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Towards decent work for Domestic
Workers in South Korea: Ways to go

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Summary

Domestic work is one of the oldest and most important occupations for many women in many countries. However, it is one of the occupations that are still undervalued and neglected. It is often regarded as unskilled because most women have traditionally been considered capable of doing the work. When paid, the work remains undervalued and poorly regulated. These days, it is also a global phenomenon that is linked with gender, race, ethnicity and nationality.

Like most of the countries around the world, domestic workers in South Korea have existed but totally neglected. Their fundamental human and labor rights have failed to get attention.

International human rights standards and labor standards are to be applied to ‘everyone’ and ‘every worker’ respectively hence domestic workers are definitely under the protection of those standards. On the other hand, it is also true that human rights and working conditions of domestic workers have not been dealt with adequately by the ILO or other international organizations. However, it is positive that at the 2010 International Labor Conference subject on standard setting for decent work for domestic work will be discussed for the first time.

Looking into national legislation in South Korea, domestic workers have been totally excluded from labor legislation and consequently not protected from any degrading or inhumane labor conditions. Moreover, non-recognition as “workers” leads to exclusion from employment insurance and industrial accident compensation schemes. Migrant domestic workers are more vulnerable because either labor legislation or migrant workers’ relevant legislation does not adequately protect their labor rights.

Therefore it is essential to bring the issue of domestic workers out from the shadow and initiate discussion to recognize their ‘work’ and protect their human and labor rights regardless of their status and nationality.

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Lastly, glory should be given to my heavenly Father who listens to the cry of the afflicted and the oppressed(Psalms 10:17~18) and is my refuge and shield(Psalms 119:114).

Abbreviations

AI	Amnesty International
CEACR	ILO Committee of Experts on the Application of Conventions And Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
EPS	Employment Permit System
ETUC	European Trade Union Confederation
FKTU	Federation of Korean Trade Union
HKCTU	Hong Kong Confederation of Trade Unions
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights Of All Migrant Workers and Members of Their families
ILC	International Labor Conference
ILO	International Labor Organization
IRENE	International Restructuring Education Network Europe
IUF	International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations

JTUC–RENGO Japanese Trade Union Confederation

KFTU Korean Confederation of Trade Unions

LSA Labor Standards Act

VMS Visit Employment System

UDHR Universal Declaration of Human Rights

UN United Nations

UNIFEM United Nations Development Fund for Women

1 Introduction

1.1 Background Information

‘Domestic work is a “labour of love”, mostly done by the women of the household; it is their duty to “care” for others. Not being able to fulfil all of this duty is usually held up as a shortcoming; they are somehow “inadequate”; the image is a negative one. This results in a negative attitude towards those who step in. They are just “helping out” – and so aren’t highly rewarded.’¹

- Anneke van Luijken, from IRENE -

Domestic work is one of the oldest and most important occupations for many women in many countries². However, it is one of the occupations that are still undervalued and neglected. It is often regarded as unskilled because most women have traditionally been considered capable of doing the work. When paid, the work remains undervalued and poorly regulated. These days, it is a global phenomenon that is linked with gender, race, ethnicity and nationality.

It is very difficult to describe what domestic work is in terms of tasks performed. Rather it should be perceived as a series of processes, of tasks inextricably linked, often operating at the same time. But it is not just physical work but also highly skilled both in terms of time management and what are actually done³.

Domestic work has been regarded as “informal economy labor” and in many countries domestic workers are beyond scope of regulation and scrutiny. Hidden in private households, women and girls domestic workers may remain unregistered, uncounted and unprotected. They are often not recognized as workers, and excluded from key labor protections accorded workers in formal sector. The exclusion of domestic workers from these

¹ IRENE and IUF : *RESPECT and RIGHTS, protection for domestic/household workers*, August 2008, p.11 available at <www.domesticworkerrights.org>

² ILO: *Decent work for domestic workers*, Report IV(1), International Labor Conference, 99th Session, Geneva, 2010, pp.18

³ Bridget Anderson, *Doing the Dirty Work: The Global Politics of Domestic Labor* (2000 London Zen Books) p. 12

rights denies them equal protection of law and has a discriminatory impact on women who constitute the vast majority of domestic workers⁴.

There are some distinct attributes of domestic work which differentiates from other work governed by labor legislation⁵.

First, the home is workplace. The work that domestic workers undertake does not correspond to what is generally thought of as the "labor market" and reflects a dichotomy between work and family. Working at home restricts the ability to associate and increases vulnerability to physical and sexual abuses. In addition, traditionally domestic workers are considered as one of the family member. They are not regarded as one of the parties of an employment relationship whose working conditions are to be respected and granted every privilege according to other family members' sense of fairness or disposition. It is precisely because domestic workers are employed within the "private sphere" that there is resistance to recognizing the domestic work relationship, and appropriately regulating it. The cumulative result is that these workers experience a degree of vulnerability that is unparalleled to that of most other workers.

Second, most of time domestic work is undervalued in monetary terms. Almost by definition the wages of domestic workers are less than their employers earn on the labor market. A concrete illustration of how domestic work has been treated differently is strong historical tendency to remunerate domestic workers by payments in kind.

Third, domestic workers are overwhelmingly women. Domestic workers are among the few categories of workers who systematically have another woman as their employer. There is perception that their work does not constitute a productive labor market activity, but rather non-productive personal care services⁶. The domestic workers are regarded to provide a waged substitute for the not waged labour "that has historically been considered women's work, liberating - if only temporarily - the "woman of

⁴ Human Rights Watch: *Swept under the Rug, Abuses against Domestic Workers around the World*, Volume 18, Number 7 (c), July 2006.p.1~3

⁵ Summarized from following materials:

ILO, *supra* note 2, p.5~15; Adelle Blackett, *Making domestic work visible* (1998 Geneva: ILO) introduction, available at

www.ilo.org/public/english/dialogue/ifpdial/publ/infocus/domestic/index.htm

; Helma Lutz, *Migration and Domestic work : European perspective on a Global Theme*, (2008 England Ashgate) p.13~15

⁶ Regarding productivity of domestic work, there were several debates especially among feminists. They claimed that the notion domestic work is unproductive downgrades its social and economic contribution and excuses its invisibility. Anderson also argues that domestic work is productive in that without it humanity and dignity as human cannot be sustained : Further details found in Anderson : *supra* note 3, p.12~14

the house" from the responsibilities that would otherwise traditionally fall upon her shoulders⁷. Yet the same domestic services are treated differently when regulated outside the home and when performed within the household. There is no fundamental distinction between work in the home and work beyond it, and no simple definition of public-private, home-workplace and employer-employee.

National legislation and existing international human rights standards often failed to address the unique circumstances of domestic workers and the need to provide specific legal guidance to protect their rights. Rather their lives and work are regulated by strong non-state norms regarding work in the employer's household, which vary significantly from one cultural context to the next but which result in domestic workers being among the most marginalized workers. At least for domestic workers, decent work is often a distant hope.

With globalization, demand for domestic work has been main reason for the mass migration of women from developing(less wealthy) countries to more developed(wealthier) countries. Female migration to take up domestic work abroad creates 'transnational' households, a form of global chain between workers with family responsibilities in the receiving countries, who require household service, and temporary migrants from the sending countries, who can provide them. On their income, migrant domestic workers often financially support whole families back home. However, the real costs of migration on the domestic worker, her family and her country of origin are often hidden.

Overall, millions of domestic workers, predominantly female, are denied the protection of decent work while they contribute to improving employment prospects and living standards of other categories of workers. This unfair treatment has repeatedly been drawn attention to by notably International Labor Organization(ILO) and other United Nations bodies, referring abuses of basic labor and other human rights, ranging from excessive hours of work, low wages and inadequate social protection to sexual harassment, physical assaults and other forms of violence.

Recent trends show an increase in abuses and point to the likelihood that the numbers of domestic workers will continue to increase worldwide. Conservative estimates put the number of domestic workers at above 100 million, making them one of the largest yet unprotected segments of the

⁷ Blackett, *supra* note 5, introduction

labor force⁸. In other words, it means that more unpaid work in the family or household is being transformed into paid jobs. Report of European Trade Union Confederation(ETUC) explains this phenomenon with demographic, social and employment reasons⁹.

Demographically, number of the elderly live on their own and single-person and single parent household increases and the number of family with several generations is on the decline.

More women working outside the home has stepped up the need for help with household services, care for children, the elderly and disabled. The increasing demands of modern working life have triggered social and cultural changes in the mutual networks of family and community and this reduces the scope for people to find support services on unpaid basis. Meanwhile, there are also an increasing number of households where all the adult members are unemployed or earn only very low wages. The women of such households may have little choice but to offer themselves as domestic workers at low prices.

Though the analysis is made in Europe, the explanation is still valid in other regions as well. South Korea which dramatically transformed to highly industrialized country is also going through this process.

1.2 Statement of problem

Like most of the countries around the world, domestic workers in South Korea are certainly existing but totally neglected. Since it is informal labor, it is hard to get the precise statistical data however according to the figure of National Statistics Agency in 2008; about 163,000 Korean domestic workers are working in South Korea¹⁰. However, there are certain numbers of migrant domestic workers who are omitted or hidden in statistics as well. Korean domestic workers are characterized as middle aged, low-skilled women, working as part-time for multiple employers¹¹, while migrant domestic workers are working as full time as live-in domestic workers.

Moreover, as migrant domestic workers are even under worse situation. Officially South Korean government does not allow migrant workers to

⁸ ILO : Governing Body decision , 301/2 (March 2008 Geneva) pp. 44

⁹ ETUC, *Out of shadows, Organizing and protecting of the domestic workers in Europe : the role of trade unions*, (2005 Brussels) p.10

¹⁰ Seonyoung Park : *How to protect the labor rights of informal care workers* , Korean Women's Development Institute, 53th forum (2009 Seoul) p.80) (in Korean)

¹¹ Ministry of Gender Equality and Family, *Research on formalization of domestic service*, (2006 Seoul) p.13 (in Korean)

work in service industries which includes domestic works, unless they are ethnic Korean migrants. It is assumed that there are some Filipina or Chinese domestic workers who are mostly undocumented migrants¹². They face double discrimination as women and alien under conservative and mono-ethnic South Korean society. Being women, they also have to fight against the prejudice based on Confucianism, male oriented social perception and sexual abuse. As migrant workers, they are more vulnerable and easily exploited since they are isolated and not used to language and culture of Korea. It is to say that they take up lowest and the most vulnerable status in South Korean labor market.

Above all, their labor status as domestic worker is not recognized as ‘worker’ under South Korean labor legislation¹³. Therefore they are excluded from labor and social protection regardless of national and non-national.

They are still invisible and hidden because their workplace is the private home and their work is undervalued. They are not legally granted right to associate and are not socially powerful enough to make their voice heard. Their labor and human rights protection has not been highlighted even compared with other informal economy workers. Therefore my research questions start from those backgrounds in South Korea.

- How does labor legislation recognize domestic workers? What are the legal problems of protecting domestic workers and their consequences in South Korea?
- How did migrant domestic workers work in South Korea? How did labor legislation governing Korean domestic workers affect human rights of migrant domestic workers?
- What are the international human rights and labor standards applied to domestic workers? Does South Korea comply with those standards?
- What measures should be made to protect domestic workers’ fundamental rights? What could it be learned from comparative studies?

In addition, it is needed to pay attention to the fact that domestic workers have multi-faceted perspectives on human rights. In South Korea, similar to other countries, domestic work is dominantly seen as ‘women’s work. Men do not do an equal share of work in the home. It is when women get jobs outside the home that other women are brought in to do it. So it cannot be

¹² Though it is illegal, the websites of private agency connecting potential employers and migrant domestic workers are easily found in South Korea.

¹³ It will be further discussed on chapter 3.

free from gender perspective. It also holds race or ethnic perspective especially for migrant domestic workers.

Not only migrant domestic workers, but also Korean domestic workers are exposed to low wage, poor working conditions and physical and mental abuse and exploitation. In some ways, rampant poor working condition of native domestic workers exacerbates the one of migrant domestic workers.

Therefore, my research will look into both national and international legal framework to protect domestic workers' human rights and then special emphasis is made on migrant domestic workers with specific norms which are relevant to them. In addition, I also hope to seek the way how to collaborate both Korean and migrant domestic workers to achieve their fundamental human rights and labor rights.

1.3 Definition and terminology

Currently in the absence of an international standard¹⁴ regulating domestic work, there is no universally accepted definition of domestic work. Also given no definition found under national legislation regarding domestic work and domestic workers in South Korea, in this research I will follow the definition of the ILO report on Decent work for domestic workers in 2010.

“Domestic work” herein means work performed in and for a household and includes housekeeping, child care and other personal care¹⁵.

“Domestic worker” refers any person who undertakes domestic work, whether on a full-time or part-time basis, for remuneration¹⁶. The term “domestic worker” in Korea has negative and depreciating perception so Association of Korean domestic workers officially promotes the terminology “ *household manager*(Gajeong Gwanlisa)”¹⁷ instead of “domestic worker”. However, considering no definition has been made under labor code in South Korea , “household manager” is not commonly used and it does not deliver the attributes of domestic work indeed, in this research I will follow the term of the ILO report.

¹⁴ For the first time, ILO will discuss the setting of international labor standard on domestic workers in June 2010 ILC. It will further discussed on Chapter2.

¹⁵ ILO : *Decent Work for domestic workers*, International Labor Conference, 99th session 2010 Report VI (2), (2010 Geneva).p.385

¹⁶ ILO, *supra* note15, p.385

¹⁷ Quote from introduction of National Corporative of Household Managers (Jeonguk Gajeong Gwanlisa Hyuphoi, Available at <http://www.homeok.org/homeok/> > (in Korean)

“Migrant domestic worker” refers to foreign domestic workers or those who migrate to foreign countries of employment to perform domestic work in individual households.

1.4 Scope of research

Scope of the research is care workers whose workplace is private home regardless of their services for remuneration. In that sense, care workers who are working at the hospitals or nursing homes, though they are hired by private employers and perform work analogous to domestic work, are not covered by this research.

Domestic workers as a whole, both nationals and migrants are vulnerable to abuse and exploitation. Moreover, exclusion of local domestic workers from labor legislation affects the labor condition of migrant domestic workers. Therefore it is required to look into legislations and policies governing domestic workers then specific emphasis is going to be made on migrant domestic workers. Extent of this research is constrained to the labor rights in South Korea and is not covered before departure and recruitment of domestic workers in countries of origin.

In chapter 1, brief introduction to current state of domestic workers both around the world and in South Korea and explanation of key words and scope of this research.

In chapter 2, international legal framework relevant to protection of domestic workers, both the UN and the ILO labor standards and South Korea’s compliance with them will be investigated. Migrant domestic workers’ human rights will be dealt with specifically.

In chapter 3, I will look into how national legislation recognizes human rights of domestic workers and discover current legal problems and limitations. To understand legal protection of migrant domestic workers’, policies and legislation governing migration policy in South Korea will be investigated.

In chapter 4, comparative studies will be made on Hong Kong and Japan which has similar cultural and social background with South Korea and try to seek solutions for better protection of domestic workers.

Finally in chapter 5, there will be some recommendation for South Korean government and conclusions for this research.

1.5 Brief Description of Domestic Workers in South Korea¹⁸

Since domestic workers belong to informal sector of the economy, it is difficult to find the accurate statistical data in South Korea.

According to the official statistics made by National Statistical Office, the population of national domestic workers is around 150,000¹⁹ and more than 90% of them are over 40 years old²⁰. Most of them are believed to work on a part time basis, offering their services to more than one household. Looking into previous occupation before the domestic work, they were either housewives or dispatched cleaning, working in the restaurants and care workers in the hospital. It seems that domestic work is the only and final occupation for low-skilled women workers to choose after having gone through manual works in formal economy²¹.

As for migrant domestic workers, it is almost impossible to figure out the number. Because domestic work is only open for ethnic Korean migrants and despite the registration of employment is compulsory upon commencement of employment, it is hardly administered by Ministry of Labor. Moreover, unlike regular migrant workers under the Employment Permit System(EPS), ethnic Korean migrants are governed by called Visit Employment System(VES) which does not restrict the industry and workplace that migrant workers employed. Other migrant domestic workers- dominantly Filipina and Chinese – are irregular hence it is hard to presume the population as well²².

Over all, given informality of domestic work and the low status that it carries in Korean society and it is likely that figures demonstrated may be under-reported in both national and migrant domestic workers.

¹⁸ Summarized from Hye-Kyung Lee , *Migrant domestic workers in Korea : The effects of global house holding on Korean-Chinese domestic workers*, International Development Plan Review (2006), p.500~502, p. 505~506

¹⁹ Ministry of Gender Equality and Family, *supra* note 11, p.20

²⁰ Ministry of Gender Equality and Family, *supra* note 11, p.21~22 :

In 2005, aged 40~49 years old takes up 29%, 50~59 years old takes up 33% and over 60 years old takes up 34% respectively.

²¹ Ministry of Gender Equality and Family, *supra* note 11, p.20

²² Local NGOs assume that the number of undocumented migrant domestic workers is two to three times of documented ones. (quotes from Weekly Dong-A, April 25 2006, No. 532 in Korean, available at

<http://weekly.donga.com/docs/magazine/weekly/2006/04/19/200604190500031/200604190500031_1.html>

To track history of domestic workers in South Korea, until the 1970s most live-in domestic workers were teenage girls, who migrated to cities in order to contribute to their parents' economic situation and their brothers' education. Young girls from poor families provided their services in remuneration for food and accommodation. It was common for some urban households to take teenage girls from their poor relatives or neighbors. Because there were no clear specifications about their wages, working conditions, rights and obligations, physical or sexual abuse and exploitation.

Since the mid 1970s, however, Korean society has experienced structural changes in its labor supply. The slowdown in the growth of the labor force was a consequence of the exhaustion of the rural labor surplus and the declining labor participation rate of youth population as a result of the increase in educational opportunities for women. In addition, the expansion of the manufacturing and service sectors offered better employment opportunities for young women than domestic work.

As it became difficult to find young local domestic workers after the mid-1970s, middle-aged married women began to take part-time jobs as domestic workers. The term 'Pachulbu' for those who work as part time domestic workers was coined by YMCA in 1966, in order to make domestic work a job with clear specifications, and to offer job opportunities for low-skilled married women. Since then several women's associations, such as the YMCA and the Korean Wives Association, have recruited and trained women to perform these tasks. Hiring such part-time domestic workers became popular after the 1980s.

Cultural and social expectation of a gendered division of labor persists even in modern Korean society; it is not surprising that a husband's share of domestic work has not changed notably during the past four decades. Although there seems to be a change in the younger generations, most husbands think that household work is not their responsibility. The strong cultural ideology that defines gender roles has been dominant. With industrialization, household technology and the development of convenience goods and services, the wives' burden of housework has been reduced. However, work-family conflicts among working wives persist in Korea, and instead of struggling for more co-operation from their husband, they try to hire domestic workers. As Korean domestic workers preferred part-time to full-time live in work and inflow of ethnic Korean-Chinese increased, South Korean household employs domestic worker either Korean part-time worker or migrant live-in full time worker. As shown before, part-time domestic workers are middle-aged, low-skilled women introduced by women's association, private employment agency, while full-time live-in

domestic workers are migrants(dominantly ethnic Korean-Chinese) introduced by private employment agency or acquaintances.

The concentration of Korean-Chinese women in domestic work can be explained by several factors. First, while the employment of migrant workers in the service industry has been prohibited for a long time, significant number of Korean-Chinese are able to bend the rules, given their ability to speak Korean and having a similar physical appearance to native Koreans. In addition, Ethnic Korean migrant workers are exclusively allowed to work as domestic workers. Second, these days Korean families living in apartments feel uncomfortable employing young women as live-in domestic workers. Instead, they prefer 'gender-neutral' older women who are similar to grandmothers, to provide such 'live-in' services.

2 International legal framework for protection of domestic workers

2.1 The UN standards

Domestic workers may suffer specific forms of abuse and deserve full protection from those abuses under international human rights law. The right to work, principles of non-discrimination, equality and equal protection of the law enshrined in international human rights standards are specifically essential to domestic migrant workers. Because they embody the general rule that human rights must be extended to all equally and the redress should be made available to all on an equal footing.

Migrant domestic workers may suffer specific forms of abuse and deserve full protection from these abuses under international human rights law. As female migrant workers, they have stood at the crossroad of three major sets of norms; as women, as workers and as migrants respectively²³.

2.1.1 ICCPR

The International Covenant on Civil and Political Rights (ICCPR) contains strong general non-discrimination and equal protection guarantees.

Article 2 provides that states must respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized within the present Convention, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This protective standard does not draw a distinction between either men and women or the rights of citizens and non-citizens²⁴. Hence it should be interpreted that States Parties extend the rights within the Convention to all individuals equally.

²³ Margaret L. Satterthwaite, *Crossing borders, claiming rights : Using Human Rights Law to Empower Migrant Workers*, Yale Human Rights and Development Law Journal 2005 , p.11

²⁴ Satterthwaite *supra* note 23, p.15

In its 2004 General Comment on the Nature of the Covenant²⁵, the Human Rights Committee confirmed this, emphasizing that "the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness . . . who may find themselves in the territory or subject to the jurisdiction of the State Party."

Article 3 places an obligation on states to ensure the equal right of men and women to the enjoyment of all civil and political rights within the Convention²⁶.

Article 8 provides that no one shall be held in slavery, and that no one shall be held in servitude or required to perform forced or compulsory labor.

Article 14 provides that all people shall be equal before the courts and tribunals. The Human Rights Committee made clear in its General Comment on the equality of rights between men and women²⁷ that *women must have equal- and autonomous- access to justice under Article 14*. In its General Comment on the Position of Aliens under the Covenant²⁸(No.15, 1986), the Committee also underscored that *this guarantee of equality before the courts and tribunals applies to aliens, who must not be treated differently from citizens on the basis of their status*.

Article 22 guarantees everyone the right to freedom of association with others, including the right to form and join trade unions for the protection of their interests. This right can only be restricted as prescribed by law and necessary in a democracy in the interests of national security or public safety, public order or the protection of the rights and freedoms of others.

Article 26 provides that all persons are equal before the law, and are entitled without any discrimination to equal protection of the law. This article is crucial because it extends equal protection of the law to all persons subject to the State Party's jurisdiction, including women and foreigners. Violations of the right to equal protection are among the most critical violations that women migrant workers face, since such infringements

²⁵ Human Rights Committee, General Comment No. 31 Nature of the General Legal Obligation Imposed on State Parties to the Covenant : 26 May 2004. CCPR/C/21/Rev.1/Add.13. pp.10

²⁶ UNIFEM : *Human Rights Protection Applicable to Women Migrant Workers*, UNIFEM Briefing Paper, (2003 New York) p.10

²⁷ Human Rights Committee, General Comment No. 28 Equality of rights between men and women (article3) : 29 March 2000. CCPR/C/21/Rev.1/Add.10. .pp.18

²⁸ Human Rights Committee, General Comment No. 15 The position of aliens under the Covenant: 11 April 1986. pp.7

compound the underlying violation for which a remedy is sought. Further, since aliens benefit from equal protection under the Covenant, all legislation in states that have ratified the Convention must be applied to aliens without discrimination²⁹.

South Korea ratified the ICCPR in 1990 and has obligation to comply with its standard.

2.1.2 ICESCR

The main focus of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is non-discrimination and terms of employment.

The ICESCR also includes strong non-discrimination clauses. Above all, with respect to gender, the ICESCR guarantees identical protection to that in the ICCPR.

Article 2 obliges States Parties to "undertake to guarantee that the rights enunciated in the present Convention will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

As with the ICCPR, the reference to "national origin" in this article can be interpreted as a general rule prohibiting discrimination on the basis of nationality. The list of protected groups in Article 2 is also identical to those in Article 2 of the ICCPR. However, one exception to this rule is shown in Article 2(3) of the Convention. Under this provision, 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." It must be stressed that this exception is limited to developing countries, and to economic rights³⁰. Therefore foreigners continue to enjoy the full complement of social and cultural rights in all countries.

Article 3 requires states to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights. Under the Article3, Satterthwaite again argues that restrictions on the economic rights of foreigners must not be applied in such a manner as to amount to sex discrimination. This would mean that both limitations on economic rights that are discriminatory on the basis of sex and nationality³¹.

²⁹ Satterthwaite, *supra note* 23, p.16

³⁰ Satterthwaite, *supra note* 23, p.18

³¹ Satterthwaite, *supra note* 23, p.18

Article 7(a) recognizes the right to enjoyment of just and favorable conditions of work, including remuneration which provides all workers, at a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, equal pay for equal work; and a decent living for themselves and their families. Article 7(b) sets out the right to safe and healthy working conditions. Article 7(d) guarantees workers rest, leisure, and reasonable limitations on working hours and periodic holidays with pay, as well as remuneration for public holidays³².

Article 8 guarantees the right of everyone to form trade unions and join the trade union of his or her choice, subject only to the rules of the organization concerned, for the promotion and protection of his or her economic and social interests. This right may not be restricted except as prescribed by law and as necessary in a democratic society in the interest of national security or public order or for the protection of the rights and freedoms of others³³. In a comment on Globalization and its impact on the full enjoyment of human rights, the Committee on Economic, Social and Cultural Rights expressed concern that the right to form and join trade unions may be threatened by restrictions upon freedom of association, restrictions claimed to be ‘necessary’ in a global economy, or by the effective exclusion of possibilities for collective bargaining or by the closing off the right to strike for various occupational and other groups³⁴.

Especially, the Committee on Economic, Social and Cultural Rights also showed the concern about workers not covered by minimum wage legislation regarding Article 7 of the Covenant on its concluding observation on South Korea in 2009³⁵.

“The Committee remains concerned that an increasing number of workers are not entitled to the minimum wage and that the minimum wage legislation does not apply to all sectors, in spite of the amendment to the Minimum Wage Act in 2005, which expanded the application of the legal minimum wage(art 7).

The Committee recommends that the State party take all appropriate measures to ensure that the minimum wage is effectively enforced and that

³² UNIFEM, *supra* note 26, p.9

³³ UNIFEM, *supra* note 26, p.44

³⁴ UN Economic and Social Council : *The Realization of Economic, Social and Cultural Rights : Globalization and its impact on full enjoyment of human rights*, 15 June 2000, E/CN.4/Sub.2/2000/13, pp.44

³⁵ The United Nations Committee on Economic, Social and Cultural Rights, Concluding Observation on Republic of Korea, 17 December 2009, E/C.12/KOR/CO/3, pp.1

it provides workers and their families with an adequate standard of living in accordance with article 7, paragraph(a) (ii), of the Covenant. The Committee also recommends that the State party extend the applicability of the minimum wage legislation to those sectors where it still does not apply and intensify its efforts to enforce legal minimum wages through increased labor inspections and fines or other appropriate sanctions for employers who fail to comply with the minimum wage legislation.”

The Minimum Wage Act in South Korea excludes domestic workers from its application³⁶ and it means the Committee underscored the need to extend its applicability to guarantee the minimum wage of domestic workers. South Korea also has obligation to comply with provisions of ICESCR³⁷.

2.1.3 CEDAW

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was intended to eliminate discrimination against women. CEDAW begins by setting out a strong general right to equality and non-discrimination, and proceeds to include specific provisions concerning substantive areas in which steps should be taken to dismantle gender discrimination and ensure the equality of women and men³⁸.

Article 1 defines the term 'discrimination against women' as any **distinction, exclusion or restriction made on the basis of sex** which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of their human rights.

Article 2 condemns discrimination against women in all forms and calls on governments to take appropriate measures to eliminate discrimination against women by any person, organization or enterprise. For example, in its General Recommendation on Violence Against Women, it makes clear that gender-based violence fits within the definition of discrimination against women under CEDAW, and specifies that gender-based violence is violence that is directed against a woman because she is a woman or that affects women disproportionately³⁹. The same

³⁶ The Minimum Wage Act Article 3(1) reads :

“This Act shall apply to all businesses or workplaces employing workers : Provided that this Act shall not apply to any business using only relatives living together, and **to those hired for household work.**”

³⁷ South Korea ratified the ICESCR in 1990.

³⁸ Satterthwaite, *supra* note23 , p.21

³⁹ CEDAW : General recommendation No. 19 – eleventh session, 1992 violence against women, pp.10

Recommendation states that sexual harassment in the workplace is a form of violence against women⁴⁰. The Committee explains that such conduct can be humiliating and may constitute a health and safety problem. Sexual harassment is discriminatory when the woman has reasonable grounds to believe that her objection to the harassment would disadvantage her in connection with her employment, including recruitment or promotion or when it creates a hostile working environment. It is noteworthy that the Committee also expressed special concern for the situation of domestic workers, whose working conditions should be monitored by states parties, in part to prevent sexual abuse⁴¹.

Article 3 requires States to "take all appropriate measures, including legislation to ensure the full development and advancement of women, in all fields, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men." Furthermore, in contrast to several other human rights treaties, CEDAW does not explicitly distinguish between the rights of citizens and non-citizens⁴². It can be argued that Article 3 shows indication of the Convention's embrace of substantive equality by ensuring "full development and advancement of women". It purports to equality of access to opportunity and equality of result and the State has obligation to take all appropriate measures to provide this advancement⁴³. This means that women's rights are violated not only when, for example, laws formally treat them differently from men, but also when any law, policy, or action has the practical effect of disadvantaging them. This standard has important protective implications for women migrant workers. In effect, whenever a pattern can be found in which a certain law or policy has a disproportionately negative impact on migrant women, discrimination is present and the state must take active steps to ensure women their equal rights⁴⁴.

Article 11(1) guarantee women equal rights in employment, including the right to same employment opportunities as men and the application of the same criteria for selection in matters of employment. The same Article also provides that women have the equal right to promotion, job security, and all benefits and conditions of service equal to men, as well as equal

⁴⁰ CEDAW, *supra* note 39, pp.18

⁴¹ CEDAW, *supra* note 39, pp.24

⁴² Jennifer S. Hainsfurther, A rights-based Approach : Using CEDAW to protect the human rights of migrant workers, *American University International Law Review* 2009, p.859

⁴³ Hainsfurther, *supra* note 42, p.868~869

⁴⁴ Satterthwaite, *supra* note23 , p.21

remuneration, including benefits, and equal treatment for work of equal value, and equal treatment in the evaluation of the quality of work⁴⁵.

The CEDAW Committees has noted in its General Recommendation on equal remuneration for work of equal value that even though the principle of equal remuneration for work of equal value has been accepted in the legislation of many countries, more remains to be done to ensure the application of that principle in practice⁴⁶. The Committee also recommends that states should support, as far as practicable, the creation of implementation machinery and encourage collective agreements, where they apply, to ensure the application of the principle of equal remuneration for work of equal value⁴⁷.

Article 12 provides that states must ensure women equal access to health care services, including those related to family planning. In its General Recommendation on Women and Health(No.24, 1999), the CEDAW Committee called on states to give special attention to the needs of migrant women, who may suffer ill-effects on their health status due to vulnerabilities and discrimination⁴⁸.

South Korea ratified CEDAW⁴⁹ and has obligation to comply with its standard.

2.1.4 CERD

Under the Convention on the Elimination of Racial Discrimination(CERD) article 1 defines the term “racial discrimination” to mean by any distinction, exclusion, restriction or preference based on **race, color, descent, or national or ethnic origin** which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

While Article 1(2) states that the Convention does not apply to distinctions, exclusions, restrictions or preferences between citizens and non-citizens, the Committee made clear in its General Recommendation on

⁴⁵ UNIFEM *supra* note 26, p.9

⁴⁶ CEDAW : General recommendation No. 13 - eighth session, 1989 equal remuneration for work of equal value, pp.1

⁴⁷ CEDAW, *supra* note 46, pp.3

⁴⁸ UNIFEM, *supra* note 26, p.27

⁴⁹ South Korea ratified the CEDAW in 27 December 1984.

noncitizens No. 11⁵⁰, that this provision must not be interpreted to detract in any way from the rights and freedoms of aliens recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the ICESCR and the ICCPR. General Recommendation No.30 on Discrimination against Non-citizens also gives a special place to migrants and considers that any differential treatment based on citizenship or immigration status is discriminatory⁵¹. Under Article 2, States condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.

Article 5(e) guarantees the rights to non-discrimination on the basis of race, color or national or ethnic origin in work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration, to equality before the law in enjoyment of the right to form and join trade unions.

The Committee on the Elimination of Racial Discrimination showed the concern on the discrimination in the labor conditions of foreign workers in South Korea and recommended measures is taken to improve the situation of all migrant workers, particularly those with irregular status⁵². South Korea ratified CERD⁵³ and has obligation to comply with its standard. Ratification of CERD is especially significant to protect migrant domestic workers on the ground that South Korea has been mono-ethnic society for a long time and it only has been very recent that South Korean got along with foreigners.

2.1.5 ICRMW

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their families(ICRMW) is meant to protect the human rights of migrant workers whether in a regular or irregular situation⁵⁴. The ICRMW is more comprehensive than the ILO Conventions Nos. 97 and 143⁵⁵, and is the most comprehensive international treaty in the field of

⁵⁰ Committee on the Elimination of Racial Discrimination : *General Recommendation 11, on non-citizens*, 42nd session 1993, pp.3

⁵¹ CERD : *General Recommendation No.30 : Discrimination Against Non Citizens* : 1 October 2004, pp.2

⁵² Concluding observation of the Committee on the Elimination of Racial Discrimination on Republic of Korea, 4 July 1999, CERD/C/304/Add.65. pp.16

⁵³ South Korea ratified the CERD in 1979

⁵⁴ ICRMW, Article 1

migration and human rights⁵⁶. It aims to “contribute to the harmonization of the attitudes of the States through acceptance of basic principles concerning the treatment of migrant workers and members of their families”⁵⁷, and it covers all migrant workers including self-employed.

The ICRMW specially focuses on labor rights. Though these are already stipulated in the ICESCR, with emphasis on unfair terms of employment and access to welfare, while the ICCPR and the CERD are concerned with discrimination between national and non-national workers, and CEDAW and the CRC devote their attention to the protection of the most vulnerable workers(i.e. women and children). The ICRMW consolidates a number of labor rights and applies them to migrant workers such as Article 25, 43, 45, 49, 51, 52, 53 and 55⁵⁸.

In 2004, the UN Special Rapporteur on the human rights of migrant workers made a report on migrant domestic workers. She referred to rights particularly relevant to the situation of migrant domestic workers. They include⁵⁹ :

- the right of everyone to the enjoyment of just and favourable conditions of work which ensure remuneration which provides as a minimum fair wages and equal remuneration for work of equal value without distinction of any kind (Article 25)
- safe and healthy working conditions; rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays (Article 25)
- the right of everyone to form trade unions and join the trade union of his choice (article 26)
- the right to social security, including social insurance (Article 27)
- the right not to have identity documents confiscated (Article 21)

South Korea has not ratified ICRMW but as the UN Special Rapporteur on the human rights of migrant workers commented in 2006 after the visit to Korea, the government has obligation to fully protect the human rights of migrant domestic workers and he also urged to ratify the ICRMW⁶⁰.

⁵⁵ Those Conventions will be looked into in chapter 2.2.

⁵⁶ Paul De Guchteneire and Antoine Pecoud, Introduction : *The UN Convention on Migrant Workers' Rights*, Migration and Human Rights, 2009 Cambridge UNESCO Publishing, p.1

⁵⁷ ICRMW, preamble

⁵⁸ Isabelle Slinckx, *Migrants' Right in UN Human Rights Conventions*, p.147, Migration and Human Rights, UNESCO Publishing Cambridge 2009, p.147

⁵⁹ Report of the UN Special Rapporteur on the human rights of migrants submitted pursuant to Commission on Human Rights resolution 2003/46, E/CN.4/2004/76, 12 January 2004, pp.22

⁶⁰ Report of the Special Rapporteur on the human rights of migrants MISSION TO THE REPUBLIC OF KOREA, A/HRC/4/24/Add.2 , 14 March 2007, pp. 23

2.2 2 ILO Conventions

The situation of domestic workers has been a concern of the ILO for decades. In 1948, the International Labor Conference adopted a resolution on the conditions of employment of domestic workers. The Conference expressed that “the time has now arrived for a full discussion on this important subject.” Subsequently it requested “the Governing Body to consider the advisability of placing on the agenda of an early session of the Conference...the whole question of the status and employment of domestic workers.”⁶¹ Again in 1965 the Conference adopted a resolution on conditions of employment of domestic workers⁶².

It recognized the urgent need to establish minimum living standards “compatible with the self-respect and human dignity which are essential to social justice for domestic workers both developed and developing countries. It also urged member states to introduce “protective measures” and worker training wherever practicable, in accordance with International Labor Standards. Research which was accordingly made showed that domestic workers were “particularly devoid of legal and social protection” and “singularly subject to exploitation” and that their legitimate interests and welfare had long been neglected in most countries⁶³.

According to the ILO research made by 2003, it brought up main issues concerning domestic workers : hours of work; workload and rest periods; wages; workload and rest periods; social security scheme; physical and sexual abuse; contractual conditions; abuses by recruitment agencies; denial of the right to organize trade unions⁶⁴. In 2004 the need for protection of migrant domestic workers had been endorsed by the Conference again. Two of the principles⁶⁵ enumerated in the non-binding Multilateral Framework on Labor Migration adopted by the Governing Body at its March 2006 Session make specific reference to domestic workers.

It has been more than four decades since the resolution was adopted and it seems that decent work for domestic work is consistent concern of the ILO.

⁶¹ ILO : *Decent Work for Domestic Workers, Labor Education* 2007/3-4 No.148-149, (2007 Geneva) p.5 : quote from ILO: *Record of Proceedings, ILC, 31st Session, 1948, Appendix XVIII: Resolutions adopted by the Conference*, pp. 545–546.

⁶² ILO : *Resolution concerning the Conditions of Employment of Domestic Workers*, adopted by the International Labor Conference at its 49th Session (1965 Geneva)

⁶³ Blackett, *supra* note 5 introduction ; ILO *supra* note2, pp.38~44

⁶⁴ Ramirez-Machado, José Maria: *Domestic work, conditions of work and employment: A legal perspective*, Conditions of Work and Employment Series No. 7, ILO, (2003 Geneva) p.1~3

⁶⁵ ILO : *ILO Multilateral Framework on Labor Migration : Non-binding principles and guidelines for a rights based approach to labor migration*, (2006 Geneva) pp.9.8, 9.12, 11.2

However, after the resolution in 1965, it takes more than four decades that promoting decent work for domestic workers has become the subject of the ILC agenda to develop ILO instruments in 2010 in spite of urgent need of protection for domestic workers. Then, it is needed to see how the existing ILO Conventions provide adequate protection for domestic workers and discussion on establishing new labor standards exclusively for domestic workers.

2.2.1 Fundamental principles and rights at work

Currently, though there are no international labor standards that exclusively apply to domestic workers, they are covered by international labor standards in many key areas, notably those that relate to fundamental principles and rights at work⁶⁶. The ILO Declaration on Fundamental Principles and Rights at Work provides eight core ILO conventions as containing universal, non-derogable human rights, applicable to all people in all ILO member states. The ILO has repeatedly taken the position that, *unless a Convention or Recommendation expressly excludes domestic workers, these workers are included in the international instrument's scope*⁶⁷. Moreover, the ILO's supervisory bodies have underscored the vulnerability of domestic workers by calling for protection to be extended to them in a meaningful manner and have maintained that specific nature of domestic work is not an adequate reason to exclude such workers from the protection of international labor standards⁶⁸.

In case of migrant domestic workers, the ILO labor standards also offer substantial protection to migrant workers with respect to their economic, social and residence rights. In its preamble, the ILO Declaration on Fundamental Principles and Rights at Work explicitly mentions migrant workers as a group with “special social needs”, requiring “special attention” in relation to the protection of their fundamental labor rights⁶⁹. Indeed, since its establishment in 1919, the ILO has attempted to improve global labor conditions, in part through the protection of the interests of workers when employed in countries other than their own⁷⁰.

- **Freedom of association**

⁶⁶ ILO, *supra* note 2 , pp.55

⁶⁷ ILO, *supra* note 2 , pp.56

⁶⁸ ILO, *supra* note 2 , pp.57

⁶⁹ Available at < <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>>

⁷⁰ ILO Constitution, June 28, 1919, 49 Stat. 2712, 225 Consol. T.S. 378, Preamble

Article 2 of the Freedom of Association and Protection of the Right to Organize Convention, 1948(No.87) applies to all “workers and employers”, without distinction whatsoever”. Similarly, the Right to Organize and Collective Bargaining Convention, 1949(No.98) seeks to ensure that workers enjoy adequate protection against interference in the establishment, functioning and administration of their representative organizations⁷¹. The ILO consistently interpreted these Conventions as requiring that legislative provisions concerning freedom of association, including the right to organize be extended to domestic workers⁷².

- **Equality and non-discrimination**

The fundamental principles of non-discrimination and equality of opportunity reflected in the Discrimination (Employment and Occupation) Convention, 1958(No. 111) and the Equal Remuneration Convention, 1951(No.100) also apply to domestic workers. The ILO has paid attention to the vulnerability of these workers, in particular migrant domestic workers, to multiple forms of discrimination and abuse due to the individual employment relationship, lack of legislative protection and undervaluing of domestic work⁷³. The Committee of Experts has recalled that laws or measures designed to promote equality of opportunity and treatment in employment and occupation that exclude domestic workers from their scope are contrary to these Conventions. It has called for laws and regulations not only to provide for the nominal inclusion of domestic workers, but also for governments to ensure that the protection against employment discrimination and inequalities in remuneration are effective and subject to enforcement⁷⁴.

The CEACR(ILO Committee of Experts on the Application of Conventions and Recommendations) has also found that domestic workers are often affected by wage disparities between men and women and has cautioned against undervaluing domestic work when fixing minimum wages⁷⁵. Even in countries where there is a minimum wage, migrant domestic workers generally earn less than their colleagues who are citizens of the host country.

⁷¹ Article 1(1) “Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.”

⁷² Ramirez-Machado and José Maria, *supra* note 64, p.73

⁷³ It can be found in following ILO reports;

ILO, *supra* note 65, p.95~98, Ramirez-Machado and José Maria *supra* note 64, p. 1~5

⁷⁴ ILO, *supra* note 2, pp.62

⁷⁵ ILO, *supra* note 2, pp.63

In some regions, there is even differential pay for migrant domestic workers, so that some nationalities are paid more than others⁷⁶.

- **Forced labor**

In its 2007 General Survey on the eradication of forced labor, the CEACR recalled that the prohibition of the use of forced or compulsory labor was a peremptory norm of modern international human rights law⁷⁷. Forced Labor Convention, 1930(No.29) and Abolition of Forced Labor Convention, (No.105) seek to suppress and abolish forced labor in law and in practice, should apply to all workers including domestic workers.

The ILO addressed the important issue of trafficking of women, to which migrant domestic workers can be particularly vulnerable. It has also tackled other forms of forced labor that these workers experience, emphasizing the structural elements of laws, regulations and migratory practices that are conducive to such situations. In its general observation on Convention No.29, the CEACR asked members to ensure that those responsible for the exaction of forced labor from legal or illegal migration, inter alia in domestic work, are actually punished, and that trafficking in persons be suppressed. It has also called upon both sending and receiving countries to ensure that appropriate measures are taken⁷⁸.

- **Child labor**

The CEACR has been very active in responding to the problem of child domestic labor given the special attention to the matter in the Worst Forms of Child Labor Convention, 1999(No.182), along with the ILO's Conventions on forced labor, 1930(No.29) and minimum age, 1973(No.138) is a crucial source of guidance on the setting of standards to combat child domestic labor. The CEACR has repeatedly called upon member states to take effective action to prevent child domestic labor, highlighting the traditional practice of entrusting young children to the care of adults⁷⁹.

- **Applicability to South Korea**

Among those eight core ILO conventions set out, South Korea has ratified following Conventions.

⁷⁶ ILO, *supra* note 65, p.96 .

Such wage disparities are also found in South Korea. See Chapter3.

⁷⁷ ILO, *supra* note 2 , pp.64

⁷⁸ ILO, *supra* note 2, pp.65

⁷⁹ ILO, *supra* note 2, pp.69

- Equal Remuneration Convention, 1951(No.100)⁸⁰
- Discrimination (Employment and Occupation) Convention, 1958(No. 111)⁸¹
- Minimum Age Convention, 1973(No.138)⁸²
- Worst Forms of Child Labor Convention, 1999(No.182)⁸³

In Human Rights Council pledge held in 2006, South Korea stated that it would consider ratifying the remaining four Conventions by 2008⁸⁴ :

- Freedom of Association and Protection of the Right to Organize Convention, 1948(No.87)
- Right to Organize and Collective Bargaining Convention, 1949(No.98)
- Forced Labor Convention, 1930(No.29)
- Abolition of Forced Labor Convention, (No.105)

However, on the contrary to its pledge to the Human Rights Council, South Korea failed to ratify those four ILO Conventions so far. Regardless of ratification, ILC concluded in 2004 that ILO instruments apply to all workers, even including irregular migrant workers⁸⁵, therefore unless otherwise stated and that the eight core ILO conventions cover all domestic workers, regardless of status as well.

Additionally, South Korea has ratified other ILO Conventions such as Labor Inspection, 1947 (No.81), Promotional Framework for Occupational Safety and Health (No.187) and Occupational Safety and Health⁸⁶ (No.155) which do not explicitly exclude domestic workers hence those Conventions should apply to domestic workers as well.

For example, with regard to the Labor Inspection Convention, the CEACR pointed out failure in 2006 as following.

“Many national provisions authorizing workplace visits leave excluded from labor protection by inspectors the many people who are carrying out

⁸⁰ Ratified on 8 December 1997

⁸¹ Ratified on 4 December 1997

⁸² Ratified on 28 January 1999

⁸³ Ratified on 29 March 2001

⁸⁴ Republic of Korea, Voluntary Pledges and Commitments on Human Rights, p.4, available at <<http://www.un.org/ga/60/elect/hrc/repkorea.pdf>>

⁸⁵ ILC : Resolution concerning a fair deal for migrant workers in a global economy, 92nd session (2004 Geneva) pp.12 and 28

⁸⁶ It can be disputed because Convention No.155 allows exclusion of limited categories of workers in respect of which there are particular difficulties from its application.(Article 2(2) However, South Korea did not declare exclusion of domestic workers therefore it is considered that the Convention should apply to all branches of economic activity.

domestic work, or who are home workers, the majority of whom are women”⁸⁷.

2.2.2 Migration relevant ILO Conventions

There are two legally binding labor standards relating to migrant workers which are Migration for Employment Convention, 1949(No.97) and Migrant Workers (Supplementary Provisions) Convention, 1975(No.143). Both of them are supported by non-binding recommendations. These conventions apply to persons who migrate from one country to another with a view to being employed other than on their own account, and cover issues concerning the entire migratory process: that is, emigration, transit and immigration⁸⁸.

The definition of ‘migrant worker’ under Convention No.97⁸⁹ and Convention No.143⁹⁰ is following :

“ A person who migrates from one country to another [or who has migrated from one country to another] with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment. “

According to the definition, unlike ICRMW it excludes self-employed persons and irregular migrant workers.

- **Convention No. 97**

The central principle of the ILO Convention No.97 is equality of treatment between migrant wage and salary workers and other workers in the country where they work.

Convention No.97 covers the conditions governing the orderly recruitment of migrant workers and also enunciates the principle of their equal treatment with national workers in respect of working conditions, trade union membership and enjoyment of the benefits of collective bargaining, accommodation, social security, employment taxes and legal proceedings relating to matters outlined in the convention. Its other objective is to ensure the orderly flow of migrants from countries with labor surpluses to

⁸⁷ ILO: *Labour inspection*, Report III (Part 1B), ILC, 95th Session (Geneva, June 2006), pp. 264

⁸⁸ ILO, *supra* note 64, p.128

⁸⁹ Convention No. 97 Article 11(1)

⁹⁰ Convention No. 143 Article 11(1)

countries with labor shortages, which is reflected in a number of its provisions as well as the annexes⁹¹.

- **Convention No. 143**

Convention No. 143, which was enacted in the wake of the economic recession in European countries that had been importing large numbers of guest workers, focused on minimizing illegal migration and integration of settled migrants by ensuring equality of treatment in wages and other benefits for migrants regardless of their legal status.

The scope of Convention No.143 is broader. It devotes a whole part to the phenomenon of irregular migration and to inter-state collaborative measures considered necessary to prevent it. To protect all workers in their working environment, Article 1 of Convention No. 143 imposes an obligation on state parties to respect the basic human rights of all migrant workers”, which also confirms the applicability of this instrument to irregular migrant workers as well⁹².

Irregular migrant workers are granted equality of treatment in respect of rights arising out of their past employment as regards remuneration, social security and other benefits. They are also entitled to equality of treatment in working conditions. In other words, they are entitled to equal treatment – as workers – for work they have actually performed. For those migrant workers in regular status, Convention No. 143 provides both equality of treatment and equality of opportunity. This equality is to be given in respect of employment and occupation, social security, trade union rights, cultural rights, and individual and collective freedoms⁹³.

- **Applicability to South Korea**

South Korea has not ratified any of these Conventions and it is hard to directly argue migrant domestic workers’ right in light of the Conventions. However, as stated before South Korea has positive obligation to guarantee fundamental human rights and labor rights of migrant workers.

⁹¹ Ryszard Cholewinski, *International labor law and the protection of migrant workers: revitalizing the agenda in the era of globalization* : Globalization and the Future of Labor Law, 2007 Cambridge University Press, p.412

⁹² Cholewinski, *supra* note 91, p.412

⁹³ ILO, *supra* note 65, p.129~130

2.2.3 Discussion on setting ILO standards for domestic workers

- **General Background**

In its 301st Session in March 2008, The Governing Body of the ILO decided to put the promotion of decent work for domestic workers on the agenda of the 2010 International Labor Conference to develop appropriate instruments such as a Convention and accompanying Recommendation. In 2009, the ILO sent Member States a report analyzing the current worldwide legislation and practice on domestic work together with a questionnaire to reply⁹⁴. It was also sent to the trade unions and workers' association which provides problems facing domestic workers, existing legislation and good and bad practices to the Conference Committee⁹⁵.

- **Response of Tripartite in South Korea**

Government, trade unions and employers' association of South Korea also submitted their reply to the ILO respectively. All of them agreed to the necessity of international labor standard exclusively for domestic workers due to the specificity of work and lack of legal and social protection. However, looking into detail of setting standards, their opinion is quite different.

Above all, for the form of instrument, while both government and employers' association prefer not legally binding "recommendation" to convention, trade unions are for a "convention" supplemented by a recommendation. The government commented that while domestic workers need certain level of protection, it cannot support the adoption of convention because the current labor standards law does not apply to domestic workers⁹⁶. In contrast, underscoring the particular vulnerability of domestic workers to abuse of basic human rights and specificity of their work such as employment arrangements, methods of remuneration, working time and conditions, trade unions(FKTU and KFTU) commented that separate consideration and standards should be adopted⁹⁷.

Other comments that tripartite submitted to the ILO also showed different approach to decent work for domestic workers between South Korean

⁹⁴ ILO: *Decent Work for domestic workers, Labor Education*, 2007 3~4, No.148~149, editorial

⁹⁵ ILO, *supra* note 15, p.1

⁹⁶ Reply of South Korean government, Question 2

⁹⁷ Reply of FKTU and KFTU, Question 2

government, employers' association and trade unions. The government repeatedly highlighted the specificity and differentiation of domestic workers from other wage earners and insisted that international labor standards and current labor standard act cannot be applied to domestic workers⁹⁸.

2.2.4 Concluding Remarks

International human rights standards and labor standards are to be applied to 'everyone' and 'every worker' respectively hence domestic workers are definitely under the protection of those standards. On the other hand, it is also true that human rights and working conditions of domestic workers have not been dealt with adequately by the ILO or other international organizations⁹⁹. Although fundamental principles and rights at work apply to all workers, lacking of protection for them seems to be obvious. Considering international standards tend to specifically reiterate the rights be guaranteed for the vulnerable such as migrants and persons with disabilities, there are voices to underscore the specific international legal framework to protect domestic workers as well.

At the 2010 International Labor Conference, first discussion on decent work for domestic workers to decide the form of the ILO instrument – whether a Convention or a Recommendation or both – and at the next Conference in 2011 a Convention or any other agreed instrument will be discussed. Where domestic workers have been excluded from the scope of a Convention, the main problem has been that their work is so specific that it is difficult for an instrument dealing with an economic activity carried out in an industrial context to cover them effectively.

Domestic workers form a significant part of the working population and given their vulnerability to dangerous, discriminatory and abusive working conditions, they warrant special attention rather than exclusion. The newly established labor standards will be able to strengthen legal protection for domestic workers and improve women's relative position in local and international labor markets¹⁰⁰.

⁹⁸ Reply of South Korean government, Question 3,4,42,47,48,49,51,54,55

⁹⁹ ILO, *Decent supra* note 94, p.2

¹⁰⁰ Amelita King Dejardin : *Gender dimensions of globalization*, ILO (2008 Geneva) p.17

3 Status of domestic workers under national legislation in South Korea

In this chapter, legal status and recognition of domestic workers under national legislation in South Korea will be investigated while highlighting the existing problems and obstacles to protect human and labor rights of domestic workers. Policies and legislation governing migrant domestic workers is going to be looked into as well.

3.1 Constitution of South Korea

Constitution of South Korea clearly stipulates all citizens' right to work and non-discrimination against women in terms of employment, wages and working conditions.

Article 11(1) states that all citizens shall be equal before law and no discrimination is allowed on account of sex, religion or social status.

In addition, Article 32(1)¹⁰¹ and 33(1)¹⁰² guarantees 'right to work' and 'right to association, collective bargaining and collective action'. Moreover, Article 32(4) emphasizes special protection be accorded to working women against unjust discrimination in terms of employment, wages and working conditions.

Since Constitution refers to "all citizens", the right to work and right to association should be also guaranteed to domestic workers regardless of their recognition as workers under the labor code.

For migrant domestic workers, Article 6(2) states that the status of aliens shall be guaranteed as prescribed by international law and treaties and Article 6 (1) proclaims that treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall

¹⁰¹ Article 32(1) reads:

"All citizens shall have the right to work. The State shall endeavour to promote the employment of workers and to guarantee optimum wages through social and economic means and shall enforce a minimum wage system under the conditions as prescribed by Act."

¹⁰² Article 33(1) reads :

"To enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action."

have the same effect as the domestic laws of the Republic of Korea. The Constitutional Court also reaffirmed that *the principles of respect for international law under Article 6(1) means ratified treaties and generally recognized rules of international law have same effect of the domestic laws*¹⁰³. Therefore international human rights standards that South Korea had acceded to or ratified such as ICCPR, ICESCR, CEDAW, CERD and ILO Conventions have same effect as domestic law and to guarantee human rights of aliens is what the Constitution ultimately seeks for.

The Committee on the CERD also underscored definition of racial discrimination is absent under Article 6(1) of the Constitution and equality and non-discrimination clause (Article 11) excludes prohibited grounds of racial discrimination referred to in the CERD¹⁰⁴. In that sense, though Article 11 does not expressly stipulate non-discrimination against race, ethnic, nationality or disabilities, it is necessary to actively apply this provision to protection of those social minorities including migrant workers¹⁰⁵.

3.2 Labor legislation

3.2.1 Labor Standards Act

- **Domestic workers as workers : Exclusion from labor legislation**

Many of the governments around the world have failed to acknowledge the rights of domestic workers by systemically excluding these workers from major labor protections granted to most other categories of workers under national legislation. Such rights include guarantees of minimum wage, overtime pay, rest days, annual leave, fair termination of contracts, benefits, and workers' compensation¹⁰⁶.

Such exclusion denies domestic workers equal protection under the law and has a discriminatory impact on women who make up the majority of this category of workers as well. Disregard for the labor rights of paid domestic workers is also directly linked to the status of women. Domestic work is considered the natural extension of women's role in the family and

¹⁰³ Decision of Apr. 26, 2001, 99Hun Ka 13 (S. Korea Const. Ct. in Korean)

¹⁰⁴ UN Committee on the elimination of racial discrimination, concluding observation on Republic of Korea, CERD/C/KOR/CO/14, 17 August 2007, pp. 10.14

¹⁰⁵ Pilkyu Hwang, *Migrant Workers and Human Rights*, (Gonggam 2008 Seoul) p.1~3 (in Korean)

¹⁰⁶ Human Rights Watch, *Slow Reform : Protection of migrant domestic workers in Asia and the Middle East*, 2010, p.13

society. Paid domestic workers essentially perform for wages the tasks the woman of the house is socially expected to perform for free. The failure properly to regulate paid domestic work facilitates abuse and exploitation, and means domestic workers have little or no means for seeking redress.

Women employed in private households encounter a wide range of human rights violations in the workplace, including extremely long hours of work without a guaranteed minimum wage or overtime pay, no rest days, incomplete and irregular payment of wages, unsafe working conditions, lack of proper health care, no workers' compensation, and job insecurity. Inadequate monitoring by any independent or government agency compounds these abuses by creating an environment of impunity for employers¹⁰⁷.

The 2004 Global Report on freedom of association also highlighted that labor law's silence on domestic work is often excused by invoking principle of non-intervention by the State in the private sphere¹⁰⁸.

To review status of domestic workers under national labor legislation, above all, it is required to see whether those domestic workers are "workers" under the Labor Code in South Korea. The Labor Standards Act is the basic legislation to set minimum standards for working conditions in conformity with the Constitution.¹⁰⁹ According to the LAS's aim and structural principle, working conditions are to be understood as all kind of contractual matters, particularly wages and working hours.

Article 2(1) of the LSA states that the term "worker" in this Act means a *person who offers work to a business or workplace to earn wages, regardless of kinds of job he/she is engaged in.*

Hence, if he/she belongs to the "worker" under the Act, his/her rights under the labor standards should be protected. According to Article 11(1), the Act shall apply to all business or workplaces in which five or more workers are ordinary employed. However, the Act does not necessarily apply to every worker and there are some exceptions. **It does not apply to any business or workplace which employs only relatives living together,**

¹⁰⁷ Human Rights Watch, Swept under the Rug, Abuses around the world against domestic workers, 2006, p.34~52

¹⁰⁸ ILO: *Organizing for social justice*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (June 2004 Geneva), pp.163

¹⁰⁹ Labor Standards Act Article 1

"The purpose of this Act is to set the standards for the conditions of labor in conformity with the constitution, thereby securing and improving the living standards of workers and achieving a well-balanced development of the national economy."

and to a worker who is hired for domestic work¹¹⁰. Simply speaking, regardless of nationality, domestic workers are not covered by the LSA and their minimum standards for working condition are not guaranteed.

Under LSA, the definition of “domestic worker” is not clearly defined. But according to interpretation from ‘Labor Code interpretation’ of Ministry of Labor,

“Domestic workers refer to the ones who involves in domestic work of ‘general household’ such as domestic care worker, domestic helper, steward or nanny. Since they are related to individual’s private life and labor administrative inspection is beyond reach, they are not able to be regarded as ‘workers’ under labor legislation.¹¹¹”

Such an exclusion from application of the Labor Standards Act is more exacerbating because it is directly related to other legal schemes protecting workers such as the Minimum Wage Act, the Act on Equal Employment and support for work-family reconciliation, Employment Insurance Act, Occupational Safety and Health Act and the Act on the Promotion of the Economic Activities of Career-Break Women. Labor Standards Act provides initial and essential criteria to decide who are to be workers covered and to be protected by those legislations¹¹².

Ministry of Labor refers to the reasons to exclude the application of domestic workers under the LSA are following:

- There are possibilities to violate freedom of private life,
- Private home is the workplace which is not the workplace as the LSA regulates,
- The work is performed in the household therefore labor inspection which monitors working hour and wage is difficult to be implemented. Moreover, as under Article 11(1) of the LSA, any business or workplace which employs only relatives is in apposition with a worker who is hired for domestic work and it stipulates domestic work is regarded as private employment¹¹³.

¹¹⁰ LSA Article 11(2)

¹¹¹ Ministry of Gender Equality and Family, *supra* note 11, p.108

¹¹² National Human Rights Commission of Korea : *Report on human rights violation of Special form of employees*, (2006 Seoul) p.26

¹¹³ YoungMi Choi, *Working condition of informal domestic workers and suggestion for the policy making*, presented in Symposium on Reality of informal care work : Emphasis on domestic work, (April 2006 Seoul), p.5 (in Korean)

However, it can be also argued that employer's right of private life and employee's labor right is not mutually exclusive. Appliance of labor legislation which purports to regulate workers' labor condition is able to be made without infringing 'private life' of employer¹¹⁴.

As for the argument that work is done in the home hence it is beyond reach of labor inspection is not sufficient reason to exclude domestic workers. The LSA already includes some workplaces with less than 4 employees¹¹⁵. Considering the purpose and aim of labor law, administrative inspection should be implemented from the most abusive workplace and domestic work is one of the most vulnerable and exploitative one among the informal economy works.

It is also found that work which covers domestic services already has been included to lists of jobs permitted for dispatched worker under the Act on the protection, etc of dispatched workers¹¹⁶. This inclusion implies that South Korean government is aware of existence of domestic workers as 'workers'. Hence it is contradictory that while Ministry of Labor recognizes domestic services as work under certain labor legislation, it still denies protection of domestic workers by the LSA .

The exclusion clause has been persisted from enactment of LSA in 1953 and it provides important criteria to define the extent of domestic worker under the LSA. Back in 1950s, the task is rather similar to the present domestic work. But at that time, domestic workers were regarded as member of household in broader sense, while provided with shelter, food and small sum of money. Hence, taking into account of specific relationship between domestic worker and employer and form of labor, it is acceptable to exclude domestic workers in scope of the LSA.

On the contrary, the scope of protection that LSA covers has become more extended and care work which incorporates domestic work has developed to one industrial sector. In addition, the way providing the domestic work and relationship between employer and employee has been changed and emerging of social enterprise or public domestic care service should be

¹¹⁴ Hyungok Chung, *The Effect of Gender Distinction in Applying the Labor Act*, women's studies 23rd edition, (2006 Seoul), p.117~118 (in Korean)

¹¹⁵ LSA Article 11(2) :

With respect to businesses or workplaces which ordinarily employs fewer than five workers, only part of the provisions of this Act may be made applicable as prescribed by the Presidential Decree

¹¹⁶ Under the Enforcement decree of the Act on the protection, etc of dispatched workers Article 2(1) in the annexed table, child care workers and home-based personal care workers are included.

considered as well. There is no more justification to exclude domestic workers from LSA.

As a consequence of exclusion from application of the LSA, domestic workers are also excluded from the legislation to protect fixed-term workers and part-time workers¹¹⁷. Under the Act on the protection, etc. of fixed-term and part-time employees, part-time workers who work less than 15 hours per week, although they are excluded from application of weekly rest day and annual, monthly leaves, part of Labor Standard Act and the Employment Insurance Act and the Occupational Safety and Health Act are applicable¹¹⁸.

Moreover, it is not reasonable that the same domestic services are treated differently when regulated outside the home and when performed within the household. Therefore it is worthwhile to recall the ILO report to underscore the necessity of protection of domestic workers as following.¹¹⁹

There is no fundamental distinction between work in the home and work beyond it, and no simple definition of public-private, home-workplace and employer-employee. Caring for children and the disabled or elderly persons in the home or in a public institution is all part of the same regulatory spectrum, wherein a range of migration and other policies shape both the supply of and the demand for care services.

Because they have no clear status under modern labor legislation, domestic workers tend to be excluded de facto from formal regulations and their enforcement. This is not to imply that their working lives necessarily lack structure and regulatory control. On the contrary, their lives and work are regulated by strong non-state norms regarding work in the employer's household, which vary significantly from one cultural context to the next but which result in domestic workers being among the most marginalized workers- and for whom decent work is often a distant aspiration.

- **Minimum Wage**

Domestic workers are not protected by the Minimum Wage Act therefore their wage totally depends on the contract between employer and domestic worker. Though no accurate statistical data on the average wage of domestic

¹¹⁷ Act on the protection, etc. of fixed-term and part-time employees which purports to redress undue discrimination against fixed-term and part-time workers and to strengthen protection of their working conditions was enacted in 2006. However, Article 3(1) of the Act again excludes domestic workers from its scope of application.

¹¹⁸ Ministry Of Women and Equality, *supra* note 11, p.109

¹¹⁹ ILO, *supra* note 8, p.11

workers, it is said that live-in domestic workers receive 1.0~1.3 million Korean Won(903~1,174US\$) while part-time domestic workers receive around 5,000 Korean Won(4.5US\$) per hour¹²⁰ that is more than minimum wage¹²¹. However the wage is extremely varied and there are several cases that domestic worker's wage is far beyond minimum wage¹²². Taking into consideration that domestic work is physically intensive and they are not protected from any social and employment benefit, their wage is still undervalued. For live-in domestic workers, their stand-by time is usually not considered and daily work-hour of part-time domestic workers only be counted by actual working time that they had spent in private household therefore their wage becomes even below than minimum wage¹²³.

In general, it is said that Korean domestic workers tend to receive 10~20 percent higher wage than migrant workers and ethnic Korean migrant workers receive more than the other migrant workers. It demonstrates wage disparities which is discriminatory and violation of equal work for equal remuneration.

- **Labor Contract**

Written labor contract which is mandatory for workers and employers under the LSA¹²⁴ to sign in is not indeed applicable to domestic workers. The research shows that around 75% of domestic workers are not signing in labor contract¹²⁵. It is more serious in case of migrant domestic workers owing to their migration status.

¹²⁰ YoungMi Choi, *supra* note 113, p. 20

¹²¹ The minimum wage in 2010 is 4,110 Korean Won(3.71US\$) per hour. Available at <<http://www.minimumwage.go.kr/>>

¹²² For example, Live-in domestic worker who earns only 60 % of minimum wage can be found.

Maeil Economy 4 November 2009, *Dispute over minimum wage of live-in domestic workers : They are not "workers"* Available at

<<http://stock.mt.co.kr/view/mtview.php?no=2009110314175405842&type=1&outlink=2&EVEC>> (in Korean)

¹²³ Quote from interview with a part-time Korean domestic worker in Choi's report, *supra* note , p.92

" I leave home at 6:30 to get to the household at 9:00 and work for 4 hours without any break. Since I visit the household two times a week, there are a lot of things to do and if I am not in a hurry, it is impossible to finish it till 13:00. Employers' expectation is very high and they really want to make full use of me. Then I have to head for another household in the afternoon right away. I really have no time to eat lunch or rest. I skip lunch or drink milk and start working again in another household from 14:00 to 18:00. But it is possible to work full time unless I'm sick. Most of the time, I cannot work for two household every day. That's because it is demanding and physically hard and also there are not enough work."

¹²⁴ LSA Article 2(2), Article 17

¹²⁵ Hyunjoon Min, *Informal domestic care workers' working conditions and problems*, p.12, in Korean

Since there is no labor contract defines wages, working hours, holidays and leaves, domestic workers' working condition is very vulnerable and heavily depends on employer's good will. Another problem arising is there is no such 'standard contract' to regulate domestic workers' working condition on the ground that difficulty to define domestic work and its duties and responsibilities.

3.2.2 Social Protection framework

Compare with other workers, domestic workers are paid less and their employment status is not stable. Therefore social security scheme is essential. However, due to exclusion from application of the LSA, domestic workers are not consequently covered by social benefit scheme in South Korea.

The core of social security scheme is based on wages that workers contribute to labor market. But participating in labor market and earning wages does not necessarily lead to inclusion in social security schemes because certain requirements should be met to pay for social insurance.

First, one should be recognized as 'worker'. In other words, in case of national pensions and health insurance which divides workplace and community policy holder, to be eligible for workplace policy holder, it is required to be recognized as 'worker'. It is only compulsory for 'workers' to join employment insurance and occupational safety and health insurance.

Second, form of wage should be suitable to pay insurance premiums. The amount of social security insurance contribution is calculated annually and paid monthly. Hence the wage should be similar for one year and paid monthly. If fluctuation of wage is drastic and payment is made by daily or hourly basis, it is difficult to assess insurance premiums¹²⁶.

Under such background, workers failing to meet those requirements have been excluded from social insurance schemes and domestic workers are the most typical sample of the exclusion.

Employment Insurance Act

Enacted in 1995, the Employment Insurance Act regulated applicable businesses and workplaces at first, then managed the insured separately afterwards. Until 1997, only workplaces with more than thirty regular workers were covered by the Act. But having extended the scope of

¹²⁶ YoungMi Choi, *supra* note 113, p. 51

application gradually, it is applicable to every workplace that hires paid workers from October 1, 1998.

However, Article 8¹²⁷ of the Act states exclusion of certain businesses by the Presidential Decree in consideration of the size, industrial characteristics and by Article 2(2) of the Decree, domestic service is excluded from application of the Employment Insurance Act. Domestic workers are de facto workers providing labor for the purpose of remuneration therefore they should be protected by social security net. Especially taking into consideration to their instability of employment and lacking of opportunity for vocational training, it is essential to cover domestic workers to the scope of Employment Insurance Act.

Industrial Accident Compensation Insurance Act

Industrial Accident Compensation Insurance Act applies to all businesses or workplaces employing workers¹²⁸ and according to social security insurance principles, it is compulsory for workers to be enrolled. Until 1999, it was only applied to businesses or workplaces with more than five employees, in 2000 it was extended to workplaces with more than one employee and in fact is applicable for every workplace. However, workers falling under 'employment activities within household'¹²⁹ are excluded from application of the Act as well. Employment activities within household are referred to domestic work under the Labor Standards Act. As stated before, that is because the definition of 'worker' and other terms are following those of the Labor Standards Act¹³⁰ and there also exists administrative difficulties to include domestic workers.

However, domestic workers are usually exposed to hazards of industrial accidents and their work requires very intensive physical labor. Domestic workers routinely engage in tasks that pose risk of injuries or long-term health problems. These include heavy lifting; bending; handling toxic cleaning chemicals, hot water, oil and irons; repetitive movements; prolonged exposure to dusts¹³¹. Choi's survey also demonstrated that 29%

¹²⁷ Article 8 (Scope of Application) of Employment Insurance Act :

This Act shall apply to all businesses or workplaces (hereinafter referred to as "businesses") that hire workers : Provided that it shall not apply to those businesses separately provided for in the Presidential Decree in consideration of their size, industrial characteristics, etc.

¹²⁸ Industrial Accident Compensation Insurance Act Article 6(1)

¹²⁹ Enforcement Decree of the Industrial Accident Compensation Insurance Act Article 2(1)4

¹³⁰ Industrial Accident Compensation Insurance Act Article 5(2) :

The term "worker", "wages", "average wages" and "ordinary wages" means the "worker", "wages", "average wages" and "ordinary wages" defined by the Labor Standards Act...

¹³¹ ILO, *supra* note 2, p. 62

of domestic workers experienced injuries or accidents performing their work¹³². Yet domestic workers who suffer from injuries on the job or work-related illness often have no means to seek compensation schemes and ill domestic workers should take care of it by themselves or trust in kindness of their employers.

Over all, domestic workers are not recognized as ‘workers’ under the LSA which is intertwined with other social benefit, employment benefit and other protective measures and consequently causes total exclusion from legal and social protection of domestic workers. In addition, non-recognition of domestic workers exacerbates working conditions of migrant domestic workers and leads them to accept the worse working conditions than native workers.

3.2.3 Right to Associate and collective bargaining

Under the Trade Union and Labor Relations and Adjustment Act which regulate workers’ rights of association, collective bargaining and collective action, “worker” means *a person who lives on wages, salary or other equivalent form of income earned in pursuit of any type of job*¹³³. Indeed, as ILO report¹³⁴ highlighted, Seoul Household Managers’ trade union(*Seoul Jaega Gwanlisa Nodong Johap*) has been registered under the Trade Union and Labor Relations and Adjustment Act and Article 33 of the Constitution in 1999. It belongs to the Federation of Korean Trade Union(FKTU). But Seoul Household Managers’ trade union cannot be recognized as trade union of domestic workers. Because although the attribute of their work is under the definition of “domestic work”, members of the union themselves do not want to be identified as “domestic workers”¹³⁵ and their employer is not private person but local government to implement public welfare service¹³⁶. Hence domestic workers are not recognized as “workers” under the labor code, it should be regarded that domestic workers’ right to associate in trade union and collective bargaining is not fully guaranteed in South Korea.

¹³² YoungMi Choi, *supra* note 113, p. 29

¹³³ Trade Union and Labor Relations and Adjustment Act Article 2(1)

¹³⁴ ILO, *supra* note 2, pp. 84

¹³⁵ They changed the name of union from “Seoul domestic helpers’ union” to “Seoul Household managers’ union” under similar implication in 2009.

Article from Voices of People, 20 April 2009, (in Korean) available at <<http://www.vop.co.kr/A00000249642.html>>

¹³⁶ The employer is Seoul Metropolitan city and ‘household managers’ visit homes of the elderly and assist in cleaning, dining and nursing. (in Korean) available at <<http://www.jongno.go.kr/Main.do?menuId=0307020401&menuNo=1589>>

There are also some associations¹³⁷ and social enterprise¹³⁸ organized by domestic workers and they start to advocate for domestic workers' labor rights in South Korea. Those workers' cooperatives, as reflected in the ILO's Promotion of Cooperatives Recommendation, 2002(No. 193), is more effective way to create structures that allow domestic workers to take control of their working lives and working time. They break the daily isolation and reinforce solidarity¹³⁹.

On the other hand, these organizations do not officially belong to any of trade unions and are not powerful enough to represent themselves and influence government policies. This has been attributed to the isolated, home-based setting of domestic work, the personal nature of employee-employer relationship, and worker's extreme dependence on the employer. It is also problematic that how to define "employer"- for example, part time workers providing service for multiple private households- and current employers' association is suitable to be counterpart of negotiation and social dialogue.

Nevertheless, there are recent examples of associations of, and collective actions by and in support of, domestic workers such as in Europe, Peru, and Hong Kong; many have been led by non-union-based nongovernment organizations. Recently, The Korean Confederation of Trade Unions(KCTU) launched collaboration with the Association of Korean Household Managers, organize awareness campaign and submit the reply to the preliminary report on decent work for domestic workers on the Agenda of the International Labor Conference in 2010¹⁴⁰.

It is much more complex and conflicting once the right to associate and collective bargaining comes to migrant domestic workers. Although trade unions recognize the importance of organizing domestic workers, there seems to be a reticence to do so. Three dilemmas hamper national trade unions in receiving countries from organizing migrant workers:

¹³⁷ For instance, **Association of Korean Household Managers** was established in 2004 in assistance and alliance with Korean Women Workers Association. It aims to promote social and economic status of domestic workers and to extend more proper employment opportunities for domestic workers : Summarized from Hyunjoo Min, *supra* note 125, p.82~83 (in Korean)

¹³⁸ For instance, **Wooreong-Gaksi** is domestic worker's voluntarily organized social enterprise. Currently about 400 domestic workers in 19 cities are registered as members. It is managed by volunteers currently working as domestic workers. They recruit new members, intermedate domestic workers and employers, provide vocational training to domestic workers and promote awareness-raising campaign : Summarized from Hyunjoo Min, *supra* note 125, p.82~83 (in Korean)

¹³⁹ ILO, *supra* note2, pp. 85

¹⁴⁰ Written Interview with International Director of KCTU on 19 April 2010

- (i) while there are labour shortages, supporting the recruitment of migrant workers might displace local workers or pull down wages
- (ii) the inclusion of migrant workers may threaten national cohesion of trade unions and local workers while their exclusion could weaken trade unions' bargaining position
- (iii) whether to advocate for equal treatment and benefits or special treatment, either of which may be disadvantageous to local workers¹⁴¹.

Migrants' Trade Union(MTU) in South Korea was organized by both regular and irregular migrant workers in 2005¹⁴². Ministry of Labor rejected MTU's notification of union establishment on the ground that irregular migrant workers do not enjoy the same legally protected rights including right to freedom of association¹⁴³. However, the Seoul High Court ruled in favor of the union, stating that right of irregular migrant workers to form and join trade union is protected under the Constitution and labor legislation and that MTU's union status should be legally recognized¹⁴⁴. Refusing to accept this ruling, the Ministry of Labor appealed to the Supreme Court where a decision is still pending¹⁴⁵.

The ILO Committee on Freedom of Association also affirmed the right of all migrant workers, regardless of status to form and join unions of their choosing and called for prompt registration of the MTU¹⁴⁶.

“...the Committee once again recalls, as it had in its previous examination of this case [see 353rd Report, para. 788], the general principle according to which all workers, without distinction whatsoever, including without discrimination in regard to occupation, should have the right to establish and join organizations of their own choosing [see Digest, op. cit., para. 216]. The Committee further recalls that when examining legislation that denied the right to organize to migrant workers in an irregular situation – a situation maintained de facto in [the MTU] case – it has emphasized that all workers, with the sole exception of the armed forces and the police, are covered by Convention No. 87, and it therefore requested the Government to take the terms of Article 2 of Convention No. 87 into account in the legislation in

¹⁴¹ Schmidt 2007.

¹⁴² Information available at <<http://migrant.nodong.net/ver3/>>

¹⁴³ Amnesty International, *Disposable Labor : Rights of Migrant Workers in South Korea*, (2009 London), p.89~90

¹⁴⁴ Decision of Feb. 1, 2006 Nu 6774 (S. Korea Seoul High Court.), in Korean

¹⁴⁵ As in April 2010.

¹⁴⁶ ILO : 355th Report of the Committee on Freedom of Association, (November 2009 Geneva), GB306/7, pp. 705

question [see Digest, op. cit., para. 214]. The Committee also recalls the resolution concerning a fair deal for migrant workers in a global economy adopted by the ILO Conference at its 92nd Session (2004) according to which “[a]ll migrant workers also benefit from the protection offered by the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998). In addition, the eight core ILO Conventions regarding freedom of association and the right to bargain collectively, non-discrimination in employment and occupation, the prohibition of forced labor and the elimination of child labor, cover all migrant workers, regardless of status” [para. 12].”

Following the Court’s ruling and Committee on Freedom of Association’s recommendation, migrant domestic workers are entitled to form and join trade union regardless of their legal status. So far, no migrant domestic workers’ association has been known and even in MTU, labor rights of domestic workers are not discussed yet. Furthermore, it is also needed to contemplate how to organize trade union of domestic workers in collaboration with national trade unions and to find the linkage between Korean and migrant domestic workers.

3.3 Act on Equal Employment and Support for Work-family Reconciliation

Act on Equal Employment and Support for Work-family Reconciliation purports to realize gender equality in employment in compliance with the idea of equality in the Constitution by ensuring equal opportunity and treatment for men and women in employment, while protecting maternity and promoting women employment and to improve the quality of life for all the people by providing support for the reconciliation of work and family life for workers¹⁴⁷.

However, the Act also excludes domestic workers from the scope of application¹⁴⁸ and they are not under protection of any policy implemented by the Act. As a consequence, domestic workers are not benefited from

¹⁴⁷ The Act on Equal Employment and Support for Work-family Reconciliation Article 1, available at <http://www.moleg.go.kr/lawinfo/engLawInfo?searchCondition=AllForEngLaw&searchKeyword=equal+employment&x=17&y=16>

¹⁴⁸ The Enforcement Decree of the Act Article 2(1) reads:

”Pursuant to the provision of Article 3(1) of the Act on Equal Employment and Support for Work-Family Reconciliation, the Act shall not apply, in whole, to businesses or workplaces consisting of blood relatives residing together and to housekeepers. ”

policies for skills development and employment promotion¹⁴⁹ and maternity protection.¹⁵⁰ Failure to cover domestic workers under the Act is contradictory because work-family reconciliation is able to be realized with contribution of domestic workers on the ground that government policies fail to provide social welfare service for women to relieve from household work, child-minding and elderly care.

The other obvious problem is sexual harassment to domestic workers. One survey made by Korea Women Workers' Associate and domestic workers' center on domestic care workers showed that 34.8% of the respondent has suffered from sexual harassment¹⁵¹. It seems specifically serious for elderly or disabled care workers because they should provide care service personally in private house and inevitably encounter physical contact with the employer or his/her household. Considering domestic workers in South Korea are over 40 years old and relatively recognized as 'gender-neutral'¹⁵², the result showed that every domestic worker is exposed to sexual harassment. However, employers or clients (in case of care workers at home) do not get any education to prevent sexual harassment which should be conducted annually in other workplace under the Act¹⁵³ and even if domestic worker is sexually harassed, no measure is taken to the offender¹⁵⁴.

3.4 Migrant Workers Policy governing domestic migrant workers in South Korea

3.4.1 Employment Permit System¹⁵⁵

The Act on Foreign Workers' Employment is the only legislation that regulates labor of 'foreign workers' in South Korea and that introduced the Employment Permit System(EPS). The EPS is the core policy to govern

¹⁴⁹ the Act on Equal Employment and Support for Work-family Reconciliation chapter 2, section III

¹⁵⁰ the Act on Equal Employment and Support for Work-family Reconciliation chapter 3

¹⁵¹ Women Journal *Ilda*, 3 November 2009, *Any solution to prevent sexual harassment against domestic care workers?* (in Korean) available at <http://www.ildaro.com/sub_read.html?uid=5027§ion=sc2§ion2=>

¹⁵² YoungMi Choi, *supra* note 113, Cases of the victims of sexual harassment presented in the article were 45, 53 and 61 years old respectively.

¹⁵³ Act on Equal Employment and Support for Work-family Reconciliation Article 12, 13

¹⁵⁴ Act on Equal Employment and Support for Work-family Reconciliation Article 14 and 14-2 states measures to be taken in case of sexual harassment in workplace and prevention of sexual harassment by clients.

¹⁵⁵ Summarized from Julia Jiwon Shin, *The Gendered and Racialized Division in the Korean Labor Market : The Case of Migrant Workers in the Catering Sector*, East Asia 2009 No. 26, p. 96~101

migrant workers which replaced heavily criticized Industrial Trainee System(ITS)¹⁵⁶ in 2004. The South Korean government defines the EPS as follows:

*The Employment Permit System allows employers who have failed to hire Korean workers to legally hire an adequate number of foreign workers and is the system that government uses to introduce and manage foreign workers in Korea in an organized manner*¹⁵⁷.

As shown before, the EPS is based on the concept that the importation of migrant workers should complement the Korean labor market. In other words, only businesses that are unable to employ Korean workers may hire migrant workers. Under the EPS, migrant workers are limited to work in five industries : manufacturing, construction, agriculture and livestock, offshore and coastal fishing and service industries¹⁵⁸. The maximum period of employment in Korea is limited to three years¹⁵⁹. The applicable industries and the number of migrant workers regulated and adjusted by the Foreign Workforce Policy Committee, which falls under the control of the Prime Minister¹⁶⁰.

Looking into the Act on Foreign Workers' Employment, the purpose of the Act is "to achieve the smooth supply and demand of manpower and the balanced development of the national economy by systematically introducing and managing foreign workers."¹⁶¹ The law itself does not intend to guarantee the decent working conditions and human rights of migrant workers.

Under the Act on Foreign Workers' Employment, 'foreign worker' means a person who does not have a Korean nationality and works or intends to work in a business or workplace located in Korea with purpose of earning

¹⁵⁶ ITS drafted in 1994 allowed companies with no more than 300 employees to recruit foreign nationals on a three year contract as trainees in the manufacturing, construction, agriculture, fisheries and service industries. But the discriminatory and exploitative treatment of trainees led many migrant workers to be irregular and civil societies and trade unions urged for reform. The ITS and EPS work schemes operated in parallel until 2007 when the ITS was finally harmonized into the EPS.

: Amnesty International, *supra* note 143. p. 7~8

¹⁵⁷ Ministry of Labor, introduction webpage of EPS, available at <http://www.eps.go.kr/en/view/view_05_01.jsp>

¹⁵⁸ Officially, under Act on Foreign Workers' Employment Article 12(1), domestic work falls into service industries which exclusively open for ethnic Koreans governed by Visit Employment System.

¹⁵⁹ Act on Foreign Workers' Employment Article 18

¹⁶⁰ Act on Foreign Workers' Employment Article 4

¹⁶¹ Act on Foreign Workers' Employment Article 1

wages¹⁶². However, the definition is only applied to low-skilled workers who are granted E-9 visas based on the Immigration Control Act, and professional or skilled migrant workers are excluded from the scope of the Act. The EPS allows employers to hire migrant workers who are only permitted to work in the designated companies and have no rights to choose or change their workplace once they enter South Korea.

Scope of its application is only limited to the migrant workers under the EPS. It put more emphasis on regulating supply and management of foreign workers in perspective of employment management rather than migrant workers' working condition. Again, as the UN Special Rapporteur on Human Rights of Migrant Workers had underscored, the Act does not apply to migrant domestic workers¹⁶³. Hence in case of migrant domestic workers, they are excluded from both Labor Standards Act and Act on Foreign Workers' Employment and consequently become the most vulnerable workers in South Korea.

Chapter 4 of the Act on Foreign Workers' Employment states protection of foreign workers and has four provisions. Article 22 stipulates "An employer shall not give unfair and discriminatory treatment to foreign workers on grounds of their status" and prohibits discrimination. But there is no punitive provision for violation of non-discrimination provisions and other effective remedy is not provided. Article 24 just iterates that South Korean government may support migrant workers' related organization or groups and it does not provide direct guarantee of status of migrant workers' organizations under labor legislation.

As in November 2009, the number of migrant workers under the EPS in South Korea is more than 490,000¹⁶⁴ and H-2 visa holder¹⁶⁵ by Visit Employment System take up almost sixty percent of total number. There is no accurate statistical data for migrant domestic workers but local NGOs estimate that 10~15% of H-2 visa holders are working as domestic workers¹⁶⁶ and there are other migrant domestic workers such as Chinese, Filipino or Thai¹⁶⁷.

¹⁶² Act on Foreign Workers' Employment Article 2

¹⁶³ Report of the Special Rapporteur on the human rights of migrants MISSION TO THE REPUBLIC OF KOREA, A/HRC/4/24/Add.2 , 14 March 2007, pp. 23
"The EPS programme does not apply to migrant workers employed for domestic services..."

¹⁶⁴ E-9 Visa holder : 189, 253, H-2 Visa holder : 306, 658 : reference from statistics of Ministry of Justice, Immigration Control Department in November 2009

¹⁶⁵ Ethnic Koreans entering South Korea with Visit Employment System are granted H-2 visa status.

¹⁶⁶ Kyunghyang Newspaper, Joseonjok(Ethnic Korean-Chinese) Aunts : Neither alien nor Korean, 24 October 2007 (in Korean), available at

Interlinked with other national legislations, non-discrimination clause Article 6 under the LSA also prohibits discrimination by employer against workers on the basis of gender and nationality¹⁶⁸. The Supreme Court also confirmed that provisions regarding retirement benefit payment under the Labor Standards Act and protection of minimum wage under the Minimum Wage Act should be equally applied to migrant workers as well as South Korean workers¹⁶⁹. In reality, migrant workers are vulnerable to discrimination and abuse. In 2009, the CEACR stressed the vulnerability of migrant domestic workers under the EPS in its Individual Observation of South Korea concerning Convention No. 111 as following :

“The Committee stressed the importance of ensuring the effective promotion and enforcement of the legislation to ensure that migrant workers are not subject to discrimination and abuse contrary to the Convention. The Committee also considered that providing for an appropriate flexibility to allow migrant workers to change workplaces may assist in avoiding situations in which migrant workers become vulnerable to discrimination and abuse.¹⁷⁰”

3.4.2 Visit Employment System

There is a special case of the EPS for ethnic Koreans, currently called “Visit Employment System(VES)”, which aims to provide preferential employment opportunities for ethnic Korean migrant workers in the construction industry and the service industry. The majority(about 98%) of ethnic Korean migrant workers working under VES are ethnic Korean-Chinese¹⁷¹. The majority of today’s ethnic Koreans in China are

<http://news.khan.co.kr/section/khan_art_view.html?mode=view&artid=200710241427271&code=900305>

¹⁶⁷ Chosun Ilbo, Increase of foreign domestic workers : in midst of child care struggles, 28 October 2001 (in Korean), available at

<http://news.chosun.com/svc/content_view/content_view.html?contid=2001102870265>

¹⁶⁸ LSA Article 6 reads :

” No employer shall discriminate against workers on the basis of gender, or give discriminatory treatment in relation to the working conditions on the basis of nationality, religion or social status. ”

¹⁶⁹ Decision of Dec. 7, 2006 Da 53627 (S. Korea Supreme Court.), in Korean

¹⁷⁰ CEACR: Individual Observation concerning Discrimination (Employment and Occupation) Convention, 1958 (No. 111) Republic of Korea 2009, ILOLEX Doc. 062009KOR111. available at

<<http://www.ilo.org/ilolex/cgi/lex/pdconv.pl?host=status01&textbase=iloeng&document=10877&chapter=6&query=Korea%40ref&highlight=&querytype=bool&context=0>>

¹⁷¹ Korea Migrant Workers Human Rights Alliance, *Fact Investigation Report on the Visit Employment System : Emphasis on ethnic Korean Chinese and on-site research in China*, 2010 Seoul, p.7 (in Korean)

descendants of refugees and migrants from Korea during the Japanese occupation period¹⁷².

The VES(or special EPS) was further developed from the former 'Employment Management System' that was regulated under the Immigration Control Act in 2002 and incorporated into the EPS in 2004. Employment Management System was to provide short-term service work visa for Ethnic Koreans. Ethnic Koreans over the age of 40 and with family (cousins or closer relatives) in Korea would receive special two-year visas to work in labor-starved industry such as restaurants, cleaning companies and nursing care facilities.

Previously the special EPS had only been applied to 1) ethnic Koreans with a foreign nationality that was over 25 years of age and 2) able to prove that they had relatives and families in Korea. In 2007, the special EPS was renamed the 'Visit Employment System' and now allows a limited number of ethnic Koreans with a foreign nationality who do not have family ties in Korea but have successfully passed the Korean language test to work in the aforementioned industries for three years¹⁷³.

The aim of the special EPS is not only to alleviate labor shortages in the service and construction industries, but also to legalize the large number of undocumented ethnic Korean migrant workers working predominantly in the service industry. While workers of the other nationalities are to a certain extent also allowed to work in the construction industry, the service industry is strictly limited to ethnic Korean migrant workers. Therefore special EPS (or VES) is the only way for migrant domestic workers to work legally in South Korea. To grant the employment opportunity working as domestic workers exclusively to ethnic Koreans is obviously discriminatory and violation of ILO Convention No. 111 because it deprives Non-ethnic Korean migrant workers' chance on the basis of race.

Unlike migrant workers under EPS, those ethnic Korean migrant workers' find the job and register their commencement of employment after entering South Korea. The registration rate of employment is assumed to be low and it is hardly inspected by Ministry of Labor¹⁷⁴. It is inevitable that migrant domestic workers' working conditions and human rights are invisible and hidden. Especially those who are undocumented have to be more dependent on employers and any research or statistical data has not been made about

¹⁷² It was from 1910 to 1945.

¹⁷³ Seol and Skrentny, *Ethnic return migration and hierarchical nationhood : Korean Chinese foreign workers in South Korea*, *Ethnicities* 9(2) 2009, p. 154

¹⁷⁴ Korea Migrant Workers Human Rights Alliance, *supra* note 171, p.56

them, though it is quite common for young working mothers to consider hiring Chinese or Filipina domestic workers.

Recently Ministry of Justice revised the notification of restriction on employment of overseas Koreans in April 2010¹⁷⁵. With the revision, overseas Koreans staying in South Korea with F-4 Visa will be able to work as domestic workers in the long term. Up to now, ethnic Koreans holding H-2 Visa (under the Visit Employment System) are only allowed to work in service industry and should leave South Korea after working for maximum five years. It is also possible for ethnic domestic worker with H-2 Visa status to change to F-4 visa and to continue working without limit¹⁷⁶.

3.5 Concluding Remarks

Domestic workers in South Korea has been totally excluded from labor legislation and consequently not protected from any degrading or inhumane labor conditions. Moreover, non-recognition as “workers” leads to exclusion from employment insurance and industrial accident compensation schemes. Migrant domestic workers are more vulnerable because either labor legislation or migrant workers’ relevant legislation does not adequately protect their labor rights. Though Constitution guarantees their fundamental human rights as ‘workers’, domestic workers have been regarded as non-existent in every legislation and policies for centuries.

¹⁷⁵Notification No. 2010-297 of Ministry of Justice, 8 April 2010 (in Korean) available at, <http://www.hikorea.go.kr/pt/InfoDetailR_kr.pt?catSeq=284&categoryId=1&parentId=155&showMenuId=122>

¹⁷⁶ Donga Ilbo, *Legalization of long-term residence of Joseonjok domestic workers*, 24 April 2010 (in Korean) available at <<http://news.donga.com/Society/3/03/20100424/27800417/1&top=1>>

4 Comparative Analysis

4.1 Hong Kong

- **Legislation and policy**

In Hong Kong, the government has promoted to import the foreign domestic workers to relieve women from household chores for taking up employment from 1980s¹⁷⁷. According to Hong Kong Immigration Department statistics, there are around 230,000 foreign domestic workers working in Hong Kong. This number represents a significant 3.39 per cent of the overall population, with an estimated 10 to 11 per cent of households employing a foreign domestic worker¹⁷⁸.

Hong Kong is one of the few destination countries where migrant domestic workers enjoy full and equal statutory labor rights and benefits as local workers. Current policy requires that all employers enter into a standard employment contract with foreign domestic workers. The contract sets out key employment terms such as wage level, free food and accommodation, free medical treatment and return passage¹⁷⁹.

In accordance with the standards set forth in ILO Convention 97¹⁸⁰, Hong Kong provides access to a range of administrative services made by the Labor Department to migrant domestic workers, such as consultation and conciliation services and a 24-hour enquiry hotline service. It is also possible for migrant domestic workers to seek redress through legal system. Legal aid may be arranged if they meet the eligible criteria, which are applicable to both local and migrant workers.

It is distinctive that although there is no specific legislation governing domestic workers, general labor legislations are applied to migrant domestic workers. Relevant legislation is following:

¹⁷⁷ available at <<http://www.legco.gov.hk/yr04-05/english/panels/se/papers/se0705cb2-2116-7e.pdf>>

¹⁷⁸ Ronald Mok, *Foreign Domestic Helpers in Hong Kong : Towards Equality of Rights*, Queensland Law Student Review Vol1(1), 2008, p.104

¹⁷⁹ Ignacio, Emilyzen and Meijia, Yesenia, *Managing labour migration : the case of the Filipino and Indonesian domestic helper market in Hong Kong* ; Asian Regional Programme on Governance of Labour Migration, ILO Regional Office for Asia and the Pacific. 2009 Bangkok: ILO, (Working paper ; no.23) p.13

¹⁸⁰ Ratified in 1951, Hong Kong is one of 46 nations to have signed onto to ILO Convention 97.

First one is Employment Ordinance¹⁸¹. It defines the general rights and benefits of foreign domestic helpers as employees such as the right to join trade union and associate, with its governance and operation specified within the Standard Employment Contract. The Schedule of Accommodation and Domestic Duties combines with the Employment Ordinance to protect rights of foreign domestic helpers. Provisions include a designated employer and residence, travel and food allowance, a Minimum Allowable Wage mechanism, right to statutory holidays and mandatory rest day, and right to termination of contract.

Second is the Immigration Ordinances¹⁸². It relates to the visa application process, stay duration and deportation procedures for foreign domestic helpers. The problematic “two week rule” is also included. “Two week rule” means that foreign domestic workers have two weeks to find new employment upon the expiry or termination of the contract. If they are not succeeding to get one, they should return to their home country, or risk severe financial penalties, imprisonment or deportation for overstaying. Indeed it makes employers retain power to arbitrarily terminate the contract and domestic workers cannot help but standing or consenting to degrading working conditions.

Third is the Employees Retraining Ordinances¹⁸³. It imposes a compulsory “Employers Retraining Levy” on employers hiring foreign domestic helpers. Revenue collected from this levy is pooled into the Employees Retraining Scheme for the purpose of equipping and reintegrating local unemployed into the work force.

The Labor Department administers Employment law and regulations. Labor law are applied to both local and migrant workers including the Employment Ordinance chapter 57 and the Employee’s Compensation Ordinance chapter 282. The Labor Department provides a “Practical Guide¹⁸⁴” to advise employers and migrant domestic workers as to their rights and duties under national legislation. There are several divisions within the Labor Department. One of the relevant is the Labor Relations Division which provides voluntary conciliation services for employers and employees who have disputes relating to wages and other conditions of employment. The Employment Claims Investigation Division is empowered to investigate suspected offences under the Employment Ordinance and to

¹⁸¹ Enacted in 1968, available at, <<http://www.labour.gov.hk/eng/legislat/content2.htm>>

¹⁸² available at <<http://www.hklii.org/hk/legis/ord/115/>>

¹⁸³ available at <<http://www.hklii.org/hk/legis/en/ord/423/>>

¹⁸⁴ Practical Guide For Employment of foreign domestic helpers- What foreign domestic helpers and their employers should know, available at, <<http://www.labour.gov.hk/eng/public/wcp/FDHguide.pdf>>

pursue prosecution action against offenders where appropriate. If a migrant domestic worker is underpaid by her employer or if her employer makes an illegal deduction from her salary then it is possible for the migrant domestic worker to complain to the relevant authorities. The law also forbids an employer from making deduction from a migrant domestic worker's salary to pay excessive fees demanded by employment agencies¹⁸⁵.

- **Right to associate**

In Hong Kong, domestic workers have the legal right to organize and are covered by the generally applicable Employment Ordinance. Indeed it is one of the countries where active trade union of domestic workers has emerged.

For instance, the Hong Kong Domestic Workers' General Union formed in 2001 is composed of local domestic workers hired to clean homes and care for children, the elderly and newborn infants. Most of them are employed on a casual basis, with irregular hours or only short-term contracts and dominantly women. They meet regularly in local areas of Hong Kong. The union is affiliated to the Hong Kong Confederation of Trade Unions(HKCTU), and collaborates with other migrant domestic workers' groups and unions in Hong Kong, such as the Indonesian Migrant Workers' Union, Filipino Domestic Helpers General Union, Association of Sri Lankans¹⁸⁶.

4.2 Japan

South Korea and Japan share similar social and cultural background and even in the field of domestic workers, it is no exception. Labor legislation in South Korea was closely influenced by Japanese labor legislation.¹⁸⁷ Hence it will be meaningful to look into how Japanese government recognizes domestic workers and implement policies and seek practical lessons for South Korea.

¹⁸⁵ Peggy W.Y. Lee and Carole J. Petersen , *Forced Labor and Debt Bondage in Hong Kong : A study of Indonesian and Filipina Migrant Domestic Workers*, Centre for Comparative and Public Law Occasional Paper No. 16, p. 5~6

¹⁸⁶ IRENE and IUF, *supra* note1 , p.54;Foreign Domestic Workers in Hong Kong SARS, available at <<http://www.mfasia.org/mfaResources/ACGFMDDomestic%20Workers%20in%20Hong%20Kong.pdf>>

¹⁸⁷ National Archives of Korea, information on labor law, available at <http://contents.archives.go.kr/next/content/listSubjectDescription.do?id=000279> (in Korean)

Foremost, domestic workers are not covered by Labor Standards Act¹⁸⁸. Article 116(2) under the Act clearly states that the Act shall not apply to businesses which employ only relatives living together or to domestic workers¹⁸⁹. It was difficult to find relevant statistical data or legal materials on domestic workers for further research.

It is generally conceived that hiring full-time live-in domestic worker is too expensive and hard to find the suitable worker as well. Rather it is more common to hire part-time domestic workers. However, unlike typical employment of domestic workers as between private employer and domestic workers, in Japan it seems there are domestic workers employed by companies who provide domestic work services. They are protected under various regulations including Labor standards Act. In light of that, on their reply to standard setting for domestic workers in ILC, both Japanese government and JTUC-RENGO emphasized that approaches for domestic workers employed by private household and companies should be dealt with differently¹⁹⁰.

Lastly in case of migrant domestic workers, while Japanese nationals are not allowed to hire foreign domestic workers, diplomats and foreign company executives are allowed to bring their own domestic helpers from abroad on a case by case basis under strict conditions¹⁹¹. However, similar to South Korea, a number of migrant domestic workers are employed by Japanese household. According to one local NGO's report, the number of foreign domestic workers is estimated at around 3,000 mostly working for expatriates and foreign government officials. They are forced to work longer hours, with no guarantee of minimum pay. They are isolated from the outside, and many are exposed to violence. Japanese labor laws do not apply to this category of workers¹⁹².

4.3 Concluding Remark

Hong Kong shows the necessity to recognize domestic workers as workers under the labor code and to grant equal legal protection to domestic migrant workers. Positive impact of being guaranteed right to associate in trade unions and collaboration between national and migrant domestic workers'

¹⁸⁸ Enacted in 31 August 1947

¹⁸⁹ Available at <http://www.jil.go.jp/english/laborinfo/library/documents/llj_law1-rev.pdf>

¹⁹⁰ ILO, *supra* note 15, p.42, p.45

¹⁹¹ Hong Kong Legislative Council Secretariat, *FACT SHEET Hiring of Foreign Domestic Helpers in Selected Jurisdictions*, p.1

¹⁹² Available at <http://www.hurights.or.jp/asia-pacific/no_29/03mnetjapan.htm>

unions also can be found. Exclusion of domestic workers from Labor Standards Acts in Japan and structural analogy of the provision with the one in South Korea again demonstrates influence of Japanese Labor Law to South Korean labor legislation. However, it is remarkable that domestic workers employed by companies are protected by labor legislation. Considering discussion on social enterprise initiated by local NGOs providing domestic service is made in South Korea, the government may learn a lesson from Japan.

5 Conclusions and Recommendations

5.1 Conclusions

Throughout research, fundamental human and labor rights of domestic workers in South Korea has been investigated in the light of both international standards and national legislations. As one activist refers them as “living in the shadows”, meanwhile they have been working for and contributing to the individual families and society altogether, their rights were forgotten and neglected. Their rights have never been highlighted in any human or labor rights discourse.

South Korean government has obligation to protect their rights which were enshrined under international human rights norms and labor standards as applicable to “everyone” and “every worker” but has failed to guarantee domestic workers’ rights. From its enactment, the Labor Standard Act has not recognized “domestic workers” as “workers” and consequently they are certainly working for remuneration but not protected by any labor legislations. Their working condition is completely dependent on employer’s good will and they are beyond reach of labor inspection. They cannot be covered by social, maternity protection and employment benefit schemes as well.

The situation is more serious when it comes to migrant domestic workers. Dominantly ethnic Korean-Chinese and also some Chinese and Filipina migrant domestic workers are facing multiple discrimination as non-recognition under labor legislation, foreigners and women. Many of them are undocumented and no statistical data is found. Their fundamental human rights and labor conditions are failed to be dealt with either in labor law or governing migrant workers law.

Therefore it is essential to bring the issue of domestic workers out from the shadow and initiate discussion to recognize their ‘work’ and protect their human and labor rights regardless of their status and nationality.

5.2 Recommendations

1. Inclusion of domestic workers into labor legislation

Above all, South Korean government should recognize domestic workers as “workers” under the Labor Standard Act. This is the first and essential step to protect fundamental rights of domestic workers. The exclusion cannot be justified by either ‘specificity of domestic work’ or “administrative difficulties to regulate them on the ground of privacy.” Though it is not easy to define ‘domestic work’ and ‘domestic worker’, it should be defined and regulated by labor code. As ILO’s report shows that number of countries have started to either extend the scope of application in labor code or draft specific legislation to protect the domestic workers. Considering South Korean government tried to extend the scope of protection of labor legislation even to temporary workers or construction workers, domestic workers cannot be reason to be the only exception.

Model contract should be made and promoted so that at least minimum wage, working hour and rest day be regulated. In line with inclusion to the LSA, measures to cover domestic workers from employment insurance and social benefit schemes have to be implemented. Vocational training under the employment insurance scheme needs to be provided to domestic workers.

South Korean government fails to provide public care service that enables women to work without burden of domestic work, child-minding and care for the elderly and gender equality in the home has not been achieved yet. Under the circumstances increase in the number of domestic workers will be inevitable. On the other perspective, to realize the decent work for domestic workers is another way to open decent employment opportunities for middle-aged women with low-skilled women who seek for work with very few options to as well.

Lastly, it is required for the government to move away from the passive stance toward international labor standard setting for domestic workers in the ILO. South Korean government should actively take part in the process based on comprehensive research on domestic workers and ultimately ratify the labor standard.

2. Promote the right to Associate in trade unions

Domestic workers’ right to associate in trade unions and collective bargaining should be recognized. Alliances and collaboration among

existing domestic workers' associations needs to be promoted and supported. Trade unions such as KFTU and FKTU have an important role to ensure and monitor that domestic workers are not excluded from protection of both national and international labor standards. KFTU and FKTU have capability and experiences to help domestic workers be organized and their voices be heard¹⁹³. It seems promising that both of the trade unions initiated affiliation with domestic workers' organizations specifically for upcoming ILC discussion on standard setting for domestic workers.

The number of domestic workers are increasing therefore to integrate those workers will ultimately contribute to strengthen trade union's power. They should bring up the issue to the tripartite social dialogue so that labor conditions of domestic workers are revealed and policies protecting them to be implemented. Unions may also seek an employers' body with whom to negotiate at national level.

3. Special attention to migrant domestic workers

Regarding migrant domestic workers, it is positive sign that South Korean government changed the policy to allow ethnic Korean Chinese domestic workers reside permanently. But providing right of abode to foreign domestic workers does not necessarily lead to guarantee their fundamental human rights at workplace. Registration rate of domestic workers is still low and any labor inspection of their working condition is not carried out. Moreover, undocumented migrant workers from other countries are still existing but hidden in any statistics or discourse on domestic workers. Measures to grasp the current situation and protect their fundamental rights regardless of their migrant status should be drafted as well.

Migrant Workers' Union and NGO working for migrant workers also need to pay attention to migrant domestic workers and help them come out of isolated and private home. Fact finding investigation and research that highlight their working conditions should be made. National trade unions again may take part in initiating efforts to seek alliance with both Korean domestic workers' associations and migrant workers' unions. Affiliation between national and migrant domestic workers' trade union found in Hong Kong may be a good model to benchmark.

¹⁹³ Trade unions advocated for so called -workers of special categories- such as golf caddies, heavy equipment operator who seemingly self-employed indeed employees but failed to be recognized as workers under the LSA. The supreme court recently recognized them as workers and to draft the legislation to protect those workers is under discussion.

4. Social awareness raising

Domestic work contributes others to engage in productive work outside at home. They often take care of the most vulnerable members of society such as the children, sick and elderly. It is not the low-skilled and easy work. Therefore respect for their dignity and skills should be emphasized.

Indeed it starts from the awareness raising of those directly related to employment domestic workers. One of the ILO report has found out, the real conditions of work and employment of domestic workers not only depends on the extend of the labor laws and the level and the way enforced by the competent authorities but also on the personal interaction between the employee and the employer¹⁹⁴. South Korean society has deeply rooted patriarchy based gender role and it affects general perception of employers on domestic work as menial and unappreciated. Diverse awareness raising campaign by both the government and civil societies should be launched and promoted.

¹⁹⁴Ramirez-Machado and José Maria, *supra* note 64, p.4~5

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