreign technical interns and working under the AMT system.

3.3.5.1. The *Misawa* Case

Three Chinese women had worked for a textile company in Misawa, Aomori prefecture for 2 years and three months, from July 2004 to November 2006; as trainees for the first one year and then technical interns for the following 15 months. From their second day in Japan, almost every day they were forced to work with sewing machines from 8 am to 11 pm, sometimes until 1 a.m., with only one day off a month. Their ‘dorm’ was a shabby hut without kitchen, shower and even toilet. In winter, a heater was hardly allowed and it was terribly cold in the hut.

Their ‘training allowance’ was JPY 60,000 per month and overtime wage was calculated JPY 350 an hour. When they got ‘promoted’ to technical interns, they got paid JPY 105,800 as monthly salary. However, boarding and utilities fees were deducted from their salaries: the boarding fee was charged JPY 20,000 and the utilities fee varied from JPY 3,000 to 9,000 per month, even though the Chinese women hardly stayed in the hut because they kept using sewing machines to make children’s clothes in the factory from 8:00 to 23:00 almost every day during the 27 months. Finally, they could not bear the hardship any more, they ‘escaped’ from the factory and ran to a civil organization for help in November 2006. The reasons they did not run away until then were:

- (1) their passports and bankbooks were kept by the employer;

- (2) they were threatened to be deported if they would run away from the factory/accommodation; and
- (3) in China before departure they had paid deposit to a recruiting broker. If they had not completed their three-year total training period, the deposit (around JPY 300,000) would have been confiscated by the broker.

In November 2006, with support of the civil organization (a small labour union), the women lodged a complaint with a local branch of the Labour Standard Inspection Office (LSIO). After inspection, the LSIO admitted that the employer breached the legal minimum wage and ordered the employer to compensate, around JPY 1.2 million each person, for the shortfall they suffered during the intern period. In other words, the LSIO did not admit the three Chinese were 'workers' during their 'trainee' period, so it came to a conclusion that the employer did not have to pay them remuneration for the labour they provided in the first one year. In April 2006, the three former trainees/interns took a lawsuit against the employer for the rest of the unpaid wage into the Hachinohe District Court.²⁴⁷

3.3.5.2. The TMC Case

On 27 March 2007, six Vietnamese filed charges in the Nagoya District Court against the JITCO and TMC, a vehicle manufacturer that produced components on a subcontractor basis to Toyota Motor Corporation. The six demanded unpaid wages and financial compensation of some JPY 70 million. The JITCO arranged to place the six as 'trainees' (and later 'interns') at TMC.

The Vietnamese sewed headrests and armrests at TMC, sometimes working from 8:30 a.m. until past midnight for a starting salary of JPY 58,400 a month. Almost half was put into bank accounts they could not access. Their passports and bankbooks were taken away for 'safekeeping'. They were met with the threat of deportation, and mistakes on the job brought curses. In addition, they were fined JPY 15 a minute for bathroom breaks.

Besides them, the six women also alleged they had undergone sexual harassment. One of the bosses would 'visit' their dormitory rooms at night and even slip into their beds, where he offered certain financial incentives in exchange for sexual favours.

According to TMC's chairman, a cooperative organization comprised of 20 businesses promoted the hiring of Vietnamese: "We were told we could obtain low-cost labour that would address the problem of worker shortages".²⁴⁸ One plaintiff said she had borrowed cash to help pay USD 8,800 to a placement agent in Vietnam.²⁴⁹

²⁴⁷ *Touhoku Shimpou Daily News*, 17 April 2007 (Japanese).

²⁴⁸ *The Japan Times*, 29 April 2007, 'Exploiting Vietnamese', available online, <http://search.japantimes.co.jp/cgi-bin/fd20070429t2.html>, visited on 30 December 2007.

²⁴⁹ See *supra* note 3, *The International Herald Tribune*, 26 July 2007.

On 25 May 2007, the Immigration Bureau suspended the cooperative organization from providing training and changed the statuses of the cooperative's trainees/interns into 'preparation for departure'.²⁵⁰ It meant that the existing trainees/interns, then nearly 100 Vietnamese, could not 'work' any longer, and a trainee/intern had to return home by 10 September 2007 unless the cooperative organization could find him/her an alternative training organization by then.²⁵¹ Many of them were about JPY 1.3 million each in debt to local recruitment agencies in Vietnam, and if deported, they would have been at a loss to return it.²⁵² As *Aichiken Roudoukumiai Sourenngou* (a local labour union) persistently negotiated with the cooperative organization and the JITCO to find other training organizations for them, by 7 September every trainee/intern concerned was provided with a new one.²⁵³

3.3.5.3. The Sexual Abuse Case

A former technical intern, a 35-year-old Chinese woman filed the suit in December 2006 against her host organization (an agricultural cooperative), a male executive at a construction firm where she was sent by the cooperative for 'on-the-job training', and JITCO.²⁵⁴ Although she had applied to a training on agriculture, she was sent to a construction company by the cooperative. The plaintiff demanded total JPY 37 million in damage and claimed that she was sexually abused by the executive on more than 60 occasions between March 2005 and June 2006, before she escaped from his house and sought help at the Tokyo Regional Immigration Bureau.²⁵⁵ The suit alleged that her passport and bank books were kept by the firm and she was often ordered to work for weeks with no days off.²⁵⁶ The wage was JPY 300 per hour.²⁵⁷ It also claimed that JITCO was responsible for not fulfilling its supervisory duties and for ignoring the fact that interns are being used for menial tasks.²⁵⁸ She reached an out-of-court settlement on 19 February 2007 with her host cooperative and the executive at the firm, but her suit against JITCO would continue.²⁵⁹ She had paid about JPY 700,000 to a Chinese emigration agency by borrowing money from her relatives and friends.²⁶⁰

²⁵⁰ *Mainichi Shimbun Daily News*, 27 May 2007 (Japanese).

²⁵¹ See website of *Aichiken Roudoukumiai Sourenngou* as of 27 May 2007, <http://rodo110.cocolog-nifty.com/viet_nam/cat7444598/index.html> (Japanese).

²⁵² *Ibid.*

²⁵³ *Ibid.* as of 7 September 2007.

²⁵⁴ *The Japan Times*, 20 February 2007, 'Sexually abused intern wins settlement: Court yet to rule on how foreign-trainee broker JITCO ignores exploitation', available online, <<http://search.japantimes.co.jp/mail/nn20070220a2.html>>, visited on 3 January 2008.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ K. Yasuda (2007), p. 129.

²⁵⁸ *Supra* note 254.

²⁵⁹ *Ibid.*

²⁶⁰ K. Yasuda (2007), p. 129.

3.3.6. Law and Weak Protection Mechanisms

The national Supreme Court has guaranteed that “Fundamental human rights inscribed in the Constitution extends also to foreign nationals staying in Japan except for those rights, which by their nature, are understood to address Japanese nationals only” (Supreme Court ruling on *the McLean case*, 4 October 1978). The MHLW has also guaranteed that “Labour Laws are applicable to all workers regardless of their nationality or residential status, whether or not they are working legally” in its ordinances issued in 1988.²⁶¹ The ‘Labour Laws’ include Labour Standards Law, Industrial Safety and Health Law, Minimum Wage Act and Trade Union Act. Labour Standards Law, Art. 3 stipulates “An employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker”.

In reality, however, due to weak law-enforcement mechanisms²⁶², it is very difficult for even Japanese employees to demand their employers to comply with the laws. Needless to say that it is more difficult for foreigners. Moreover, industrial trainees and technical interns are situated in a more vulnerable position than other foreign workers. There are some vices in the ITP which allow exploitative practices. The following sections will discuss them.

3.3.6.1. Trainees not Workers

The labour standard administration authority has denied to apply labour protection laws to trainees. In the *Misawa* case, as mentioned above, the local Labour Standard Inspection Office (LSIO) rejected the three Chinese women’s claim for overtime pay which they made during their trainee period. An Indonesian trainee who lost his finger during the ‘training’ claimed for Occupational Injury Compensation but it was rejected by a local LSIO because “he was a trainee, not a worker”.²⁶³ Yasuda, K. reports that some ‘employers’ make the best use of such LSIO’s attitude toward trainees and they order only trainees to ‘work’ overtime.²⁶⁴

For recognition of the status of employee, however, there have been a number of legal actions brought by sub-contractors and interns. Each case was examined to what content a sub-contractor or an intern was subordinated to the other contractual partner and whether they had other characteristics pertinent to employment relationship.

²⁶¹ See JIL website, ‘Database on Labour related Qs and As’, <www.jil.go.jp/kikaku-ga/kokusai/K02.html>, visited on 9 January 2007 (Japanese).

²⁶² For example, there were about 3,000 labour inspectors nationwide, while 47 million employees and five million business establishments existed in private sector in 2006. With respect to immigration control, there were about 3,000 immigration control officers nationwide while eight million foreigners entered Japan and 170,000 ‘illegal’ residents were estimated in 2006. They are apparently understaffed.

²⁶³ Advocacy Network for Foreign Trainees (2006), p.63 (Japanese).

²⁶⁴ K. Yasuda (2007), p. 168.

View from universal instruments

According to the definition of migrant workers in C143, Art. 11(1), a migrant worker is a person “with a view to being employed otherwise than on his own account” and “regularly admitted as a migrant worker“. An example of exclusion from migrant workers is, based on C143, Art. 11(2)(d), “persons coming specifically for purposes of training or education”.

Japan has not ratified this convention, but in order to be consistent with the ILO’s view of migrant workers, Japan should take account of this definition. Many foreign trainees under the AMT go on to become interns who make employment contract with employers. It is impossible to assert that they come to Japan only for purpose of training.

As recruitment agencies told them it would be an opportunity to earn a fortune in Japan, many of prospective trainees have paid or owed a large sum of money to recruitment agencies in home countries. It is necessary to know whether they obtained correct information before departure as well to examine how they work in the form of ‘on-the-job training’ in Japan, in order to judge their *real* status, either trainee or employee.

MWC’s definition of a migrant worker is “a person who is to be engaged, is engaged or has been engaged in a *remunerated activity* in a State of which he or she is not a national” (Art. 2(1)). “Students and trainees” are excluded from this definition (Art. 3(e)) but the ILO has made an emphasis on the protection of “all persons working in a country other than their own, [...] including [...] students and trainees whenever they are *economically active*” in the drafting process.²⁶⁵ Technical interns are definitely included into the category of migrant workers because they get remunerated for their work. Also industrial trainees, when engaged in an economic activity, can fall under this category.

3.3.6.2. No responsible authority

There is no specific authority in charge to protect the rights of trainees/interns by inspecting training programmes and hearing their complaints directly.²⁶⁶ The government attributes all the cases of misconduct to private companies. The Guidelines revised in December 2007 by the Ministry of Justice²⁶⁷ emphasizes that “training bodies must understand the spirit of the ITP, *i.e.* “transfer of technology, skills, and/or knowledge of industry as a means of *contributing to the development of other countries*” and all the problems were caused by the companies “who do not understand it” (P.2, emphasis added). It further states that “first accepting bodies (mainly cooperatives/associations) are responsible to supervise second accepting bodies (their member companies)” so “the

²⁶⁵ See Chapter 2.4.1. of this study.

²⁶⁶ See *supra* note 232.

²⁶⁷ Available online, <www.moj.go.jp/PRESS/nyukan67-2.pdf>, visited on 16 January 2008 (Japanese).

former must inspect the latter and submit a report on it to the Immigration Bureau every three month” (p. 13). “If a first accepting body knows that an sending agency in a home country has charged trainee-applicants an exorbitant security deposit, it *would be* necessary to cease using the agency” (p. 20, emphasis added).

3.3.6.3. Management Fee

While the government emphasizes first accepting bodies’ responsibility to supervise second accepting bodies, it does not either prohibit or put on a cap on the ‘management fee’, charged by the former to the latter. The Guideline states “many of the first accepting bodies charge the second accepting bodies ‘management fee’. The amount of management fee should be appropriate. Management fee should be collected from the second accepting bodies but not from trainees. Likewise, management fee paid to sending agencies abroad should not be collected from training allowance” (p. 18). It further states that “collecting management fee from training allowance” constitutes a case of ‘misconduct’ (pp. 26-31), and breaching of which can entail suspension of providing training (or accepting trainees/interns) for three years (p. 31).

The MHLW Report states “some first accepting bodies and sending agencies charge second accepting bodies high management fee for their services (p.9)”. Both ministries consider ‘high management fee’ problematic, but have no intention to limit the amount. On the other hand, Japan’s Employment Security Act sets caps on the fees which private employment agencies can charge companies.

3.3.6.4. Security Deposit

The MHLW Report states:

“many sending agencies impose high amount of money on trainee-applicants as deposit with intention to prevent them from going missing. Collecting security deposit has been effective for that purpose, but too high deposit can make them in debt and eventually make them want to work overtime or even take up irregular work. Therefore, it is necessary to demand the sending countries’ governments to regulate too high deposit. (p.23)”

The Ministry evaluates security deposit as a means to prevent foreigners’ ‘running away’. Although it estimates the average of deposit is between JPY 150,000 to 300,000 (p. 23), this range seems conservative. Many media reports have told that foreign trainees/interns had paid or borrowed more money to their emigration agencies, including security deposit and other expenses, and such financial burdens make them obedient to their ‘employers’ in Japan.

View from universal instruments

As mentioned before, “induced indebtedness” and “financial penalty” are indicators of forced labour. Many trainees/interns have been reported to

suffer from “retention of passports and bankbooks” and “threat of deportation” as well. Japan has ratified C29, thus it has obligation to “suppress the use of forced or compulsory labour in all its forms” (Art. 1(1)).

3.3.6.5. Deportation

Trainees/interns are not protected from deportation. The Guidelines states

“trainees/interns must repatriate in the event of suspension of the first accepting bodies’ training or bankruptcy of the second accepting bodies, even though they have no fault, unless they obtain alternative bodies to be accepted in a designated period” (p. 37).

This could make trainees/interns ‘collaborate’ with the ‘training’ bodies or employers on an occasion of inspection for fear of repatriation.

Yasuda, K. (2007) describes two cases in which foreign trainees/interns were forced to return to China by cooperative officials and a firm owner. One case is that a young Chinese man, who had complained about low pay, was pushed into a car by a cooperative executive and a firm owner, who wanted to carry him to an international airport. The young man realized that he would be deported, and resisted hard to kill the executive (pp. 34 - 36). The other case is that two Chinese interns were taken away of their dorm at dawn and pushed into a car running to an international port by the cooperative officials. At a rest facility on the motorway, they confined themselves in a toilet and screamed for help of others such a long time until the police came to them. (pp. 172 – 173). *Aichiken Roudoukumiai Sourengou* also reports about Chinese interns who asked a flight attendant and a police officer for help at an international airport where they were about to be sent back. Before that, they had lodged complaints with a local LSIO.²⁶⁸ There is no measures to confirm the will of trainees/interns in the event of deportation by direct hearing. It seems like that Immigration officials carry forward the procedures as ‘training bodies’ (*i.e.* cooperatives and firms) claim.

View from universal instruments

CCPR, Art. 13 guarantees regular migrants procedural protection from arbitrary expulsion. The Japanese government should provide a foreigner in question with an opportunity with which he/she can submit the reasons against expulsion and the competent authority in charge of reviewing his/her case.

²⁶⁸ *Supra* note 251 as of 22 December 2007 (Japanese).

3.4. Biggest Obstacle to Ratify MWC

Each government examined above is recommended by Special Rapporteur or NGOs to ratify MWC. What is the biggest obstacle to each government to do so?

To Singapore, it is that residence permit is tied up with employment (Art. 51).

To Korea, it is collective expulsion prohibited in Art. 22.

To Japan, it is that employers are allowed to use migrant workers (trainees) in a discriminatory manner (Art. 25).

4. Recommendations to the Japanese Government

This section returns to the main question held in Chapter 1.1., “Should Japan open its labour market to foreign low-skilled workers?” The answer of this author is yes. By disguising labour immigration as a training system, the government has deprived their status of worker and yielded many human rights violations. The government should face this reality and accept them as workers and protect their basic human rights.

4.1. The Need to Abolish the AMT

The AMT has many features identifying forced labour. Trainees/interns are bound by security deposit and other debt charged by recruitment agencies in home countries, in Japan there is no public support to change ‘training organizations’ or ‘employers’, unemployment leads repatriation, there is no protection from arbitrary deportation. They all create a mechanism to force them to be obedient to employers. The Japanese government wants to ignore their plights by non-establishment of a competent authority to hear their complaints directly. Japan has ratified C29, thus it must undertake “to suppress the use of forced or compulsory labour in all its forms within the shortest possible period”.

4.2. The Need to Create Working Visa for Low-skilled Foreigners

The Japanese government has no intention to abolish the principle of “no unskilled migrant workers admitted” by keeping the ‘backdoor system’. However, as SMJ points out, “the roof of the problems is that actually existing workers are not recognized as workers or guaranteed rights”.²⁶⁹ The Japanese government should accept low-skilled foreigners as workers. ‘Influx of foreigners’ is one of the arguments in a favour of keeping the principle, but it can be controlled by measures to limit the number of visa issuance. Strange enough, today there is no cap on the number of visa issuance for industrial trainees.

The Singaporean model is not desirable because it gives greater power to employers and this power-imbalance can incubate forced labour. Still, it has some points better than Japan’s AMT:

²⁶⁹ SMJ (2007), p. 39.

- (a) migrant workers are treated as workers and given legal protections to some extent;
- (b) security deposit is imposed on employers not workers; and
- (c) there is a responsible authority, the Ministry of Manpower, where migrant workers can lodge complaints.²⁷⁰

Korea's Employment Permit System can be a model when inventing a new scheme for labour migration. The Korean government takes on many responsibilities by:

- (a) selecting sending countries considering transparency of sending nationals, the history of nationals' 'running away', and guarantee of receiving back of nationals;²⁷¹ and
- (b) making MoU and demanding sending countries' governments to be responsible for recruitment in an attempt to secure prospective migrant workers from avaricious agencies as well as to ensure legal migration.

And also the government makes sure that

- (c) the initial education for migrant workers on arrival is conducted by the two government-related organizations ; and
- (d) placement service is provided by public-run employment agencies.

The Japanese government should stop leaving responsibilities to private sector and commit itself more to protect foreign nationals' human rights: it can also lead to prevent illegal migration.

²⁷⁰ ILO (2003), p. 343. However, this is also a regulating authority.

²⁷¹ Park, Y. (2007).

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